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ANOTHER UNIVERSALISM: ON THE UNITY AND DIVERSITY OF HUMAN RIGHTS

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I

Between 1934 and 1937, as Europe was plunging towards a new war, an ailing Edmund Husserl composed the series of reflections, notes, and lectures that would be posthumously published as *The Crisis of European Sciences and Transcendental Phenomenology*.¹ Full of foreboding and pathos amid the dark clouds gathering over the European continent, Husserl gave voice to a sense of civilizational crisis:

“The true struggles of our time, the only ones which are significant, are struggles between humanity which has already collapsed and humanity which still has roots but is struggling to keep them or find new ones” (*Crisis*, p. 15). For Husserl these struggles were not primarily political ones among the totalitarian ideologies of Nazism and Soviet-style communism versus liberal democracy; they were, in the first place, philosophical² (*Crisis*, p. 15).

What haunted Husserl then and might well challenge us now is none other than the claims to universality of western philosophy and rationalism. If that form of inquiry, which originated in the Greek pursuit of *theoria*, has no claim to universality, if it is the manifestation of just one more cultural life-world among others, then it cannot “be decided,” as Husserl put it, “whether European humanity bears within itself an absolute idea (sic!) rather than being merely an empirical anthropological type like ‘China’ or ‘India’” (*Crisis*, p. 16). For Husserl, reflection on the crisis of the European sciences was essential not only for understanding Europe’s spiritual-political malaise; it meant having the courage to defend the legacy of philosophical rationalism since the Greeks to be not only the cognitive form of inquiry of a historically contingent life-world—the West—but as having a claim to universality for all of humanity, for other life-forms that were now, in Husserl’s words, increasingly “Europeanizing themselves.”

In a lecture presented before the Vienna Cultural Society on May 7 and 10, 1935, during the composition of the *Crisis of the European Sciences*, Husserl was even blunter:

[We] pose the question: How is the spiritual shape of Europe to be characterized? Thus we refer to Europe not as it is understood geographically, as on a map, as if thereby the group of people who

live together in this territory would define European humanity. In the spiritual sense the English dominions, the United States, etc., clearly belong to Europe, whereas the Eskimos or Indians presented as curiosities at fairs, or the Gypsies, who constantly wander about Europe, do not. Here the title "Europe" clearly refers to the unity of a spiritual life, activity, creation, with all its ends, interests, cares and endeavors, with its products of purposeful activity, institutions, organizations.³

These attempts by an aging Husserl, who passed away on April 27, 1938, to retrieve a sense of the West's commonalty by demarcating its spiritual and philosophical legacy not only from the high civilizational worlds of China and India, but from the "lesser worlds" of Eskimos, Gypsies, and "Indians" (by which he meant North and South American indigenous peoples), are poignant in the extreme. Husserl's is a form of Eurocentrism, which, without even so much as a blush, finds it necessary to rank entire life-worlds and cultural totalities according to whether or not they are capable of attaining "the entelechy of humanity" (Husserl)—i.e., universal philosophical reason. Perhaps it is the cruelest of ironies that the Nazis, who were to enter Poland a year and a half after Husserl's death, thought that Europe's Jews, to whom Husserl belonged, far from being the spiritual descendants of the Greeks, bore rather more affinity to the Gypsies, another dark people without a land and wandering among the nations of the world. The concentration camps of Europe devastated the Sinti and the Roma along with the Jews. It was Husserl's good fortune not to have experienced the worst and to have died with his faith in European rationalism intact.

II

Why recall this episode at all? Why dust off a volume composed during such a fraught period of history? Certainly I have no intention of defending Husserl's project of a transcendental phenomenology or his search for some "absolute idea" (!) borne by western humanity. Nevertheless, his late reflections articulate a question that is still very much with us: What is universalism? In what respects, if any, is the legacy of western rationalism a universal one? Husserl's answer to these questions is an *essentialist* one: it takes the form of identifying *logos*—in his words—as the *entelechy* of humanity and to claim that other cultural life-forms, which certainly deserve respect for their achievements,⁴ are nevertheless *inferior* to the occidental life of *theoria* or the spirit of contemplation.

These questions have become all the more pressing in our times. Whereas for Husserl it was the impending rise of fascism and the retreat of Europe from rational liberalism that was of concern, we are confronted with the galloping spread to all corners of the world of "our" western way of life which, often, however, uses the shields of western reason and Enlightenment to bring other peoples and cultures under the influence of an inegalitarian global capitalism, whose effects are manifestly neither rational nor humane. The legacy of western rationalism has been used and abused in the service of institutions and practices that will not stand scrutiny by the very same reason which they claim to spread. As the globe

grows together materially into one world, it becomes all the more urgent to understand how claims to universality can be reconciled with assertions of religious and cultural difference; how the unity of reason can be reconciled with the diversity of life-forms.

The public vocabulary through which these questions are articulated most forcefully is the *language of human rights*.⁵ The spread of human rights, as well as their defense and institutionalization, have become the uncontested language, though not the reality, of global politics. It is in terms of the language of human rights that I, as well, wish to pose the question of universalism anew in this lecture. I will argue that there is one fundamental moral right, the “right to have rights,”⁶ of every human being, that is, to be recognized by others, and to recognize others in turn, as a person entitled to moral respect and legally protected rights in a human community. Human rights, I will maintain, articulate moral principles protecting the communicative freedom of individuals; while such moral principles are distinct from the legal specification of rights, nevertheless there is a necessary and not merely contingent connection between human rights as moral principles and their legal form.

There is wide-ranging disagreement in contemporary thought about the philosophical justification as well as the content of human rights. Indeed, it has been remarked that “...in recent years, as political commitment to human rights has grown, philosophical commitment has waned.”⁷ Some argue that human rights constitute the “core of a universal thin morality” (Michael Walzer), while others claim that they form “reasonable conditions of a world-political consensus” (Martha Nussbaum). Still others narrow the concept of human rights “to a minimum standard of well-ordered political institutions for all peoples”⁸ (John Rawls) and caution that there needs to be a distinction between the list of human rights included in the Law of Peoples, and defensible from the standpoint of a global public reason, and the Universal Declaration of Human Rights of 1948.

These different justifications of human rights inevitably lead to a certain variation in content and to “cherry-picking” among various lists of rights. Michael Walzer, for one, suggests that a comparison of the moral codes of various societies may produce a set of standards “to which all societies can be held—negative injunctions, most likely, rules against murder, deceit, torture, oppression and tyranny.”⁹ But this way of proceeding would yield a relatively short list. “Among others,” notes Charles Beitz, “rights requiring democratic political forms, religious toleration, legal equality for women, and free choice of partner would certainly be excluded.”¹⁰ From the standpoint of many of the world’s moral systems, such as ancient Judaism, medieval Christianity, Confucianism, Buddhism, and Hinduism, Walzer’s “negative injunctions against oppression and tyranny” would be consistent with great degrees of inequality among genders, classes, castes, and religious groups.

Another suggestion is that a *nonparochial* view of human rights, while it may not be endorsed necessarily by all conventional moralities, may, in fact, find favor in the eyes of main conceptions of *political and economic justice* in the world: understood thus, human rights would constitute the core of

a *political* rather than *moral* overlapping consensus. Martha Nussbaum's defense of human rights follows this strategy.¹¹ I agree that we can view the public law documents of our world such as the Universal Declaration of Human Rights (UDHR), The International Covenant on Civil and Political Rights, The International Covenant on Economic, Social and Cultural Rights, and the Geneva Conventions of 1951 and its Protocol of 1967 as embodying such "a political overlapping consensus."¹² Nevertheless, Nussbaum's method of philosophical deduction, which ties in rights concepts all too narrowly to a philosophical anthropology of human capabilities, is problematic. No distinction is made between rights as "moral principles" and rights as "legal entitlements," on the one hand, and "the principle of rights" and "the schedule of rights," on the other. When a person's "right to have rights" is recognized in a duly constituted regime of the rule of law, then the "principle of right" is acknowledged; but this leaves open the question as to what level of variation in the enumeration, content, and interpretation of rights is permissible among different "schedules of rights," in the sense of being normatively defensible. Nussbaum envisages a one-to-one correspondence between a philosophically derived list of human rights, based upon a moral theory of capabilities, and the enactments of specific legislatures. But this neglects how legitimate variations in the interpretations, contextualization, and application of human rights can emerge.¹³

Certainly, the most provocative defense for limiting human rights "to a minimum standard of well-ordered political institutions for all peoples" has been John Rawls's. Rawls lists the right to life (to the means of subsistence and security); to liberty (to freedom from slavery, serfdom, and forced occupation and to a sufficient measure of liberty of conscience to ensure freedom of religion and thought); to personal property and to "formal equality as expressed by the rules of natural justice (that is, that similar cases be treated similarly)"¹⁴ as the basic human rights. The rights to liberty of conscience and association are pared down in *The Law of Peoples* (1999) such as to accommodate "decent, hierarchical societies," which grant *some* liberty of conscience to other faiths but not *equal liberty of conscience* to minority religions that are not state-sanctioned. Article 18 of the UDHR, by contrast, which guarantees "the right to freedom of thought, conscience and religion," including the right to change one's religion, "to manifest one's religion or belief in teaching, practice, worship and observance," is much more egalitarian and uncompromising vis à vis existing state religions than is Rawls's right to the "non-egalitarian liberty of conscience."

