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HUMAN DIGNITY: REASON OR DESIRE?

Natural Rights versus Human Rights

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The Universal Declaration of Human Rights (henceforth UD) was introduced in Paris on December 10, 1948, in the aftermath of World War II and the long period of economic depression and political tur-moil that preceded it. Although the UD was generally praised, it did not have an immediate impact on the legal profession. For example, as a law student from 1965 to 1970, I heard nothing about it apart from a brief mention in a course on international law.

I did read the document, however, in 1968, when the media drew attention to its twentieth anniversary. I confess that I was shocked. I read with distaste and disbelief the UD's message that a person's fun-damental rights were none other than to be treated without cruelty and taken care of by the powers that be. My first impression was that it was adapted from the charter of some society for the protection of ani-mals, with humans in the role of animals and governments in the role of their keepers. My thinking about rights, undeveloped as it then was, clearly was inspired by sources other than the UD. It was not until la-ter that I discovered how different those sources were.

Today, the UD's human rights have become almost universally accepted among lawyers, law students, and the general public as

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the indisputable basis from which all profound thinking about rights must start. The occasional charge that the UD is too much imbued with Western ethical and political values to deserve the epithet "universal" is noted, but not taken seriously. Nevertheless, that criticism merits consideration. While it is true that those who make it are, all too often, no more than ideologues of fashionable "cultural relativism," it is equally true that the UD's underlying philosophy of the nature of humans only came into vogue fairly recently, even in the Western world. It does not fit in the long tradition of law and justice from which the notion of rights derives its status as a basic ingredient of serious thought about human relations and interactions. In fact, the UD has obscured the meaning and significance of that tradition.

My starting point for reflecting on human rights is a remark by my friend and colleague Hans Crombag concerning the current fascination with human rights. He finds human rights "sympathetic but naive."[1] In his view, they are sympathetic because they are well intentioned, but naive because they are a legacy of the classical theory of natural law.

I disagree with him on both points. I have little sympathy for the human rights doctrine of the UD—and not only for the reason mentioned above. I also believe that whatever good it can do could be done equally well under the aegis of the classical theories of rights. Moreover, over the past fifty years, the UD has generated a hyperinflation of rights that can only destroy the value of rights altogether.

However, what must be stressed is that the UD's doctrine of human rights is neither naive nor a legacy of classical natural law theory. As I shall argue below, it is a legacy of the sophisticated political philosophy of Thomas Hobbes, and, as such, a repudiation of everything for which classical natural law stood.[2] The logic of

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[1]H.F.M. Crombag, "Sympathetiek, maar naief," chap. 30 in *De man van Susquehanna* (Amsterdam: Contract, 2000). See also his *Een manier van overle-ven: Psychologische grondslagen van moraal en recht* (Zwolle: Tjeenk Willing, 1983), pp. 14–21.

[2]I do not intend to add to or comment on the long debate on the relation-

the UD's doctrine of human rights is remarkably similar to that of Hobbes's theory of the natural right of man—and both are very different from the logic of the classical theories of natural law and natural rights. As Crombag's remark illustrates, and my experience with generations of law students amply confirms, people all too easily assume that human rights are tributes to be paid to the dignity of man as defined by the grand tradition of Western law and justice. The purpose of this paper is to refute that assumption.

HUMAN RIGHTS IN THE UNIVERSAL DECLARATION

A Dilemma

In a superficial reading, the UD seems to contain several elements that should be acceptable without further comment. They are sometimes likened to the rights of man that figure so prominently in such older documents as the French Declaration of the Rights of Man and Citizen (1789) or the American Bill of Rights, or such influential books in the tradition of natural rights as Locke's *Second Treatise*. Articles 3, 4, 5, 9, 10, 11, 12, 13, 16, and 17 of the UD are in this category. Other elements also remind us of such precedents. However, they do not concern the rights of man as such, but rather the rights of the citizen, i.e., the rights of members of "political associations" (e.g., states). Examples are found in articles 6, 7, 8, 15, and 21.

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ship between the classical theories of natural law (in the tradition of Aristotle and Saint Thomas) and natural rights (the Lockean tradition). That debate goes back at least to Leo Strauss's classic *Natural Right and History* (Chicago: University of Chicago Press, 1953), and the works of Michel Villey, which present natural rights as a radical "modern" departure from the classical Aristotelian and Thomistic theory of natural law. See, e.g, Michel Villey, *Seize essais de philosophie du droit* (Paris: Dalloz, 1969); Michel Villey, *La Formation de la pensée juridique moderne*, Nouvelle édition corrigée (Paris: Montchrétien, 1975); and Michel Villey, *Le Droit et les droits de l'homme* (Paris: Presses universitaires de France, 1983). See also F.D. Miller, *Nature, Justice, and Rights in Aristotle's Politics* (Oxford: Clarendon Press, 1995); and B. Tierney, *The Idea of Natural Rights* (Atlanta: Scholars Press, 1997).

It is noteworthy that, unlike its predecessors, the UD does not explicitly distinguish between human rights and citizen rights. For example, in the Declaration of the Rights of Man and Citizen, the rights of man appear as natural rights, the rights of the citizen as no more than artificial constructs. Indeed, in its Article 2, the French Declaration states unambiguously that the protection of the natural rights of man is the *raison d'être* of every political association.[3] Consequently, the rights of the citizen are presented as mere tools designed to further that end. It was probably no mere oversight that the authors of the UD did not make that distinction. As we shall see, it is a distinction that does not make sense within the basic philosophy of rights that appears to underlie the whole document.

Of course, the distinctive elements of the UD are the "economic, social, and cultural rights" found in Articles 22 through 28. Without these, there would have been no reason to make an issue of the Declaration, since its other elements had been expressed more clearly and elegantly elsewhere. The tone is set in Article 22:

> Everyone, as a member of society, has the right to social security and is entitled to the realisation, through national effort and international co-operation and in accordance with the organisation and resources of each state, of the economic, social, and cultural rights indis-

[3]Art. 2, Déclaration des droits de l'homme et du citoyen, 1789: "Le but de toute association politique est la conservation des droits naturels et imprescriptibles de l'homme. Ces droits sont la liberté, la propriété, la sûreté et la résistance à l'oppression." ("The end of every political association is to preserve the natural and life-long rights of man. These rights are freedom, property, security against arbitrary arrest, and resistance against oppression.")