Most significantly, Rawls passes over without comment the all-too-crucial Article 21 of the Universal Declaration, which guarantees everyone "the right to take part in the government of his country, directly or through freely chosen representatives," and which stipulates that "the will of the peoples shall be the basis of the authority of government."¹⁵ There is no *basic human right to self-government* in the Rawlsian scheme.¹⁶

Given that the Universal Declaration of Human Rights is the closest document in our world to international public law, how can we explain

this attempt on the part of many philosophers to restrict the content of human rights to a fraction of what is internationally agreed to—at least on paper? I am not precluding the possibility that these documents themselves may be philosophically confused, produced as a consequence of political compromises—as was the UDHR, which was the subject of continuous negotiation between the delegations of the United States and the Soviet Union.¹⁷ Nevertheless, they do set certain public norms and standards which are underwritten by the vast majority of the states in the world. As James Griffin has argued, it is at least necessary to consider seriously the “discrepancies between the best philosophical account of human rights and the international law of human rights.”¹⁸

I wish to argue that it is necessary to shift both the *justification* strategy and the derivation of the *content* of human rights away from minimalist concerns¹⁹ towards a more robust understanding of human rights in terms of the “right to have rights.” Let me note at the outset that I owe the phrase “the right to have rights” to Hannah Arendt. Whereas in her work, however, this right is viewed principally as a *political* right and is narrowly identified with the “right to membership in a political community,” I will propose a conception of the “right to have rights,” understood as the claim of each human person to be recognized and to be protected as a legal personality by the world community. This reconceptualization of the “right to have rights” in non-state-centric terms is crucial in the period since the 1948 Declaration of Human Rights—a period in which we have moved away from “international” toward “cosmopolitan” norms of justice. Contemporary rights discourse has sadly failed to take note of these transformations and to develop a justification and content for human rights consonant with these juridical transformations.

In what follows, I begin by looking more closely at the term “universalism”; then I develop a discourse-theoretic account of human rights. This, in turn, leads to the question whether there are some minimal assumptions about human nature and rationality which must underlie any normative account of human rights. Universalism cannot simply, without residue, be translated into a juridico-political question alone. Certain normative commitments are crucial. I argue that justificatory universalism and moral universalism are deeply intertwined.

III

Let me begin by distinguishing among essentialist universalism, justificatory universalism, moral universalism, and juridical universalism.²⁰

1. *Universalism* may signify the belief that there is a fundamental human nature or human essence which defines who we are as humans. Some say, as did most philosophers of the eighteenth century, that human nature consists of stable and predictable passions and dispositions, instincts and emotions, all of which can be rationally discovered and analyzed. Thomas Hobbes, David Hume, and Adam Smith, but also Claude-Adrien Hélyvétius and Baron Paul-Henri Diderich d’Holbach, come to mind here. Others may argue that there is no fixed human nature (Jean-Jacques Rousseau), or that even if there were, it would be irrelevant for determining what is most

essential about us as humans (Immanuel Kant): namely, our capacity to formulate and live by universalizable principles. Still others may repudiate empirical psychology, philosophical anthropology, and rationalist ethics, and maintain that what is universal about the human condition is that we are doomed to choose for ourselves and to create meaning through our actions in a universe devoid of such standards and values. Although many philosophical universalists are essentialists, they need not be. As the example of Jean-Paul Sartre shows, they can be existentialists as well.

2. Universalism in contemporary philosophical debates has come to mean, most prominently, a *justification strategy*. Hermeneuticists, strong contextualists, postmodern skeptics, and power/knowledge theorists all question whether there can be an impartial, objective, and neutral philosophical reason; all maintain that justificatory strategies—which they regard as pretenses to philosophical objectivity—are trapped within historical horizons and beholden to cultural, social, and psychological currents of power that are barely acknowledged (cf. Michel Foucault, Jean-François Lyotard, and the early Jacques Derrida).

Opposed to these contextualist critics are “justificatory universalists,” most of whom are not essentialists: some entertain very few rock-bottom beliefs about human nature and psychology; but they all share and defend strong beliefs in the normative content of human reason, that is, in the validity of procedures of inquiry, evidence, and questioning that have been the cognitive legacy of western philosophy since the Enlightenment. Impartiality; intersubjective verification of results, argument, and data; consistency of belief; and self-reflexivity are the minimum conditions of this normative content. (Karl Otto-Apel, Juergen Habermas, Hilary Putnam, Robert Brandom, John Rawls, and many others, are in this sense “justificatory universalists.”)

3. Universalism, still others argue, is not primarily a term of cognitive inquiry; equally significantly, it has a moral meaning. I would define it as the principle that all human beings, regardless of race, gender, sexual orientation, bodily or physical ability, ethnic, cultural, linguistic, and religious background, are entitled to equal moral respect. The hard question in philosophical ethics continues to be whether such a *moral universalism* can be defended without some commitment to cognitive universalism, either in the sense of essentialism or justificatory universalism.

4. Finally, universalism can be understood in *juridical* terms. Many who are skeptical about providing definitive accounts of human nature and rationality may nonetheless urge that the following norms and principles *ought* to be respected by all legal and political systems claiming legitimacy: all human beings are entitled to certain basic human rights, these juridical universalists say, including, minimally, the rights to life, liberty, security, and bodily integrity, some form of property and personal ownership, due process before the law, and freedom of speech and association, including freedom of religion and conscience. Some would add socio-economic rights, such as the right to work, health-care, disability, and old-age benefits, to this list; others would insist on including democratic as well as cultural self-determination rights.²¹

I will argue that any political justification of human rights, that is, the project of *juridical universalism*, presupposes recourse to *justificatory universalism*. The task of justification, in turn, cannot proceed without the acknowledgment of the communicative freedom of the other, that is, of the right of the other to accept as legitimate only those rules of action of whose validity she has been convinced with reasons. Justificatory universalism then rests on *moral universalism*, i.e., equal respect for the other as a being capable of communicative freedom. Justificatory universalism, however, need not presuppose a full-fledged theory of human nature or a comprehensive moral, religious, or scientific worldview: an account of human agency in terms of the “generalized” and “concrete” other will suffice. This means that juridical universalism without some defense of moral universalism is incoherent. However, these are not relationships of “entailment.” Moral universalism does not *entail or dictate* a specific *list of human rights* beyond the protection of the communicative freedom of the person; nor does justificatory universalism do so. But without the recognition of such communicative freedom, the enterprise of justification itself is meaningless. Philosophical differences will still persist in articulating the content of such recognition. My position is distinctive in interpreting such communicative freedom in relation to the “right to have rights.”

IV

Recall here Alasdair MacIntyre’s provocative claim: “...the best reason for asserting so bluntly that there are no such things as rights is indeed precisely of the same type as the best reason we possess for asserting that there are no witches, and the best reason we possess for asserting that there are no unicorns: every attempt to give good reasons for believing that there are such rights has failed.”²² Echoing Jeremy Bentham’s quip that belief in natural rights is “nonsense on stilts,”²³ MacIntyre gives voice to a long tradition of skepticism toward talk of “natural rights,” “human rights,” or “basic rights.” These criticisms are based on a mistake which consists in identifying human rights with the social imaginary of early bourgeois thinkers.²⁴ Historically the widespread use of the terms “property” and “propriety” to designate rights in general served to demarcate a sphere of individual claims and entitlements and gave them an aspect of inviolability.²⁵ At the same time this language has marred discussions of rights down to our own days.

We need neither repeat the naturalistic fallacy nor the paradigmatic use of property to defend rights claims. I will argue that rights claims are in general of the following sort: “I can justify to you with good reasons that you and I should respect each others’ reciprocal claim to act in certain ways and not to act in others, and to enjoy certain resources and services.” Some rights claims are about *liberties*, that is, to do or to abstain from doing certain things without anybody else having a moral claim to oblige me to act or to withhold from acting in certain ways. Liberty rights generate duties of forbearance. Other rights claims are about *entitlement to resources*. Such rights, as the right to an elementary school education or to secure neighborhoods, for example, entail obligations on the part of others, whether they be individuals or institutions, to act in certain ways

and to provide certain material goods. As Jeremy Waldron observes, such rights issue in “cascading obligations.”²⁶

For the Kantian morally constructivist tradition, rights claims are not about what “exist”; rather, we ask whether our lives together within, outside, and betwixt polities ought not to be guided by mutually and reciprocally guaranteed immunities, constraints upon actions, and by legitimate access to certain goods and resources. Rights are not about what there *is* but about the kind of world we reasonably *ought* to want to live in.

In his *Metaphysics of Morals* Kant proposed that there is one basic right: “Every action which by itself or by its maxim enables the freedom of each individual’s will to co-exist with the freedom of everyone else in accordance with a universal law is *right*” (*gerecht*).²⁷ Note that Kant’s formulation is not about a list of basic rights that is said to precede the will of the republican sovereign. Rather, this principle establishes how a juridico-civil order can come into existence which would be in compliance with the moral law. The “principle of right,” like the natural rights discourse of the tradition, basically states that only that political order is legitimate which is based upon a system of general laws that binds the will of each equally. *Generality, formal reciprocity, and equality* are features of the “principle of right.” Your freedom as a moral being can be restricted only by reasons that would be generally and reciprocally applicable to each. A polity based on the principle of rights respects you as a moral being.

A discourse-theoretic justification of the principle of right would differ from Kant’s in the following ways: instead of asking what each of us could will without self-contradiction to be a universal law for all, in discourse ethics we ask: Which norms and normative institutional arrangements could be considered valid by all those who would be affected if they were participants in special moral argumentations called discourse? (T.A. McCarthy) The emphasis now shifts *from* what each can will to be valid for all via a thought-experiment, *to* those justificatory processes through which you and I in dialogue must convince each other of the validity of certain norms—by which I mean “general rules of action.”

How then can we justify talk of human rights without falling either into the traps of naturalistic fallacy or possessive individualism? My answer is: “In order to be able to justify to you why you and I ought to act in certain ways, I must respect your capacity to agree or disagree with me on the basis of reasons the validity of which you accept or reject. But to respect your capacity to accept or reject reasons the validity of which you evaluate means for me to respect your capacity for communicative freedom.” I am assuming that *all* human beings who are speakers of a natural language are capable of communicative freedom, that is, of saying “yes” or “no” to an utterance whose validity claims they comprehend and according to which they can act. Human rights then are moral principles that protect the exercise of your communicative freedom and which require embodiment in legal form.

Certainly, the exercise of communicative freedom is also an exercise of agency, of formulating what goals and ends we wish to pursue, and how

to effectuate such pursuits. Unlike agent-centric human rights theories, however, which are still the most commonly subscribed to accounts of human rights, in the discourse-theoretic model, we proceed from a view of the human agent as an individual embedded in contexts of communication as well as interaction. The capacity to formulate goals of action is not prior to the capacity to be able to justify such goals with reasons to others. Reasons for actions are not only grounds which motivate me; they are also accounts of my actions as I project myself as a “doer” unto a social world which I share with others, and through which others recognize me as a person capable of, and responsible for, certain courses of action. Agency and communication are two sides of the same coin: I only know myself as an agent because I can anticipate being part of a social space in which others recognize me as the initiator of certain deeds and the speaker of certain words. It is the weakness of all agent-centric accounts of human rights that they abstract from the social embeddedness of agency in such shared contexts of speech and action, and instead focus on the isolated agent as the privileged subject for reasoning about rights.²⁸

First and foremost as a moral being capable of communicative freedom you have a fundamental *right to have rights*. In order to exercise communicative freedom, your capacity for embedded agency, your capacity for communication as well as action, needs to be respected. You need to be recognized as a member of an organized human community in which your words and your acts situate you within a social space of interaction and communication. You have a “right,” that is, a moral claim to be recognized by others as “a rights-bearing person” entitled to a legally instituted schedule of rights.²⁹ Others can only constrain your freedom as a moral being through reasons that satisfy the conditions of formality, generality, and reciprocity for all.

The right to have rights further involves the acknowledgment of your identity as a generalized as well as a concrete other.³⁰ If I recognize you as a being entitled to rights only because you are like me, then I deny your fundamental individuality which entails your being different. If I refuse to recognize you as a being entitled to rights because you are so other than me, then I deny our common humanity.

The standpoint of the “generalized other” requires us to view each and every individual as a being entitled to the same rights and duties we would want to ascribe to ourselves. In assuming this standpoint, we abstract from the individuality and the concrete identity of the other. We assume that the other, like ourselves, is a being who has concrete needs, desires, and affects, but what constitutes his or her moral dignity is not what differentiates us from each other, but rather what we, as speaking and acting and embodied, beings have in common. Our relation to the other is governed by the norms of *formal equality and reciprocity*: each is entitled to expect from us what we can expect from him or from her. In treating you in accordance with these norms, I confirm in your person the rights of humanity and I have a legitimate claim that you will do the same in relation to me.

The standpoint of the “concrete other,” by contrast, requires us to view each and every being as an individual with an affective-emotional constitution, concrete history, and individual as well as collective identity, and in many cases as having more than one such collective identity. In assuming this standpoint, we bracket what constitutes our commonality and focus on individuality. Our relation to the other is governed by the norms of *equity* and *complementary reciprocity*. Our differences in this case complement rather than exclude one another. In treating you in accordance with these norms, I confirm not only your humanity but your human individuality. If the standpoint of the generalized other expresses the norm of respect, that of the concrete other anticipates experiences of altruism and solidarity.

Concepts of the generalized and the concrete other do not describe human nature; rather, they are phenomenological accounts of human experience. Admittedly, the standpoint of the generalized other, in the very universalistic form which I have given to it, presupposes the egalitarian experiences of modernity. I am not maintaining, in some Hegelian fashion, that these views are the necessary end-products of the course of history. Rather, they are contestable, fraught, and fragile experiences through which the standpoint of “generalized other,” as extending to “all of humanity,” becomes a practical possibility, but certainly not a political actuality.

Such reciprocal recognition of each other as beings who have the “right to have rights” involves political struggles, social movements, and learning processes within and across classes, genders, nations, ethnic groups, and religious faiths. This is the true meaning of universalism: universalism does not consist in an essence or human nature which we are all said to have or to possess, but rather in experiences of establishing commonality across diversity, conflict, divide, and struggle. Universalism is an aspiration, a moral goal to strive for; it is not a fact, a description of the way the world is.³¹

Let me emphasize how this justification of human rights through a discourse-theoretic account of communicative freedom differs from others. In the first place, the justification of human rights is viewed as a dialogic practice and is not mired in the metaphysics of natural rights theories or possessive individualist selves. This justification of human rights also differs from *agent-relative* accounts because in these accounts it is assumed that human rights are enabling conditions of the exercise of agency under some description. This then leaves unanswered the question why the claim that some condition or another is essential to the exercise of *your* agency imposes a moral obligation upon *me* to respect that claim. By contrast, in the discourse model we argue that the recognition of *your* right to have rights is the very precondition for you to be able to contest or accept *my* claim to rights in the first place. *My* agent-specific needs can serve as a justification for *you* only if I presuppose that *your* agent-specific needs can likewise serve as a justification for *me*. And this means that you and I have recognized each others’ right to have rights.