With respect to those natural rights, Laborde de Méréville had insisted, in a suggested Preamble, that "il est surtout indispensable d'ôter au corps législatif tous les moyens d'en abuser, en le renfermant dans la défense des droits de l'homme." ("above all, it is necessary to deprive the legislative body of all the means of abusing its powers by restricting them to the defence of the rights of man.") Quoted in S. Rials, ed., *La déclaration des droits de l'homme et du citoyen* (Paris: Hachette, 1988).

> pensable for his dignity and the free development of his personality.

Among the rights listed, we note the rights to work, free choice of employment, just and favourable remuneration and conditions of work, and rest and leisure, including periodic holidays with pay. In addition, there is "a right to an adequate standard of living" (Art. 25), which includes food, clothing, housing, medical care, and all sorts of social security.

Article 26 mentions "a right to education." It turns out to be primarily a right to schooling, which in some cases should be at once free, compulsory, and according to the choice of the parents. Such schooling should be directed "to the full development of the human personality and to the strengthening of respect for human rights and fundamental freedoms," and promote "understanding, tolerance, and friendship among all nations, racial or religious groups, and the activities of the United Nations for the maintenance of peace."

According to Article 27, "everyone has the right freely to participate in the cultural life of the community, to enjoy the arts, and to share in scientific advancement and its benefits." Finally, Article 28 declares that "everyone is entitled to a social and international order in which the rights and freedoms set forth in the Declaration can be fully realised." Apparently, the "right to the United Nations" is a human right as well.

The UD presents such economic, social, and cultural rights simply as human rights, as if they are of the same nature and on the same level as other rights, with their seemingly respectable ancestry. Anyone familiar with the classical doctrine of natural rights will see—and it has been said many times—that the UD's distinctive "rights" are incompatible with that doctrine. Enforcement of one person's economic, social, and cultural rights necessarily involves forcing others to relinquish their property, or to use it in a way prescribed by the enforcers. It would, therefore, constitute a clear violation of their natural right to manage and dispose of their lawful possessions without coercive or aggressive interference by others. It would also deny a person the right to improve his condition by accepting work for what he (but perhaps no one else) considers an adequate wage.

We have a dilemma here: either the "old" rights of the UD are indeed the natural rights of the tradition—which would mean that the whole document is inconsistent propaganda—or they are consistent with the rest of the document—which would mean that they cannot be assimilated to the tradition of natural rights and natural law.[4]

To mitigate the inevitable conflicts of rights implied by the first hypothesis, lawyers and legal theorists often propose to rank various human rights as being more or less important than others.[5] By ranking them in some hierarchical order, they hope to provide guidelines for weighing rights. However, this strategy is no more than a pragmatic evasion of the problem of inconsistency. Even so, it only works where there is a genuine consensus on the relative importance of conflicting rights—a condition not likely to be fulfilled in the world of politics.

I shall consider only the second horn of the dilemma. I shall take the UD seriously and not dismiss it (as lawyers long did) as a

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[4]A few clauses in the UD do identify aspects of genuine natural rights as well as traditional "rights of the citizen." Interestingly, though, they are not presented as rights, but as absolute prohibitions imposed on everyone in general or political authorities in particular. Examples can be found in Article 4 ("No one shall be held in slavery or servitude"), Article 5 ("No one shall be subject-ed to torture or to cruel, inhuman, or degrading treatment or punishment"), and Articles 9, 11, 12, 15, and 17. They are clear examples of "negative rights": anyone can respect them merely by not doing something to a person without his consent.

[5]For an early formulation of this strategy, see, e.g., H. Coing, *Grundzüge der Rechtsphilosophie* (Berlin: Walter De Gruyter, 1969), pp. 222–23: "Zwischen den verschiedenen Grundrechten besteht eine bestimmte Rangordnung, die sich aus der in der Rechtsidee enthaltenen Rangordnung ergibt. Die geistigen Grundrechte gehen der Ehre, beide den ökonomischen Grundrechten des Eigentümers vor." ("There is a certain ranking among the different fundamental rights that is implicit in the idea of Law itself. The spiritual rights precede the economic rights of the proprietor.") As if there were only one uncontested Rechtsidee!

politically powerful blast of hot air without relevance to questions of law and justice.

In truth, the UD was a political compromise, the product of inputs from different parties with incompatible beliefs and ideologies. Most people now, however, seem to think that human rights are, in fact, those outlined in the UD, or perhaps any "rights" of the kind the document so prodigiously attributes to us. Even among lawyers, the idea that the UD's human rights are fundamental rights is now quite common (at least in the Western world). Whatever the actual history of its drafting, the document has come to be seen as a coherent doctrine of human rights. It does not follow, however, that it merely continues the tradition of the Rights of Man. The UD's Preamble refers to Franklin D. Roosevelt's "Four Freedoms" as "the highest aspirations of the common people." This suggests that those who wrote the Preamble did not intend the UD to be interpreted in terms of the classical theory of natural law and natural rights and its associated political ideal of a constitutional regime committed to the rule of law and substantive due process. It suggests, rather, that they intended the UD to be read as an original manifesto of the philosophy of the welfare state. One way to summarize the UD is by saying that people have a right to live in a welfare state without having qualms about its unprecedented peacetime powers of social control and mobilization.[6] The statement

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[6]On the drafting of the UD, see Johannes Morsink, *The Universal Declaration of Human Rights: Origins, Drafting, and Intent* (Philadelphia: University of Pennsylvania Press, 1999).

From the first day of his presidency, ten years before the U.S. joined the fray of World War II, Franklin D. Roosevelt saw himself as a war leader. He exploited the sense of crisis (and, with his long banking holiday of 1933, possibly provoked a real financial emergency). In his Inaugural Address, he began the push for "broad executive power to wage a war against the emergency as great as the power that would be given me if we were in fact invaded by a foreign foe." He even based his authority for closing the banks on the Trading with the Enemy Act of 1917, a World War I measure. Indeed, according to J. Garraty, in "The New Deal, National Socialism, and the Great Depression," *American Historical Review* 78 (1973), p. 932, "The crisis justified the casting aside of precedent, the nationalistic mobilization of society, and the removal of traditional re-

must, of course, be qualified. Only the welfare states of the victorious Allies (including the Soviet Union), not those of the defeated Axis powers, were to be the homes of human rights.