Does not this discourse-theoretic justification of human rights prove either too much or too little? Are not my formulations dependent upon

some understanding of what constitutes “good reasons” in discourses? And surely, the contextualist will continue, such shared understandings can hardly be non-controversial, so your justification strategy is mired in circularity. It presupposes an understanding of “good reasons,” such as to preclude moral points of view incompatible with the non-recognition of communicative freedom. To face this serious objection, let me first observe that discourses, to be distinguished from bargaining, cajoling, brain washing, or coercive manipulation, are dependent upon certain formal conditions of conversation: these are the *equality* of each conversation partner to partake in as well as initiate communication, their *symmetrical* entitlement to speech acts, and *reciprocity* of communicative roles: each can question and answer, bring new items to the agenda, and initiate reflection about the rules of discourse itself. These formal preconditions, which themselves require reinterpretation within the discursive process, impose certain *necessary* constraints upon the *kinds of reasons* that will prove acceptable within discourses, but they *never can* nor should they be required to, provide *sufficient* grounds for what constitute “good reasons.” Indeed there is a circularity here, but this is not a vicious circle. It is the hermeneutic circularity of practical reason which Aristotle had noted long ago in his *Ethics* to be an essential feature of all reasoning in morals and politics: we always already have to assume some understanding of equality, reciprocity, and symmetry in order to be able to frame the discourse model in the first place, but each of these normative terms are then open to reflexive justification or recursive validation within the discourse itself. Such recursive validation of the preconditions of discourse has been misunderstood by many as indicating a vicious circle. These charges ignore the hermeneutical structure of practical reason and wish to have practical reason proceed as if it were theoretical reason—from uncontested first premises.

This limitation of the range of what can or cannot count as “good reasons” in terms of the necessary conditions of recursively validated discursive structures will still not convince some³²; nevertheless, let me emphasize that communicative freedom is what makes the practice of normative justification at all possible, for if human beings cannot assent to or reject each others’ claims on the basis of reasons the validity of which they can evaluate, then there can be no justificatory enterprise at all. Even if the reasons we invoke in such a practice are utilitarian or Kantian, Nietzschean or Christian, in doing so we must always already presuppose the capacity of our conversation partner to assent or dissent from our claims on the basis of reasons the validity of which she comprehends. “Justificatory universalism” is at the heart of reason as a reason-giving enterprise and so is the recognition of the other as a being capable of communicative freedom and of the right to have rights.

The motivation for moral discourses arises when the certitudes of our life-worlds break down through conflict, dissent, and disagreement, when there is conflict as well contention, misery as well as lack of solidarity. Discourses are not simply hypothetical thought experiments or conversation chambers that we can choose to enter into or exit at will; they are reflexive dialogues the need for which emerges out of the very real

problems of our life-worlds. It is when everyday certitudes disappear that we assume the attitude of reflective and critical distantiating which are essential for discourses. In this sense, Husserl is right: there is an intrinsic connection between the commitment to reason as a life-form founded on contingent practices of reason-giving and justification and the view of the human person as a free being entitled to respect.

There is an unbreakable bond, then, between reason understood as a justificatory enterprise, as reason-giving, and the justification of human rights. Justificatory universalism presupposes moral universalism—the respect for the other as a being capable of communicative freedom. I am not grounding the claim that human beings ought to be considered as beings entitled to rights upon their rationality, which, as we know, the natural law tradition considered to be an expression of the divine in human beings. Rather, I have argued that the right to have rights and the moral right of the human being to be considered as a being entitled to juridico-civil rights are enabling conditions of the exercise of communicative freedom.

Human rights and the various public law documents in our world define both a *minimum* to be maintained and a *maximum* to be aspired to among human beings who have recognized each others' right to have rights. There will always be debate about their meaning as well as their comprehensiveness; therefore, any list we provide of them is necessarily incomplete. New moral, political, and cultural struggles will bring forth rights to be added to the list and to extend the maximum that humans can aspire to. For example, technological developments in human cloning, gene therapy, and gene manipulation are likely to lead to some basic rights protecting human beings' biological and species integrity in the near future.³³ Precisely because they emerge out of such struggles and learning processes, human rights documents cannot simply embody an "overlapping consensus" or "minimum conditions of legitimacy"; they give voice to the aspirations of a profoundly divided humanity by setting "a common standard of achievement for all peoples and all nations" (Universal Declaration, Preamble).

How can one make the transition from these highly abstract and formal considerations of the right to have rights to the specific rights regimes, legal systems, charters, and conventions of existing polities? What about the legal form of human rights?³⁴ In jurisprudence as well as moral philosophy there have long been two dominant positions in response to this question: natural rights versus legal positivism. The natural rights position can count Aristotle and Plato, the Stoics as well as St. Thomas Aquinas, the social contract theorists of modernity, such as Locke and Rousseau, as well as Leo Strauss, among its advocates. They argue that no political or legal order can be considered legitimate which does not subscribe to, respect, or enshrine in its constitution certain rights which human beings are entitled to qua human beings and which are thus unalterable and unrescindable. In the language of modern constitutionalism, these rights are "entrenched."

Legal positivism, a complex position which some trace to the Sophists such as Thrasymachus, to Machiavelli, to H.L.A. Hart, as well as Carl Schmitt, argues that legal systems are not susceptible to judgments

based on “extra-legal” standards of articulation—whether these be moral, metaphysical, naturalistic, or scientific. Any legal system, insofar as it is a coherent articulation of norms, carries within it its own standards of judgment, evaluation, subordination, and subsumption—in short, its own rules of recognition, which make it function as the legal system that it is. The idea of entrenched norms, such as natural rights are considered to be, and which are supposed to precede such a legal system, is unintelligible from this point of view.

The language of human rights straddles this divide. The discourse of democracies, in particular, is necessarily caught in this tension generated by the context- and community-transcending validity dimension of human rights on the one hand, and the historically formed, culturally generated, and socially shaped specificities of existing juridico-civil communities on the other. The point is not to deny this tension by embracing only one or another of these moral alternatives but to negotiate their interdependence by re-situating or reiterating the universal in concrete contexts. This is a project I have called “interactive universalism” in *Situating the Self* and “democratic iterations” in subsequent works.³⁵ It is around the negotiation of the unity and diversity of human rights, that is, the relation between their *moral core* and their *legal form*, that the most salient differences between my approach and other contemporary positions become apparent.

V

If human rights embody principles which need contextualization and specification in the form of legal norms, then we must ask how this legal content is to be shaped. The right to have rights seems quite abstract and formalistic and will make many natural right theorists and others uncomfortable since it abstains from prescribing the content of civil and political rights to which one would be entitled once the right to have rights was recognized. In response to this concern, one possible approach may be to proceed from the right to have rights, which I have already claimed to protect the communicative freedom of the person, to the norms of equal respect and concern and to derive a concrete list of basic human rights in this fashion. Human rights then would find their place in moral philosophy.

Basic human rights, although they are based on the moral principle of the communicative freedom of the person, are also legal rights, i.e., rights that require embodiment and instantiation in a specific legal framework. As Ronald Dworkin has observed, human rights straddle that line between morality and justice; they enable us to judge the legitimacy of law.³⁶ The core content of human rights would form part of any conception of the right to have rights as well: these would include minimally the rights to life, liberty (including to freedom from slavery, serfdom, forced occupation, as well as sexual violence and sexual slavery)³⁷; some form of personal property; equal freedom of thought (including religion), expression, and association. Furthermore, liberty requires provisions for the “equal value of liberty” (Rawls) through the guarantee of socio-economic goods, including adequate provisions of basic nourishment, shelter, and education.

Agreement on this core content still leaves many of the philosophical difficulties unresolved: if we agree on the centrality of a principle such as “freedom of religious expression” must we also accept that minority religions are entitled to rights to public expression equally with the majority, as I have argued, or can we maintain that freedom of religious expression is compatible with some reasonable restrictions upon its exercise, as Rawls has claimed? It is at this point that the human right to self-government becomes crucial, and why I would argue, contra Rawls, that it is a basic human right. My claim is that without the right to self-government which is exercised through proper legal and political channels, we cannot justify the range of variation in the content of basic human rights as being legitimate. If the difficulty with Martha Nussbaum’s conception of human rights is that no distinctions are made between the philosophical account of human rights and their legal embodiment (see above), the weakness of the Rawlsian “minimalist position” about human rights is that one is forced to accept whatever a legal regime stipulates to be the content of human rights, as long as it meets certain minimum criteria of being a “decent, well-ordered society.” Among other things, this is compatible with the denial of equal freedom of religion, expression, and association to minorities, as well as with the rejection of the right to democratic self-government.

Certainly, the juridical, constitutional, as well as common law traditions of each human society, the history of their sedimented interpretations, their internal debates and disagreements will shape the legal articulation of human rights. For example, while equality before the law is a fundamental principle for all societies observing the rule of law, in many societies such as Canada, Israel, and India this is considered quite compatible with special immunities and entitlements which accrue to individuals in virtue of their belonging to different cultural, linguistic, and religious groups.³⁸ For societies such as the United States and France, with their more universalistic understandings of citizenship, these multicultural arrangements would be completely unacceptable. At the same time, in France and Germany, the norm of gender equality has led political parties to adopt various versions of the principle of “*parité*”—namely, that women ought to hold public offices on a fifty-fifty basis with men, and that for electoral office, their names ought to be placed on party tickets on an equal footing with male candidates. By contrast, within the United States, gender equality is protected by Title IX, which applies only to major public institutions which receive federal funding. Political parties are excluded from this. There is, in other words, a legitimate range of variation even in the interpretation and implementation of such a basic right as that of “equality before the law.” The legitimacy of this range of variation and interpretation is crucially dependent upon the principle of self-government, and here is where the distinctiveness of an approach based on communicative freedom lies. Freedom of expression and association are not merely citizens’ political rights the content of which can vary from polity to polity, they are crucial conditions for the recognition of individuals as beings who live in a political order of whose legitimacy they have been convinced with good reasons. Only when this condition has been fulfilled can we also say that there is legitimate “unity and diversity” in human rights among well-ordered polities.

If the people are viewed not merely as subject to the law but also as authors of the law then the contextualization and interpretation of human rights can be said to result from public and free processes of democratic opinion and will-formation. Such contextualization, in addition to being subject to various forms of the rule of law and legal traditions in different countries, attains democratic legitimacy insofar as it is carried out through the interaction of legal and political institutions with free public spaces in civil society. When such rights principles are appropriated by people as their own, they lose their parochialism as well as the suspicion of western paternalism often associated with them. I will call such processes of appropriation “democratic iterations.”

By *democratic iterations* I mean complex processes of public argument, deliberation, and exchange through which universalist rights claims are contested and contextualized, invoked and revoked, posited and positioned throughout legal and political institutions as well as in the associations of civil society.

In the process of repeating a term or a concept, we never simply produce a replica of the first intended usage or its original meaning: rather, every repetition is a form of variation. Every iteration transforms meaning, adds to it, enriches it in ever so subtle ways. The iteration and interpretation of norms and of every aspect of the universe of value, however, is never merely an act of repetition. Every act of iteration involves making sense of an authoritative original in a new and different context. The antecedent thereby is repositioned and resignified via subsequent usages and references. Meaning is enhanced and transformed; conversely, when the creative appropriation of that authoritative original ceases or stops making sense, then the original loses its authority upon us as well.³⁹

If democratic iterations are necessary in order for us to judge the legitimacy of a range of variation in the interpretation of a right claim, how can we assess whether democratic iterations have taken place rather than demagogic processes of manipulation or authoritarian indoctrination? Do not democratic iterations themselves presuppose some standards of rights to be properly evaluated? I accept here Juergen Habermas’s insight that “the democratic principle states that only those statutes may claim legitimacy that can meet with the assent (*Zustimmung*) of all citizens in a discursive process of legislation which has been legally constituted.”⁴⁰

The “legal constitution of a discursive procedure of legislation” is only possible in a society that institutionalizes a communicative framework through which individuals as citizens or residents can participate in opinion- and will-formation regarding the laws which are to regulate their lives in common. The right to have rights then is not only a right to conditions of membership but entails the right to action and to opinion in the public sphere of a polity the laws of which govern one’s existence. Only through the public expression of opinion and action can the human person be viewed as a creature who is capable of self-interpreting rights claims.⁴¹ To have rights does not mean to possess a physical attribute such as green eyes or to possess an object such as a red shirt. It means the capacity to initiate action and opinion to be shared by others through an interpretation

of the very right claim itself. We have had an all-too passive understanding of the agency involved in the entitlement to rights. Human rights and rights of self-government are intertwined. Though the two are not identical, only through institutions of self-government can the citizens and residents of a polity articulate justifiable distinctions between human rights and civil and political rights and judge the range of their legitimate variation.

Democratic legitimacy reaches back to principles of *normative justification*, though the two are not identical. Democratic iterations do not alter conditions of the normative validity of practical discourses that are established independently of them; rather, democratic iterations enable us to judge as *legitimate* or *illegitimate* processes of opinion and will-formation through which rights claims are contextualized and contested, expanded and revised through actual institutional practices in the light of such criteria. Such criteria of judgment enable us to distinguish a *de facto consensus* from a *rationaly motivated* one (see section IV above).

VI

As Husserl surveyed the intellectual-political landscape of a Europe hurtling toward a world war in 1935, the fragile institution of the League of Nations was in decay owing to, among other things, the hypocrisies created by the various minority and statelessness treaties that had accompanied the demise of the Austro-Hungarian, Russian, and Ottoman Empires, and the German Kaiserreich. For Husserl, faith in western reason, per force, had to replace the expectation that institutional structures could embody the relations between reason and freedom, peace and justice in more tangible fashion. Yet the 1948 Universal Declaration and the era of human rights which have followed it reflect the moral learning experiences not only of western humanity but of humanity at large. The World Wars were fought not only in the European Continent but also in the colonies, in Africa and Asia. The national liberation and anti-colonization struggles of the post-World War II period, in turn, inspired principles of self-determination. The public law documents of our world—the UDHR; the various international human rights covenants; and the Geneva Conventions of 1951 Relating to the Status of Refugees and their Protocol of 1967—are distillations of collective struggles as well as of collective learning. It may be too utopian to name them steps toward a “world constitution,” but they are more than mere treaties among states. They are global public law documents which, along with many other developments in the domain of *lex mercatoria*, are altering the terrain of the international domain. They are constituent elements of a global and not merely international civil society. In this global civil society, individuals are rights-bearing not only in virtue of their citizenship within states but in virtue of their humanity simpliciter. Although states remain the most powerful actors, the range of their legitimate and lawful activity is increasingly limited. We need to rethink the law of peoples against the background of this newly emergent and fragile global civil society, which is always being threatened by war, violence, and military intervention. The shrinking world public sphere, while increasing contact across cultures, also creates bewilderment as to how to explain deep divergences. I have sought to provide some philosophical answers to these perplexities in this lecture.

There is a fundamental relationship between complex cultural dialogues⁴² among peoples in a global civil society and processes of democratic iteration. Only when members of a society can engage in free and unrestrained dialogue about their collective identity in free public spheres can they develop narratives of self-identification that unfold into fluid and creative re-appropriations of their own traditions. By contrast, totalizing discourses about “our culture” versus “theirs” seek to inhibit the free flow of individual and collective cultural narratives that might produce so-called “subversive” effects, in that they question the legitimizing collectivities in whose name power is exercised. Cultures are narratively constituted through contentious accounts of self-other differentiations. The other is not outside culture, but constitutive of it. Intercultural conversations and intracultural ones are deeply intertwined.

One way to look at human rights is to consider them as enabling conditions, in the legal and political senses, of “uncoerced democratic iterations” among the peoples and cultures of the world. Such iterations cannot be understood as agreements frozen in time and space, but only as a continuing conversation, a complex dialogue, which challenges the assumptions of completeness of each culture, by making it possible for its members to look at themselves from the perspectives of others. Since the goal is not an irreversible agreement but the enlargement of perspectives, the consequence of such dialogues is to educate us to the range of acceptable variation in the interpretation and contextualization of human rights. It is a broadening of our understanding of the unity and diversity of human rights to equality and toleration, to property, privacy, and citizenship.

We should free human rights discourse from the interventionist rhetoric that so often accompanies it. When, why, and under what conditions intervention to rectify and stop human rights violations is justifiable is a question in political ethics.⁴³ By “political ethics,” I mean the balancing between intentions and consequences, between an ethics of responsibility and an ethics of conviction (Max Weber). Particularly when states are considered the unique agents of intervention and when intervention means the use of military force, according to international law, only the prevention of genocide and ethnic cleansing through a properly enacted decision of the Security Council can legitimize such acts. These situations involve hard choices that entail the exercise of political judgment.⁴⁴ They impose upon citizens, leaders, and politicians the “burden of history.” I think that philosophy can neither guide us all the way through such deliberations nor can it guarantee that our good intentions will not be destroyed by contingent events and turn into their opposite. Nor should it do so. Nevertheless, as Kant observed,⁴⁵ there is a distinction between the “political moralist,” who misuses moral principles to justify political decisions, and a “moral politician,” who tries to remain true to moral principles in shaping political events. The discourse of human rights has often been exploited and misused by “political moralists”; its proper place is to guide the moral politician, be they citizens or leaders. All that we can offer as philosophers is a clarification of what we can regard as legitimate and just in the domain of human rights themselves.