Contradictions and Practical Problems

In one sense, Crombag's use of the word naive in describing the UD's conception of human rights is understandable. Not only is their enumeration chaotic, but they also seem to be full of both logical and practical contradictions. For example, what the UD tells us about education and working defies common sense. How can we reconcile free choice of employment or education with the idea that labour should receive just and favourable remuneration or that education should be free (i.e., 100 percent subsidised)? What are we to make of Article 28 and its right "to a social and international order in which the rights and freedoms set forth in the Declaration can be fully realised"? The full realisation of almost any one of the "rights" in the UD would impede the implementation of almost any other! The majority of the human rights mentioned in the UD are exposed to the risk of a conflict of rights. Most of them are indeed "rights" to resources that are in short supply relative to the quantities needed to satisfy the desire for them.[7] Should we conclude that a human being's fundamental "right" is what can be possible only in Utopia, that Nowhereland where there is enough of everything for everyone, and where, consequently, there are no choices to be

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straints on the power of the state."

We should not forget the fascination with war, strong leadership, national planning, technocratic management, and the like that characterised the intellectual and political elite of the first half of the century. On this, see Robert Higgs, *Crisis and Leviathan* (New York: Oxford University Press, 1987), p. 169. This fascination is as apparent in the UD as it is in "the welfare state [, which] is an offspring of the total warfare of the industrial age." B. Porter, *War and the Rise of the State* (New York: Free Press, 1994), p. 192.

[7]Scarcity in connection with desire is crucial here. The economic concept of scarcity relative to "effective demand" is not relevant. The UD does not hold that we have rights only to such things as we are willing and able to produce or pay for.

made, no costs to be borne, and where frustration is not to be feared?

Even in the richest states, budgetary limitations often lead to sharp confrontations between pressure groups and vested interests in various social, economic, and cultural domains. Using the term "human rights" to describe one's interests does not change this fact of real-world limits. Rather, it creates the risk of inflating political rhetoric and passion, now that the flag of human rights flies over almost the whole arena of government policy. Each policy option can be interpreted at one and the same time as both a measure to further some human right and as an indication of the neglect or even violation of any number of other human rights. Therefore, there is at all times unlimited room for weighing various "rights" and for setting and revising priorities. The political and administrative bodies to which this weighing of rights has been entrusted or that have succeeded in monopolising it have ample opportunities for expanding their power and influence.

Nothing remains of the old idea that a right is worthy of respect in all circumstances except, perhaps, the most extreme emergency. The human rights of the UD are not and cannot be absolute, even in the most normal of circumstances—unless anything short of Utopia should count as an emergency.[8] By their very nature, they are susceptible to continuous weighing, negotiation, and qualification. They are a politician's delight, for every human right translates into "a right to more government intervention on its behalf."

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[8]This is a familiar fallacy. Thomas Hobbes used one version of it when he gave his expansive definition of war and correspondingly strict definition of peace. See Thomas Hobbes, *Leviathan: or, the matter, forme & power of a commonwealth,ecclesiasticall and civill*, ed. A.R. Waller (Cambridge: Cambridge University Press, 1935), chap. 14. Equating even the remotest risk of conflict with the war of all against all, he argued that comfort and commodious living would be possible only under the strictest form of centralised absolutism. As Leibniz remarked, "Hobbes's fallacy lies in this, that he thinks things which can entail inconvenience should not be borne at all—which is contrary to the nature of human affairs." See Leibniz, "Caesarinus Fürstenerius," in *Leibniz: Political Writings*, ed. Patrick Riley (Cambridge: Cambridge University Press, 1988), p. 119.

This is no less true for the ghosts of natural rights that linger in the first half of the UD than for the economic, social, and cultural "rights" in the rest of it. Of course, we should not confuse the ghost and the real thing. For example, Article 2 of the French Declaration of the Rights of Man and Citizen clearly states what a person's natural rights *are*: liberty, property, freedom from arbitrary arrest, and resistance to oppression.[9] In the UD, on the other hand, a person is not informed that his life, liberty, security of person, and property *are* his fundamental rights. He is told only that he has the right to life, liberty, and security of person (Art. 3) and property (Art. 17).[10] He should not expect more. For it is obviously inconsistent to claim that everyone is entitled to the full realisation of the economic, social, and cultural "rights" and at the same time to claim that any person's fundamental rights are *his* life, liberty, and property. The administration of the former requires the concentration of massive coercive powers of taxation and regulation in the hands of the state, and so must presuppose that a person's life, liberty, and property are *not* his rights. However, this inconsistency evaporates once we realise that the UD's "rights to life, liberty, property" do not specify to *whose* life, liberty, or property a person has a right. It rules out the possibility that he has an exclusive right to *his own* life, liberty, or property, but it *does not* rule out that some or all others have an equal, or perhaps more pressing, claim on those things in order to enable them, say, to enjoy the arts or a paid holiday.

Thus, a person's life, liberty, and property are thrown upon the enormous heap of desirable scarce resources to which all people are said to have a right. As such, they, too, end up in the scales with which political authorities, administrators, and experts are supposed to weigh the ingredients for their favoured policy-mix. Here

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[9]See note 3 above. "Freedom from arbitrary arrest" (*sûreté*) and "resistance to oppression" are not genuine natural rights. Rather, they are reflections of the duty of any legitimate government to respect natural rights.

[10]The relegation of "the right to property" to Article 17—i.e., its separation from the rights to life, liberty, and security of person, with which it has been linked traditionally—is certainly worthy of note.

we catch our first glimpse of the shadow of Hobbes behind the contemporary notion of human rights: the person who believes he has "a right to everything" is likely to find out that there is no thing that is his right.