In this lecture I have argued that there is one fundamental moral right, the “right to have rights,” of every human being, that is, to be recognized as a person entitled to the protection of his/her legal rights. Human rights articulate moral principles that need to be given legal form. The legal form of human rights can offer legitimate variations in juridical and constitutional interpretations and contextualizations provided that these variations result from the exercise of public autonomy through structures of self-governance. Without self-governance, human rights remain hollow. There is an intrinsic, and not merely contingent, connection between human rights and democratic self-determination. I have therefore pleaded for viewing human rights not just as minimum conditions of legitimacy in the international arena—although they are surely that as well—but as articulating normative standards to which the peoples of the world can aspire. I have characterized processes of interplay between democratic will- and opinion-formation on the one hand, and constitutional principles and international law on the other as “democratic iterations.” Charges of parochialism and Eurocentrism, often voiced against human rights, can only be met when institutions of democratic self-rule permit the expression and articulation of cultural differences in free public spheres.

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References

1. Edmund Husserl. *The Crisis of European Sciences and Transcendental Phenomenology. An Introduction to Phenomenological Philosophy*, trans., with an introduction by David Carr. Northwestern University Studies in Phenomenology and Existential Philosophy (Evanston: Northwestern University Press, 1970). All references in the text are abbreviated as “Crisis” and are to this edition. See also *Die Krisis der europäischen Wissenschaften und die transzendente Phaenomenologie*, edited and introduced by Elisabeth Stroker (Hamburg: Felix Meiner Verlag, 1977).
 2. Caught between the positivism of the Vienna School and the existential-ontology of his former student, Martin Heidegger, Husserl saw the mission of philosophy in a dual-pitched battle: to show that the modern mathematical sciences of nature, despite their considerable achievements, could not define what counts as “reason” alone. Philosophical questions concern “man as free, self-determining being in his behavior toward the human and extrahuman surrounding world” and the sciences have nothing to say “about us men as subjects of this freedom,” he wrote (*Crisis*, p. 6). Husserl was equally concerned with another approach prevalent in the “human-historical sciences” or the *Geisteswissenschaften*. According to this relativist historicism, “all the shapes of the spiritual world, all the conditions of life, ideals, norms upon which man relies, form and dissolve themselves like fleeting waves, that it always was and ever will be so, that again and again reason must turn into nonsense, and well-being into misery” (*Crisis*, p. 7). “Can we console ourselves with that?” he asks.
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3. Husserl, “The Vienna Lecture,” Appendix I: “Philosophy and the Crisis of European Humanity,” in *The Crisis of the European Sciences*, p. 273.
4. I introduce this qualification because Husserl also states that in India as well as China, “similar philosophies” developed, which aimed at universal knowledge of the world (Husserl, “The Vienna Lecture,” p. 280). These pursuits gave rise to vocational communities who then transmitted their knowledge from generation to generation. What distinguishes the Greek pursuit of *theoria* from these other efforts is its detachment from cosmological and religious-communal interests, precipitated by the emergence of a community of men, who “strive for and bring about *theoria* and nothing but *theoria*” (*Ibid.*).

Husserl here is repeating some well-established sociological assumptions of his time that in other high cultures, and in contrast with the Greek experience, the pursuit of “universal knowledge of the world” never freed itself from the interests and vocations of a cultured literati (the Brahmins in India), a priestly caste (Buddhist monks throughout Asia), or of a state bureaucracy (the Chinese mandarins). See Reinhard Bendix, *Max Weber. An Intellectual Portrait*, with a new Introduction by Guenther Roth (University of California Press: Berkeley, 1977), pp. 90 ff. Cf. Max Weber’s statement: “...which chain of circumstances has led to the fact that in the West, and in the West alone, cultural phenomena have appeared, which nonetheless—or at least we like to think—lie in a line of development having universal significance [*Bedeutung*] and validity [*Gueltigkeit*]?” Max Weber. “*Die Protestantische Ethik und der Geist des Kapitalismus*.” In *Gesammelte Aufsätze zur Religionssoziologie* (Mohr Verlag: Tübingen, 1920), 1. English translation: *The Protestant Ethic and the Spirit of Capitalism*, trans. Talcott Parsons (Scribner’s: New York, 1958). For reasons which I explain elsewhere, I have used my own translation of this passage rather than that of Talcott Parsons. See Seyla Benhabib, *Critique, Norm and Utopia. A Study of the Foundations of Critical Theory* (New York: Columbia University Press, 1986), p. 395, fn. 64.

In a series of influential articles, Amartya Sen has contended that some of the most prized aspects of western rationalism, such as public discussion, toleration, and consultation with the governed, have been developed and prized by other traditions as well. See Amartya Sen, “Elements of a Theory of Human Rights,” *Philosophy and Public Affairs* 32 (2004): 315-56; here p. 352; A. Sen, “Human Rights and Asian Values,” *The New Republic* (July 14 and July 21, 1997): 33-40; A. Sen, “The Reach of Reason: East and West,” *The New York Review of Books* (July 20, 2000): 33-38; A. Sen, “Democracy and its Global Roots,” *The New Republic* (October 2003): 28-35. Clearly, Husserl and Weber relied upon a comparative theory of cultures and civilizations which needs serious updating for our times.

5. See Michael Ignatieff, *Human Rights as Politics and Idolatry*, edited by Amy Gutmann (Princeton, NJ: Princeton University Press, 2001). I use the concept of “a public vocabulary” to distinguish it from the Rawlsian concept of “public reason.” Public reason for Rawls is primarily the deployment of reason as a justificatory enterprise in a pluralistic, liberal society, in which many worldviews compete for the allegiance of citizens. See John Rawls, *Political Liberalism* (New York: Columbia University Press, 1996). It would go beyond the limits of this essay to explore all the epistemological and methodological differences between the Rawlsian concept of public reason

- and the discourse-theoretic model which I will defend. For my early critique of Rawls, see Seyla Benhabib, "Toward a Deliberative Model of Democratic Legitimacy," in *Democracy and Difference*, edited by S. Benhabib (Princeton, NJ: Princeton University Press, 1996), 67-95.
6. The phrase "the right to have rights" was introduced by Hannah Arendt in *The Origins of Totalitarianism* [1951] (New York: Harcourt Brace Jovanovich, 1979 edn.); originally published in Britain as *The Burden of Our Times* (London: Secker and Warburg, 1951). Here p. 296. Hegel as well starts his *Philosophy of Right* with the right of "personality," which is the right of the individual to be considered as a being entitled to rights. Like Arendt, Hegel considers this status to emerge from the development of political, cultural, and social struggles in the world community but also as being the only standpoint compatible with the modern concept of freedom. See G.W.F. Hegel, *Grundlinien der Philosophie des Rechts*, in *Werke in zwanzig Bänden*, vol. 7, edited by Eva Moldenhauer and K. Markus Michel (Frankfurt: Suhrkamp, 1970); *Hegel's Philosophy of Right*, translated by T.M. Knox (Oxford: Oxford University Press, 1973). See section on "Abstraktes Recht."
 7. Susan Mendus. "Human Rights in Political Theory." *Political Studies* (1995), xliii, p. 10.
 8. John Rawls. "The Law of Peoples" [1993]. In *Collected Papers*, edited by Samuel Freeman (Cambridge, MA: Harvard University Press, 1999), 529-64; here p. 552. There are interesting differences in formulation between this early article and Rawls's later book *The Law of Peoples*, which I leave uncommented in this paper. See J. Rawls, *The Law of Peoples with "The Idea of Public Reason Revisited"* (Cambridge, MA: Harvard University Press, 1999).
 9. Michael Walzer. *Thick and Thin: Moral Argument at Home and Abroad* (Notre Dame, IN: University of Notre Dame Press, 1994).
 10. Charles Beitz. "Human Rights as a Common Concern." *American Political Science Review* 95 (June 2001): 272.
 11. Martha C. Nussbaum. "Capabilities and Human Rights." *Fordham Law Review* 66 (1997-98): 273-300.
 12. The UN Commission on Human Rights, created in 1946, drafted "major international human rights standards, including the two international human rights covenants, which, together, with the earlier adopted Universal Declaration of Human Rights (1948), form what is known as the International Bill of Human Rights." Yvonne Terlingen. "The Human Rights Council: A New Era in UN Human Rights Work?" *Ethics and International Affairs* 21 (Summer 2007): 167-79; here p. 168. For the documentation of the Declaration and Covenants, see: Henry J. Steiner and Philip Alston, *International Human Rights in Context: Law, Politics, Morals, 2nd ed.* (Oxford: Oxford University Press, 2000). Louis Henkin writes: "As of 1999, some 140 to 145 (of the near 190 members of the United Nations) have adhered to each of the two Covenants, albeit in some cases with significant reservations. Contrary to expectations and earlier trends, about as many are parties to the Covenant on Civil and Political Rights as to the Economic and Social Rights Covenant." Louis Henkin. "Ideology and Aspiration, Reality and Prospect." In *Realizing Human Rights. Moving from Inspiration to Impact*, edited by Samantha Power and Graham Allison (St. Martin's Press: New York, 2000), 3-39; here p. 15.