A Hobbesian Predicament

The following thought experiment will bring out the Hobbesian character of the UD's conception of human rights. Imagine two people, the only survivors of a shipwreck, who find refuge on a small deserted island. They have with them nothing but their human rights, in particular their "right to work" and all that it entails according to Articles 23, 24, and 25 of the UD. One can imagine what will happen if they sit there insisting on their "right" of being employed by the other at a just and favourable wage, or to receive an unemployment compensation high enough to allow them an existence worthy of their dignity. One can also imagine what will happen if, instead of just sitting there, they attempt to enforce their human rights against one another: their own version of Hobbes's war of all against all. Finally, one can easily imagine what would happen if one of them won that war: Hobbes's solution for the incompatibility of their "rights" would emerge. The winner could then arrange for himself a nice unemployment compensation (e.g., a tax on another's labour) to match his new-found dignity as a ruler, and keep the other man quiet by leaving him as much as is consistent with "the organisation and the resources of their state."

Indeed, starvation, universal war, and the Leviathan State are the only possible outcomes under a regime of human rights—and only the latter outcome is compatible with survival. Imagining a two-person situation makes this conclusion clear, but its validity does not depend on the numbers. Large numbers only serve to obscure the logic of the situation. They may induce the illusion that the ruler is simply "out there," at no extra charge, protecting the human rights of his subjects, when, in fact, he is continuously testing their ability to pay and endure while keeping the burden of taxation and regulation just below the threshold of revolt.

Of course, the two men need not be so foolish as to insist in any way on their human rights. They may have enough sense to understand the natural laws of living together and settle for their

natural rights, respect each other and each other's work (property), and try to agree on mutually advantageous exchanges. Indeed, they might be satisfied with the claim that, for each of them, his life, liberty, and property are his only fundamental rights, and that the only thing to which either has a "right" is respect for their natural rights.

RIGHTS IN THE CLASSICAL TRADITION

Claims and Rights

The connection between the UD's notion of human rights and Hobbes's political philosophy is far from fanciful. It rests on formal and material similarities that show both of them to be instances of the same concept of "rights"—a concept that is incompatible with the classical natural law tradition. As to their form, the UD's human rights are "rights to."[11] As to their material content, they are "rights to desirable things"—that is to say, to things that most people desire. Thus, they appear to be specific forms of some generic right to the satisfaction of desire. As the UD does not attempt to identify a foundation for its validity, we have to presume that "the right to the satisfaction of desire" is itself the fundamental human right. That, in a nutshell, seems to be the UD's philosophy of human rights. It is also the kernel of Hobbes's purported emendation of the classical theory of natural rights, though it plays no part in the classical natural law tradition.

Neither in the classical tradition nor in the normal business of law can "rights to" count as fundamental rights; they are claims, rather than rights. In fact, to be "rights to," they must be lawful claims, which logically presuppose some right as the ground for their validity. If you sell your car to me, you have a right to payment of the price we agreed on. The reason is not that you have some generic "right to money" or "right to payment." The reason is that, once you have met your obligations under the contract, you have acquired ownership of the specified sum of what until then was my money. Consequently, if I neglect or refuse to pay, you have a lawful claim to the money because it is now yours. Similarly,

[11]There are a few exceptions. See note 5 above.

the victim of theft has a "right to" the stolen goods, or to adequate compensation, because they are his goods—not because he has some generic "right to goods."

As a general proposition, we may say that a person has a lawful claim to ("right to") respect for his rights.[12] Rights to specific perfor-mances or things are particular forms of the lawful claim to respect for one's rights. Thus, according to the classical theory of natural rights, I can say that I have a right to (respect for) *my* life, *my* liberty, and *my* property, because those things are *my* rights—not because I have some generic right to life, liberty, and property. Lawyers and judges spend a lot of time establishing the rights of parties to determine which has a lawful claim against the other. They normally do this by looking at the facts and the history of the events leading up to the institution of proceedings, i.e., by a careful and objective distinction of the parties, their personal identities, words, works, actions, possessions, and relations. Of course, when legislative interference corrupts the normal business of the law, the facts that, in the absence of such interference, would be relevant to determine the rights of the parties are often set aside. Claims are then accepted merely because they have a basis in what the legislative authority says the various parties have a "right to." However, in that case, lawyers and judges are no longer preoccupied with questions of law and justice, but with trying to figure out on whose side the authorities stand.

Human Dignity and Human Nature

The UD presents human rights as "rights to"—that is, as lawful claims—but does not say anything about the foundation of their validity. We have to make do with references to "human nature" and "human dignity" in Article 1: "All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act toward one another in a spirit of brotherhood." The text suggests that all human beings possess dignity, but this only reminds us that the word "dignity" is understood here

[12]See Frank van Dun, *Het fundamenteel rechtsbeginsel: Een essay over de grondslagen van het recht* (Antwerpen: Kluwer, 1983).

in a special sense. It is obviously not true that all human beings have dignity in the ordinary sense of the word. There is daily proof of this in any newspaper or newscast, or, for those who find that sort of evidence too depressing, in almost any broadcast of the *Jerry Springer Show*.

The reference to "human dignity" is a commonplace of the philo-sophy of law, but there the term has a more technical definition. It refers to the fact that people as such have rights that they are lawfully obliged to respect regardless of their opinions of each other's personal dignity. However, the term does not specify those rights, and it does not specify why people as such have them. Without an unambiguous reference to an objective foundation for fundamental rights, "human dignity" is an empty shell.

The classical foundation, of course, is the fact that a human being is an *animal rationis capax*, a physical, living being distinguished from other forms of life by his rational faculties. Because of these rational faculties, a human being is not just a physical agent but a "moral agent" capable of acting on the basis of reasons and of criticising and evaluating reasons for acting in the light of various goals and values. As such, a human being is a *natural person*, a free agent with a modicum of rational control over his own body, its actions, and their outcomes—his life, liberty, and property. These are his natural rights, i.e., the things that his rational faculties, by nature, control.[13] To this observation, the classical theory of natural rights adds that one human person is just as much a human person as is any other. There is no natural hierarchy of natural persons. In consequence, there is no natural hierarchy among one person's natural rights and those of another. As Locke wrote:

> There being nothing more evident, than that Creatures of the same species and rank promiscuously born to all the same advantages of Nature, and the use of the same faculties, should also be equal one amongst another without Subordination or Subjection.[14]

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[13]Rights, from the Latin *recta*, controlled things (from the verb *regere*: to lead, steer, manage, control).

[14]John Locke, *The Second Treatise of Civil Government*, ed. Thomas P.