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13. Amartya Sen criticizes Nussbaum's attempt to identify an "overarching 'list of capabilities,'" on the grounds that such a "canonical list," as well as the weight to be attributed to the various items on this list, cannot be chosen without a further specification of context. More importantly, Sen sees in such a procedure "a substantive diminution of the domain of public reasoning." Sen, "Elements of a Theory of Human Rights," p. 333, fn. 31. As I will argue below, Sen's own approach may be likewise subject to the critique that it involves the "diminution of the domain of public reasoning." See footnote 37 below.
 14. Rawls, *The Law of Peoples* (1999), 65. The earlier list in the 1993 article of the same title presented a slightly different formulation: included here as human rights were "the elements of the rule of law, as well as the right to a certain liberty of conscience and freedom of association, and the right to emigration" (Rawls 1993, p. 554).
 15. See "The Law of Peoples" (1993), pp. 553-54; *The Law of Peoples* (1999), pp. 79-80. Rawls's principal motivation in thus limiting the list of human rights is to formulate a "political conception" of rights that would or could be endorsed by all the known and recognized moral, religious, scientific, etc. comprehensive worldviews in the global community. If the core of political liberalism is to formulate a political conception that citizens could endorse despite their widely divergent comprehensive views within a national community, the core of public reason on a global scale is to formulate likewise a "minimalist conception of human rights," which could be endorsed by peoples with divergent religious and moral traditions. Joshua Cohen spells this out clearly: "Justificatory minimalism is animated by an acknowledgment of pluralism and embrace of toleration. It aspires to present a conception of human rights without itself connecting that conception to a particular ethical or religious outlook." Joshua Cohen. "Minimalism about Human Rights: The Most We Can Hope For?" *The Journal of Political Philosophy* 12 (2004): 190-213, here p. 192. The justification strategy proposed by the discourse-theoretic approach respects the pluralism of worldviews not by conceptually imagining, let us say, what a Buddhist and a Catholic may hypothetically agree to, but by framing and encouraging a real dialogue among a Buddhist and a Catholic to take place such that a reasonable agreement among them may result. The emphasis in discourse ethics is on the constraints necessary for the dialogic procedure, which itself is "thin" enough not to be identifiable with any particular worldview, and yet on the other hand, "thick" enough to guide the conversation toward rationally justifiable agreement. This is at least my aspiration in defending discourse-ethic.

There is a methodological problem in identifying the constituent addressees of global public reason to be "worldviews" rather than individuals, or even peoples with complex histories in which many worldviews intersect, clash, and reach some synthesis or don't, as the case may be. The Rawlsian position proceeds from a "methodological holism" in reasoning about these matters and Josh Cohen's essay, "Minimalism about Human Rights," is not immune to this criticism as well. For a critique of the methodological holism and Rawls's faulty sociology in *The Law of Peoples*, see Seyla Benhabib, "The Law of Peoples, Distributive Justice, and Migrations," *Fordham Law Review* LXXII, No. 5 (April 2004): 1761-87.

16. For a lucid account of this Rawlsian position, cf. Joshua Cohen, "Is There a Human Right to Democracy?" *The Egalitarian Conscience. Essays in Honor of G.A. Cohen*, edited by Christine Sypnowich (Oxford: Oxford University Press, 2006), 226-48. In contrast to Cohen I will argue that the human right to democracy is crucial for being able to articulate what Cohen himself names an account of human rights as "entitlements that serve to ensure the bases of membership." There is a human right to democracy, precisely because without it the account of "just membership" provided by Cohen is incoherent. *Ibid.*, p. 226. According to Cohen, "the central feature of the normative notion of membership is that a person's good is to be taken into account by the political society's basic institutions: to be treated as a member is to have one's good given due consideration, both in the process of arriving at authoritative collective decisions and in the content of those decisions." *Ibid.*, pp. 237-38. I fail to see how these conditions can be realized other than in well-functioning democracies. A more detailed critique of Cohen's position will be forthcoming in Benhabib, "The Human Right to Democracy and the Vicissitudes of Rawlsian Public Reason," The Kansas University, Lindley Lecture (2008).
 17. Cf. Johannes Morsink, *The Universal Declaration of Human Rights. Origins, Drafting and Intent* (Philadelphia: University of Pennsylvania Press, 1999).
 18. James Griffin. "Discrepancies between the Best Philosophical Account of Human Rights and the International Law of Human Rights," The Presidential Address, *Proceedings of the Aristotelian Society* 101 (2001): 1-28. The result of such an examination may be that "some of the items on the lists are so flawed that they should be given, as far as possible, the legal cold shoulder" (*Ibid.*, p. 26). I agree, but Griffin proceeds from a rather conventional account of human rights as "centered on the notion of agency. ... We value our status as agents especially highly, often more highly than our happiness. Human rights can then be seen as protections for our agency—what one might call our personhood." *Ibid.*, p. 4. This defense of human rights is subject to the same criticisms as all other agent-centric views: that some condition is necessary for the exercise of *my* agency does not impose an obligation upon *you* to respect this condition, unless you and I also recognize each other's equality and reciprocity as moral beings. This is the first justificatory step in the argument. See fn. 28 below.
 19. For a defense of Rawls, see Joshua Cohen, "Minimalism about Human Rights: The Most We Can Hope For?" *The Journal of Political Philosophy*, pp. 190-213. For an interesting critique of Rawls on the right to democracy, see Alessandro Ferrara, "Two Notions of Humanity and the Judgment Argument for Human Rights," *Political Theory* 31, No. X (2003): 1-30; here pp. 3 ff.
 20. I have developed an early version of this analysis in *The Claims of Culture. Equality and Diversity in the Global Era* (Princeton and Oxford: Princeton University Press, 2002), 26-28.
 21. Richard Rorty's defense of "postmodernist bourgeois liberalism" fits this paradigm, as do Jacques Derrida's many interventions against apartheid and on behalf of minorities and civil rights in the decade before his death. They all attempt to disassociate the "right" from the "good," and distinguish what I am calling "juridical universalism" from essentialism, whether cognitive or moral. Universalism, such is their claim, can be political without being
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- metaphysical. Cf. Richard Rorty, "Postmodernist Bourgeois Liberalism," *Journal of Philosophy* 80 (1983): 583-89; R. Rorty, "Human Rights, Rationality and Sentimentality," in *On Human Rights: The Oxford Amnesty Lectures 1993*, edited by Stephen Shute and Susan Hurley (New York: Basic Books, 1993), 11-34. See also Jacques Derrida, "Declarations of Independence," *New Political Science* (Summer 1986): 6-15.
22. A. MacIntyre. *After Virtue* (London: Duckworth, 1981), 67. Cf. Jeremy Bentham: "Right, the substantive right, is the child of law; from real laws come real rights; but from imaginary laws, from "law of nature" [can come only] "imaginary rights." Jeremy Bentham. "Anarchical Fallacies." In *The Works of Jeremy Bentham*, vol. 2, edited by John Bowring (Edinburgh and London: W. Tait, 1843), 523.
 23. Jeremy Bentham, "Anarchical Fallacies," p. 501.
 24. For a careful analysis of the self-contradictions of MacIntyre's own appeal to reason, see Rainer Forst, *Contexts of Justice. Political Philosophy beyond Liberalism and Communitarianism*, trans. by John M. Farrell (Berkeley and Los Angeles: University of California Press, 2002), 200-15.
 25. Richard Tuck. *Natural Rights Theories* (Cambridge: Cambridge University Press, 1979); see also Anthony Pagden, "Human Rights, Natural Rights, and Europe's Imperial Legacy," for a good historical account of the evolution of the discourse of rights, which nonetheless avoids endorsing or denouncing Eurocentrism, in *Political Theory* 31 (April 2003): 171-99.
 26. Jeremy Waldron. "Introduction," *Theories of Rights* (Oxford: Oxford University Press, 1984), p. xxx. I have also found very helpful, Matthew Noah Smith, "The Normativity of Human Rights" (manuscript on file with the author).
 27. Immanuel Kant. *The Metaphysics of Morals* [1797], trans. and edited by Mary Gregor. In *Cambridge Texts in the History of Political Thought* (Cambridge: Cambridge University Press, 1996), 133.
 28. This is the major flaw in James Griffin's otherwise instructive account, "Discrepancies between the Best Philosophical Account of Human Rights and the International Law of Human Rights," *The Presidential Address, Proceedings of the Aristotelian Society* 101 (2001): 1-28; here pp. 4 ff.
 29. For an analysis of the two meanings of "the right to have rights," in terms of its moral and juridico-civil components, see Seyla Benhabib, *The Rights of Others. Aliens, Residents and Citizens* (Cambridge: Cambridge University Press, 2004), 56-61.
 30. See Seyla Benhabib, *Situating the Self. Gender, Community and Postmodernism in Contemporary Ethics* (London and New York: Routledge, 1992), 35-37.
 31. For a thoughtful statement which I endorse, cf. Heiner Bielefeldt, "The history of human rights in the West is not a binding "model" that allows us to make forecasts about the prospects of human rights in other parts of the world. ...Rather, the history of human rights in the West gives us an *example*—not the paradigm per se but merely an example—of the various obstacles, misunderstandings, learning processes, achievements, and failures in the long-lasting struggle for human rights." In "'Western' versus 'Islamic' Human Rights Conceptions?: A Critique of Cultural Essentialism in the Discussion of Human Rights," *Political Theory* 28 (February 2000): 90-121; here pp. 101-102.
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32. I wish to thank Richard J. Bernstein for pressing me on this point. In *The Claims of Culture* I addressed this question from within a mode of deliberative democracy and distinguished between “the syntax” and “semantics” of public-reason giving. Reasons, I suggested, would be counted as good reasons because they could be considered as being in the “best interest of all considered as moral and political beings.” And to parse X or Y—a policy, a law, a principle of action—to be “in the best interests of all,” would mean “that we have established X or Y through processes of public deliberation in which all affected by these norms and policies take part as participants in a discourse.” Benhabib, *The Claims of Culture*, pp. 140 ff. I said that there is no way to know in advance which semantically specific claims or perspectives may count as “good reasons.” What discourse ethics, as well as deliberative democracy modeled on discourse ethics, rules out are *some kinds of reasons*—these are ones which cannot be syntactically generalizable.
 33. See the very instructive reflections by Norberto Bobbio, “Human Rights Now and in the Future,” in *The Age of Rights*, trans. by Allan Cameron (London: Polity Press, 1996), 12-32.
 34. For a position which strongly differentiates between the moral and ethical dimension of human rights and their legal articulation, see Amartya Sen, “Elements of a Theory of Human Rights,” *Philosophy and Public Affairs*, here p. 319. Sen wishes to consider human rights as “primarily ethical demands,” which relate to the “significance of the freedoms that form the subject matter of these rights.” Although he refrains from an exhaustive listing of these freedoms, for Sen freedoms are actualizations of capabilities, both in the sense of opportunities and processes requisite for capabilities to be unfolded. “Rather, freedom, in the form of capability, concentrates on the *opportunity* to achieve combinations of functionings...” (334). By situating human rights so centrally within an ethical theory of freedom and capabilities, Sen disregards the political history of the concept of rights which was always closely tied to claims to legitimacy and just rule. Rights are not simply about strong moral entitlements which accrue to individuals; they are about claims to justice and legitimacy enframing our collective existence. We cannot simply reduce rights to the language of moral correctness. Violating a right is different from inflicting a moral harm on a person. We can do the latter, without engaging in the former; while some violations of rights, but not all, can be forms of moral harm. By humiliating you in front of your family, friends, and your loved ones, for example, I inflict a moral harm upon your dignity as a person; but I have not thus violated your “human right to dignity,” which I would be doing if I were to subject you to torture and other forms of “cruel and unusual punishment.” All violations of basic human rights, by contrast, that impinge upon the communicative freedom of the person, also inflict moral harms. I do not see that on Sen’s account we can make such necessary distinctions between “moral harm” on the one hand and “rights violations” on the other.
 35. See Seyla Benhabib, *Another Cosmopolitanism. Sovereignty, Hospitality, and Democratic Iterations*, The Berkeley Tanner Lectures, with Responses by Jeremy Waldron, Bonnie Honig and Will Kymlicka, edited by Robert Post (New York and London: Oxford University Press, 2006).
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36. See the classical essay by Ronald Dworkin, "Taking Rights Seriously" (1970), in *Taking Rights Seriously* (Cambridge, MA: Harvard University Press, 1978), pp. 184ff.
 37. Since I consider individuals as "generalized" and as "concrete" others, taking into account their embodiment, the protection of the bodily integrity of persons, who are sexed differently, is an important human right. It is not only women who are subject to sexual violence, many gay and lesbians are as well; however, because of their capacity to become pregnant, forced and arbitrary violence against women affects their personhood and capacities for communicative freedom differently than gay men. The important point is to keep in view the different kinds of violence that one can be subject to as a result of sexual difference and to incorporate this into our understanding of human rights. For example, many governments, including the USA and Canada, now recognize and grant as legitimate requests for asylum for women escaping female genital mutilation.
 38. For further elucidation, see Benhabib, *The Claims of Culture*, ch. 5 in particular.
 39. I offer democratic iterations as a model to think of the interaction between constitutional provisions and democratic politics. It may be possible to extend democratic iterations as a model for the "pouvoir constituant," the founding act as well. In this essay, I am assuming that democratic iterations are about ordinary as opposed to constitutional politics; though I am claiming that ordinary politics can embody forms of popular constitutionalism and can lead to constitutional transformation through accretion. There is a lot more that needs to be said about the relationship of a discourse-theoretic analysis of democratic iterations and political liberalism than I can within the scope of this paper. See Rawls's final reflections in his "Political Liberalism: Reply to Habermas," *The Journal of Philosophy* 92 (March 1995), here pp. 172 ff. Thanks to my student Angelica Bernal for her observations on this problem.
 40. Juergen Habermas. *Between Facts and Norms. Contributions to a Discourse Theory of Law and Democracy*, trans. by William Rehg (Cambridge, MA: The MIT Press, 1996), 110.
 41. For a discussion of traditions besides liberalism which do not acknowledge that individuals are "self-authenticating sources of valid claims," see Joshua Cohen, "Minimalism about Human Rights: The Most We Can Hope For?" p. 207.
 42. For the concept of "complex cultural dialogues," see Benhabib, *The Claims of Culture. Equality and Diversity in the Global Era*, chs. 1 and 2, and Boaventura de Sousa Santos who observes: "...all cultures are incomplete and problematic in their conceptions of human dignity. The incompleteness derives from the very fact that there is a plurality of cultures and this is best visible from the outside, from the perspective of another culture. If each culture were as complete as it claims to be, there would be just one single culture. To raise the consciousness of cultural incompleteness to its possible maximum is one of the most crucial tasks in the construction of a multicultural conception of human rights." "Toward a Multicultural Conception of Human Rights," in *Moral Imperialism. A Critical Anthology*, edited by Berta Hernandez-Truyol (New York: New York University Press, 2002), 46-47.
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43. Minimalism about human rights is at bottom also a concern about the interventionist politics which may ensue from a maximalist and overblown conception of human rights. Ignatieff is certainly explicit about this worry. See Michael Ignatieff, *Human Rights as Politics and Idolatry*, pp. 90 ff., and also M. Ignatieff, *The Lesser Evil* (Princeton: Princeton University Press, 2004). For an analysis of why this line of argument is fallacious, and that there is no necessary link between human rights violations and humanitarian interventions, except in the case of genocide and “crimes against humanity,” such as ethnic cleansing, see Greg Dinsmore, “When Less is Really Less—What’s Wrong with Minimalist Approaches to Human Rights,” *The Journal of Political Philosophy* (2007- Online Early Article).
 44. For an incisive account of a “non-legal” but nonetheless legitimate intervention by NATO troops in the bombing of Belgrade to prevent genocide in Kosovo, see Allen Buchanan, “From Nuremburg to Kosovo: The Morality of Illegal International Legal Reform,” *Ethics* 111 (July 2001): 673-705.
 45. Immanuel Kant. [1795]. “Perpetual Peace: A Philosophical Sketch,” trans. by H.B. Nisbet. In *Kant. Political Writings*, edited by Hans Reiss (Cambridge: Cambridge Texts in the History of Political Thought, 1994). Second and enlarged edition. Appendix II, “On the Agreement between Politics and Morality According to the Transcendental Concept of Public Right.”
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