Hence, it follows "that being all equal and independent, no one ought to harm another in his Life, Health, Liberty, or Possessions."[15] Every person is to respect every other person and his natural rights: *no person has "a right to another."* Thus, according to the classical theory, one person's natural rights are limited and constrained by those of every other person. It is only because of this structural feature of the classical theory that natural rights can be seen as constituting a natural order or natural law of the human world.[16] It is an order or law of distinct and separate persons of the same species—or, to use the standard formula, a law of freedom and equality. Respect for this law is justice. There can be no doubt that Locke felt he was simply restating the foundations of law and justice as they had long been accepted. He did so in the face of an attack by the proponents of an absolutist state who had begun to invoke either a divine right of kings (Filmer) or an unconditional covenant of submission (Hobbes).

Having Rights and Being a Person

As we have seen, the second sentence of the UD's Article 1, in making the obligatory reference to human rational and moral capacities, echoes the classical foundation of rights. However, most of the human rights mentioned in the UD, and all of the human rights specific to the UD and its progeny of similar charters, have no particular relation to the rational nature of man. They have nothing to do with the "dignity" of mankind as one among many living species. On the contrary, they can be, and indeed have been, applied, with no more than a slightly different wording here and there, to animals, "ecosystems," and other things. My first impression,

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Pear-don (Indianapolis, Ind.: Bobbs-Merrill, 1952), chap. 2, §4.

[15]Locke, *Second Treatise*, chap. 2, §6.

[16]The etymologically prior meaning of "law" is "order" (Scandinavian *lag*, order, bond). Law is the social order or social bond that has its natural foundation in the plurality and diversity of distinct and separate persons. It is what the Romans called *ius*, the order of *iura*, which are bonds arising from solemn speech (*iurare*, to make a personal commitment to or covenant with another). See Frank van Dun, "The Lawful and the Legal," *Journal des Économistes et des Études Humaines* 6 (1995).

over thirty years ago, that the UD was little more than an adaptation from some charter for the well-being of animals, has not been dissipated by numerous subsequent readings of the document. The UD never goes further than the "right to a decent treatment" that would be the central message of any such charter.[17]

Today, it is apparently acceptable to talk about "animal rights," and not just about some sort of perfectionist moral duty of kindness and care on the part of human beings in their dealings with animals. Would not the reason for this be that the current harvest of human rights no more presupposes that human beings are natural persons than that "animal rights" presuppose that animals are persons? If, as the text of the UD suggests, "the satisfaction of desire" is itself the fundamental human right, should we then not discard the reference to rationality and instead accept man's covetousness as the essence of his "dignity"? But then "human dignity" can no longer be distinguished from "animal dignity." After all, there is nothing particularly human about either desire or its satisfaction.

Like human beings, animals may feel pleasure and pain, satisfaction of desire, and frustration. However, animals are not persons; it makes no sense to hold them morally responsible, inquire about the justice or injustice of their actions, insist on their good faith in contractual relations, or anything of the kind. Not being persons, they cannot have rights, except perhaps in some derivative or metaphorical sense.[18]

People who invoke "animal rights" are, in fact, claiming the authority to forcibly impose their own norms for dealing with animals on other human beings. These "animals rights" are no more than reflections of the moral duties implied in these people's perfectionist view of human morality. However, by calling these reflections "rights," they present them as if they were objective principles of animal existence; such is the rhetorical force of the word "right."

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[17]The only specifically human bias of the UD is in its affirmation of the right not to be prevented from taking part in political elections or applying for a government job.

[18]See, e.g., the rigorous conceptual analysis in A.R. White, *Rights* (Oxford: Oxford University Press, 1984).

Advocates of "animal rights" make an adroit use of it in claiming that legal enforcement of their moral views is justified on the basis of a lawful obligation that humans owe animals.

Likewise, human-rights policies are presented as if they were lawful obligations owed by all governments to all human beings, independent of any morality or ideology of government. However, human rights make sense only as reflections of a particular ideology of government, one that holds that governments relate to their subjects as zookeepers to the animals under their care. They certainly do not reflect the duties of a constitutionally limited government committed to the rule of law and substantive due process. That its subjects are natural persons, and, as such, have a lawful claim to respect for their life, liberty, and property, is of no relevance in the UD's worldview. In that document, human beings typically appear as passive holders of "rights to" various things. However, those things are not theirs until the proper authorities have decided on the appropriate distribution. Indeed, the UD implies that governments, although elected by and from the human population, are superior to their subjects. Consequently, the UD does not need to countenance natural rights if they stand in the way of the "moral perfection" of government.[19]

Once the connection between "having rights" and "being a person" has been severed, almost anything may be said to have rights. Not surprisingly, the so-called rights revolution that has been gathering steam since the 1960s has led to a cancer-like growth of "rights," not only of human beings and animals, but also of plants, landscapes, lakes, oceans, the earth itself, historical monuments, and other cultural artefacts. Moreover, in the field of specifically human rights, the "rights" of individual human beings as such are now difficult to discern among the "rights" of an ever-increasing number of abstract "aspect-persons." Thus, the woman, the child, the homosexual, the labourer, the immigrant, the student, the pa-

[19]A typical expression of this attitude is the statement on "affirmative action" in a book by a former Chief Justice of the Supreme Court of West Virginia; see R. Neely, *How Courts Govern America* (New Haven, Conn.: Yale University Press, 1981), p. 6.

tient, the consumer, the elderly, the handicapped, the victim, or the member of any group whatsoever is said to have "special rights," in particular, the "right to positive discrimination," which is the "right to privileged treatment." Indeed, the common characteristic of all such "rights" is that they are supposedly of sufficient weight to override or trump anyone's truly non-discrimina-tory natural rights as a human being. Compared to the dignity of the woman, the child, the worker, and so on, the dignity of the human being as such ranks near the bottom of the scale.

Human Rights, Moral Perfectionism, and Natural Law

The previous section's reference to perfectionist theories of morality could be understood as a support for Crombag's thesis that human rights are a legacy of the classical theory of natural law. Indeed, much of what goes under the name of "natural law" is more concerned with the ethical idea of moral perfection than with the problem of order in the human world. The Aristotelian-Thomistic "natural law theory" doubtlessly belongs to moral philosophy ("ethics") rather than to the philosophy of law. However, it does not imply that it is appropriate for governments to enforce moral perfection. As Thomas Aquinas put it:

> [Because] law regards the common welfare . . . there is no virtue whose practice the law may not prescribe. [However,] human law is enacted on behalf of the mass of men, most of whom are very imperfect as far as the virtues are concern-ed. This is why law does not forbid every vice which a man of virtue would not commit, but only the more serious vices which even the multitude can avoid. These are the vices that do harm to others, the vices *that would destroy human society* if they were not prohibited: murder, theft, and other vices of this kind, which the human law prohibits.[20]

The vices that destroy human society would be violations of natural rights. Not contaminated by the modern intellectual vice of utopianism, classical natural law theory made a pragmatic distinc-

[20]Thomas Aquinas, *Summa Theologiae*, 60 vols. (Cambridge: Blackfriars, 1964–1976), IaIIae, Qu. 96, Artt. 3 and 2, emphasis added.

tion between moral and political life. The former is devoted to the perfection of virtue, the latter to the perfection of the *lex humana*, the purpose of which is to safeguard society even for those who are not likely to give much attention to higher virtues. If the Thomist theory assumes, without justification, that there is some good that is the good of all,[21] it also expresses grave doubts about the possibility of making men virtuous by means of politics and legislation.[22]

In making the distinction, the classical theory of natural law was probably not anticipating the basic assumption of today's neo-Aristo-telian proponents of natural rights,[23] namely, that the forms of human flourishing or of living "a good life" are as diverse and manifold as the individual men and women themselves. On the basis of that assumption, neo-Aristotelians conclude that only natural rights are suitable objects of legal enforcement, because enforcement by a few of a particular perfectionist morality is bound to sacrifice on the altar of moral arrogance the value of life for many.

Neo-Aristotelians would not, therefore, subscribe to the view that, in principle, there is no virtue whose practice the law may not prescribe. On the contrary, they insist that the difference between

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[21]However, it still implies that the good is to be realised in the actual life of a person. It does not commit the statistical fallacy that is evident in utilitarianism, with its *ad hoc* constructions of the "greatest good" based on de-personalised, anonymous data about wants—thus making the *greatest good* into something completely extrinsic to every person.

[22]Aristotle comments on this idea in the final section of *Nicomachean Ethics*, trans. and ed. Roger Crisp (Cambridge: Cambridge University Press, 2000). See also R. George, *Making Men Moral* (Oxford: Clarendon Press, 1993).

[23]E.g., D.B. Rasmussen and D.J. den Uyl, *Liberalism Defended: The Challenge of Post-Modernity* (Cheltenham, U.K.: Edward Elgar, 1997); D.B. Rasmussen and D.J. den Uyl, *Liberty and Nature: An Aristotelian Defense of Liberal Order* (LaSalle, Ill.: Open Court, 1991); and Eric Mack, "Moral Individualism and Libertarian Theory," in *Liberty for the 21st Century*, ed. Tibor Machan and D.B. Rasmussen (London: Rowan & Littlefield, 1995). See also van Dun, *Het fundamenteel rechtsbeginsel*, for an early statement of this doctrine.

morality and politics is not, as Aquinas would have it, merely a pragmatic matter, but is itself a matter of principle. Nevertheless, if given a choice, they would no doubt prefer the theologian's pragmatic distinction over the modern belief that those who want only the best for mankind should therefore be entitled to enforce their "ideals" with all the powers that today's governments have at their disposal.

If all that Crombag is saying is that the modern preoccupation with human rights is drenched in the rhetoric of moral perfectionism, I would be the last to disagree. There is, however, no reason to take that fact as proof of his claim that human rights are a legacy of the classical theory of either natural law or natural rights. If anything, it is proof that human rights are derived from some perfectionist theory of the duties of a virtually omnipotent government, not from some idea of the moral perfection of human beings as such.

HOBBES AND HUMAN RIGHTS

Hobbes's Apostasy

Hobbes's apostasy from traditional philosophy of law is found in his rejection of man's rational nature as the foundation of a person's natural right. Instead of the things that are by nature under the control of his rational faculties, Hobbes identified as a man's rights those things over which he exerts controlling power of any kind, regardless of whe-ther those things are other persons or not. In order to have a chance of getting away with this radically subversive move, Hobbes had to redefine almost all of the terms pertaining to law and justice. More than two centuries would pass before his legalistic revisions, suitable as they were for legitimising the expansion of state power, became the norm. By the time the UD was drafted, the Hobbesian concept of right had virtually obliterated its classical predecessor. The form and content of the UD's human rights clearly prove that fact.

There is no need to detail Hobbes's theory except to recall his de-finition of man's natural right as the liberty to do everything he can—and Hobbes did mean everything—if he believes it to be use-

ful for his self-preservation. As Hobbes himself pointed out, this natural right[24] implies the "Right to every thing; even to one another's body."[25] It is the "right" to rule the world for one's own benefit, even by killing, maiming, robbing, subjugating, or controlling others by whatever means available. In plain language, it is the "right" to commit any injustice that appears to further one's own interests—or, as Thomas Aquinas might have put it, a "right" to destroy society itself.

It is no mystery why Hobbes chose to build his theory on that para-doxical "right." He needed to justify his intended conclusion that political absolutism is the only way out of the war of all against all. War would inevitably ensue if everybody took that "right" seriously and tried to set himself up as the ruler of the world. From this, Hobbes concluded that peace is only possible when there is a single ruler with sufficient power to make resistance to his commands futile.

If, as Hobbes wanted us to believe, there is no objective difference between justice and injustice, then reason is of no avail in choosing either one. The fundamental choice for man is not between just and unjust acts, but between unorganised or competitive injustice and organised or monopolised injustice. It is a choice between a life that is "brutish, nasty, and short" under the unorgan-

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[24]In referring to *"ius naturale,"* Hobbes was playing a trick on Grotius's rather unfortunate definition of *ius* as a moral faculty or moral power, in Hugo Gro-tius, *De jure belli ac pacis libri tres: in quibus jus natur & gentium item juris publici prcipua explicantur* (Amsterdami: Apud Guilielmum Blaeuw, 1631). According to Hobbes's conventionalist ideas, a "*ius naturale*" could only be a faculty or power that was not constrained by anything except another natural power (or "externall impediment," as he called it)—as if adding the qualifier *naturale* to *ius* was the same as removing the qualifier "moral" from "moral power." However, a *ius* is not a faculty or power. It is a bond specified by the terms of agreement among persons as to where they will draw the boundaries among themselves, as to how they will separate the "mine" from the "thine." As such, it is a moral constraint as to what they can do. Likewise, a *ius naturale* is a moral constraint, albeit one specified by the natural boundaries between any two persons. See note 14.

[25]Hobbes, *Leviathan*, XIV.

ised satisfaction of wants by competing powers, and a condition of "commodious living" when the satisfaction of wants is organised or controlled by a monopoly of power. Hobbes was confident that every sensible person would agree that a strong ruler or regime should monopolise "the right to everything." He was also confident that everyone's voluntary submission to such a regime was a dictate of reason.

Thus, political absolutism is justified as if by a contract in accordance with reason. Under this hypothetical contract, all subjects are supposed to identify completely with the regime, and to consider its every action as the execution of their own will.[26] The state, therefore, can never be a source of injustice, because "Whatsoever is done to a man, conformable to his own will signified to the doer, is not injury to him."[27] Hence, the state, by definition, is *just*. It is also a fictitious legal person—and so are its subjects, now called "citizens," who, having surrendered their natural independence, have become integral parts of the state and, therefore, unconditionally belong to it. A further consequence is that whatever belongs as "property" to any citizen ultimat-ely belongs to the state, because without the state's power and protection, there would be no property.[28] In any case, considerations of justice in the state must be based exclusively on its legal system, not on any natural law or the natural rights of natural persons.

The philosophical basis for this remarkable theory is Hobbes's view of man. Far from holding the traditional view of man as a natural person, a physical, finite, rational being with objective boundaries, Hobbes held that the physical or natural aspect of man was not relevant for the definition of his natural rights. What was relevant was the alleged fact that man has unlimited desires, especially an unlimited desire for power "that ceaseth only in Death."[29]

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[26] Hobbes, *Leviathan*, part I, chap. 16

[27] Hobbes, *Leviathan*, XV.

[28] Hobbes, *Leviathan*, part II, chap. 29: "Every man has indeed a Propriety that excludes the Right of every other Subject; And he has it onely from the Soveraign Power."

[29] Hobbes, *Leviathan*, part I, chap. 10.

In short, man is not what he is and does, but what he desires to be and to do. His "right" is not his life, liberty, or property, but the satisfaction of his desires.[30]

This interpretation of the "natural right" of human beings is the fundamental subversive element in Hobbes's theory. It would not show its full effects until a couple of centuries after Hobbes wrote *Leviathan*. Nevertheless, it should be clear that, from the beginning, it implied an eminently "economic" interpretation of the state as the essential organisation for the satisfaction of human wants and desires.

Hobbes was undoubtedly preoccupied with strictly political questions concerning the distribution of power. Nevertheless, he was well aware that, for the sake of a stable regime, some sort of welfare state would be required.

> And whereas many men, by accident inevitable, become un-able to maintain themselves by their labour; they ought not to be left to the Charity of private persons; but to be provid-ed for . . . by the Lawes of the Commonwealth. . . . But for such as have strong bodies . . . : they are to be forced to work; and to avoid the excuse of not finding employment, there ought to be such Lawes, as may encourage . . . Navigation, Agriculture, Fishing, and all manner of Manufacture that requires labour.[31]

A Hobbesian Legacy

Until the end of the nineteenth century, Hobbes's theory was little more than a curiosity in the history of ideas. At that time, though, it resurfaced as a "rational foundation" for the omnipotent state, a state which many intellectuals praised as an instrument of progress. Moreover, the celebration of war in all its forms—

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[30]As Giovanni Pico della Mirandola, that archetypal Renaissance intellectual, wrote: "To [man] it is given to have what he wishes, to be what he wants." See Giovanni Pico della Mirandola, *De hominis dignitate, Heptaplus, De ente et uno, e scritti vari*, ed. Eugenie Garin (Florence: Vallecchi, 1942), p. 106.

[31]Hobbes, *Leviathan*, part II, chap. 30.

between classes, races, nations, religions, ideologies, cultures, new and old elites, even biological species—returned Hobbes's metaphor of universal war to the core of political thought. At the same time, the republican notion of popular sovereignty, with its stress on "the will of the people" (as manifested by the majority), began to displace the old idea of the rule of law.

Already in the late nineteenth century, Rudolph von Jhering promoted a utilitarian conception of the state—a conception that owed as much to Hobbes as to Bentham—as the basis for a new socio-political approach to jurisprudence.[32] In the United States, Roscoe Pound did much the same thing. This sociological dimension originated in the idea that social conflicts are rooted in subjective factors (desires, needs, wants, interests). Thus, resolution of such conflicts has to be at the level of those factors, rather than at the level of interpersonal relations as defined by objective natural rights. Pound concluded that there was a need for a sociological jurisprudence that focused on a new conception of justice. It would no longer refer to safeguarding the social order of free and equal persons by means of rules of law. Instead, it would require political legislators and administrators to produce a condition of "social justice" by means of "social engineering." This condition would be characterised by "the satisfaction of every-body's wants so far as they are not outweighed by the wants of others."[33] Pound was well aware of the incompatibility of "social justice" with justice as such. The former, he noted, "is repugnant to the spirit of the common law." It would require a return to a regime of status in which

> rights belong and duties attach to a person of full age and natural capacity because of the position he occupies in society or the occupation in which he is engaged. . . . When the standard is equality of freedom of action, all classes . . . are repugnant to the idea of justice. When the standard is equality in the satisfaction of

[32]See Rudolph von Jhering *Der Zweck im Recht* (Leipzig : Breitkopf & Hartel, 1893–98); and also in Rudolph von Jhering, *Der Kampf um's Recht* (Wien: Manz, 1872).

[33]Roscoe Pound, "Need of a Sociological Jurisprudence," *Green Bag* 19 (1907), p. 612.

> wants, such classification and such return in part to the idea of status are inevitable.[34]

Pound may not have predicted the present explosion of "special rights" for all sorts of classes, groups, and categories, but he would not have been overly surprised by it either. As he well knew, social justice and the "rights" it implies are about little else than classification, grouping, and categorisation.

Pound's view, though, was only a partial conversion to Hobbesian subjectivism. To him, the common law remained within the domain of justice. However, this domain was reduced to what remained after "social legislation" attempted a "socially acceptable economy of the satisfaction of everybody's wants." Where they were legally recognised, wants, desires, and interests would supersede natural rights—which is to say that they first had to become "rights" with a higher legal standing than natural rights.

Legal realists, who did not accept Pound's separation of law from political legislation, were far more radical converts. In their view, judges should be social engineers who used whatever power was at their disposal to enforce social justice. Judges should not be intimidated by "the ideology of property" or by "traditional justice." They should not shy away from intervening as rulers in the affairs of businesses, institutions, associations, and families.

In his discussion of monopoly grants (to railroads and other utilities), American jurist Brooks Adams announced a principle that legal realists would subsequently apply to the institution of private ownership, as well as to all rights of property and contract attached to it:

> When the law confers upon any man or class of men an exclusive privilege to fix upon some object which is a matter of necessity *or even of desire* to others, it . . . subjects the purchaser to a servitude.[35]

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[34]Pound, "Need of a Sociological Jurisprudence," p. 615.

[35]Brooks Adams, "Law Under Inequality: Monopoly," in *Centralization and the Law*, ed. M. Bigelow (Boston: Little, Brown, 1906), emphasis added.

Arguing that the rights of ownership and property are "exclusive" rights, realists concluded, in Hobbesian fashion, that all were monopolies granted by the political power of the state. There is no such thing as "natural property"; property is always a creature of legislation. The realists also accepted Adams's argument that servitude is a condition of unsatisfied or frustrated need or desire. They used it to indict private property as the single most important threat to "social justice." After all, to claim as property for oneself something that another needed or desired was the height of injustice, because, in doing so, one violated the other's fundamental right to full satisfaction, his right to be free from want and frustration.

The sociological turn in jurisprudence, beginning in the late nineteenth century and culminating between the world wars, was, in fact, a return to Hobbes's subjectivist redefinition of "the natural right of man." Hobbes had laid the foundations for the revolution in thinking about law and politics that finally erupted in an age of rampant author-itarianism and Big Government. One cannot begin to understand the human rights of the UD without taking that revolution into account.

As we have seen by way of the thought experiment conducted above, the idea that people should act on their own initiative in trying to secure their right to the satisfaction of their wants can only lead to one of the familiar Hobbesian outcomes: universal war or the concentration of political power. The logic of this argument is clearly visible in the structure of the UD. In order to keep human rights from creating universal war, one should "socialise" and transform them into mere reflections of governmental duty. The state should adminis-ter human rights in accordance with the organisation and resources of the country. This requires a continuous weighing of interests and desires as well as a vast apparatus of politicians, bureaucrats, experts, and agents to gather data, concoct and interpret the statistics essential to policy-making, and implement the policies selected. All of this is inevitable because the things which the human rights are "rights to" are inevitably scarce.

Unlike a person's natural rights, which recognise his standing as a producer or guardian of scarce resources, his human rights are claims to whatever might serve to satisfy his "dignity," i.e., his covetousness. In the final analysis, they all translate into a right to the

labour and productive services of the great multitude of nameless others who find themselves under the same government. Each person's human right is a "right" to tax and regulate others—a right that, to deprive it of its lethal character, must be taken from him and administered by a powerful central authority. Social justice—that is to say, taking human rights seriously—means statistics and political resource management.[36] It implies that a "right" can have no more than a rhetorical significance until it is made into a legal privilege by effective policy:

> Benefits in the form of a service have this . . . characteristic that the rights of the citizen cannot be precisely defined. The qualitative element is too great. . . . It follows that individual rights must be subordinated to national plans.[37]

Politics trumps rights. T.H. Marshall's words were not meant to criticise the concepts of social justice and human rights, but to illustrate how wholeheartedly their advocates have swallowed the political hook together with the subjectivist bait of the Hobbesian philosophy of "right."

CONCLUDING REMARKS

Unlike Crombag, I do not see human rights as "sympathetic, but naive." Instead, I see them as a sophisticated elaboration of the peculiar Hobbesian view that a human being is not some definite, finite, physical, "moral agent," but merely an indefinite bundle of desires seeking satisfaction by all means available. Thus, a human being's fundamental or natural right is not the physical integrity of his own being and works, but the satisfaction of his desires.

Unfortunately, if human beings tried to satisfy their desires

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[36]Statistical criteria of social justice have been skillfully used by a number of feminists complaining about the "under-representation" of women in politics and other high-profile occupations. Spokespersons for a few other groups have followed their example.

[37]T.H. Marshall, *Citizenship and Social Class* (Cambridge: Cambridge University Press, 1950), pp. 58–59.

through individual initiative by all means available, war and destruction would result. For that reason—so the theory implies—they should choose to relinquish control over their own lives so that their desires might be satisfied for them according to the priorities, policies, and "national plans" of a single authority. In this way, according to the theory, their desires can be satisfied more efficiently by all means available. Of course, the desires that will be satisfied are no longer their own, but only those that have been transformed by means of statistics into suitable policy goals.

Of course, none of this is without cost. If an army, as Robert Hein-lein wrote, is "a permanent organisation for the destruction of life and property," then the modern state, with its myriad of privileged public and private institutions, is a permanent organisation for the separation of persons from their own life and property. Human beings themselves, to the extent that they are not members of the policymaking elite, must be treated as "national resources" in order for the state to realise their human rights. As such, they are to be managed in the endeavour to equalise the satisfaction of wants in accordance with the organisation and resources of the state that claims authority over them.

This is a sophisticated and, in its own way, fascinating view of human beings and their rights, but I have no sympathy for it. I cannot believe that covetousness, not the rational nature of man, is the distinguishing mark of "human dignity." To believe that is to accept that one's rights are as unlimited as one's desires, and, thus, are the primary sources of conflict and disorder. No such belief is found anywhere in the classical tradition of law and rights. Human rights are not a legacy of the tradition's representative theories of, say, Thomas Aquinas or John Locke. The UD's human rights are at odds with any view that takes human beings—and not just their desires—seriously. Social justice is not a species of justice; it is as different from justice as equalising the satisfaction of wants is different from ordering interpersonal relations in accordance with freedom and equality.

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