

## Aspirational Law

PHILIP HARVEY†

### INTRODUCTION

What are “human rights” and what does it mean to say that someone has them in situations where they are not enforced? I have never found the standard answers to that question very satisfying. On the one hand, legal positivists argue that there is no such thing as an unenforced right. If a so-called human right is not enforced it isn’t a right at all, but just a moral claim.<sup>1</sup> On the other hand, human rights theorists tend to rest their case for the existence of such rights on philosophical or theological arguments that ignore the enforcement issue.<sup>2</sup> For lack of a better term, I shall refer to these justifications as the natural rights argument.

I find both of these arguments useful but incomplete. The legal positivist argument strikes me as evasive, substituting quibbles over terminology for a real coming to terms with the nature of human rights claims. Language is a product of usage, and definitions (even in legal theory) should not ignore usage. People consistently use the term

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† Associate Professor of Law and Economics, Rutgers School of Law-Camden.

1. This view was famously expressed in the following comments by Jeremy Bentham objecting to the rights talk of the French Revolution:

*Right*, the substantive *right*, is the child of law: from *real* laws come *real* rights; but from laws of nature, fancied and invented by poets, rhetoricians, and dealers in moral and intellectual poisons come *imaginary* rights, a bastard brood of monsters, ‘gorgons and chimeras dire’.

Jeremy Bentham, *Anarchical Fallacies*, in *NONSENSE UPON STILTS: BENTHAM, BURKE AND MARX ON THE RIGHTS OF MAN* 69 (Jeremy Waldron ed., 1987).

*Natural rights* is simple nonsense: natural and imprescriptible rights, rhetorical nonsense—nonsense upon stilts.

*Id.* at 53.

2. For examples of this type of reasoning applied to economic and social human rights claims, see *ECONOMIC, SOCIAL AND CULTURAL RIGHTS: PROGRESS AND ACHIEVEMENT* (Ralph Beddard and Dilys M. Hill eds., 1992).

“human rights” in a way that connotes a special category of entitlements that is distinct from other moral claims and that may, under certain circumstances, be more authoritative than mere legal rights. Who are the positivists to say that this usage is mistaken? Was it simply a linguistic mistake to assert that apartheid violated the human rights of non-white South Africans or for Thomas Jefferson to assert that “all men are created equal”? I don’t think so. The usage is too widespread and, more importantly, too consequential to be dismissed as confused. Something special and unique is going on when people assert or accept the existence of unenforced human rights that is not adequately captured in the positivist distinction between legal rights and moral claims.

On the other hand, I think the natural rights argument confuses justification with explanation. That a particular human right may be philosophically justified is important, but it doesn’t explain when it is reasonable to assert that such rights exist or what it means to assert that a person possesses such a right if it is not enforced. These issues, concerning which the positivist argument is at least clear if narrowly dogmatic, are not adequately addressed by the natural rights argument. Surely it is not sufficient to claim that a particular right exists just because it can be justified within a particular philosophical framework, irrespective of whether anyone agrees with it or is willing to fight to achieve its enforcement. At any rate, I’m enough of a legal positivist to think that something more than logic is required to support the existence of human rights.

Given my dissatisfaction with both the legal positivist and the natural rights arguments, I find myself in the awkward position of believing strongly in the existence of human rights—including unenforced human rights—without having a very clear notion of what that means or what gives people the “right” to claim that they possess such rights. In this essay I want to explore an idea I have been turning over in my mind that may resolve the difficulties I see in the legal positivist and natural rights arguments. I’m not sure the idea will withstand close scrutiny or that other people will find it any more satisfying than I find the positivist and natural rights explanations, but I think it does explain the special character of unenforced human rights as a form of what I refer to as “aspirational law.”

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## I. ECONOMIC AND SOCIAL HUMAN RIGHTS AND NEO-CLASSICAL ECONOMICS

People go to law school for a variety of reasons. In my case it was an interest in economic and social human rights—though interest is really too mild a term. In the late 1970s and early 1980s I was a socially engaged left-wing economist teaching in a Third World studies program with a Ph.D. in economics from the New School for Social Research, a place that prided itself on its international origins and its progressive, interdisciplinary perspective. Still, I had never heard of the economic and social provisions of the Universal Declaration of Human Rights. Indeed, I was only dimly aware of the existence of the Universal Declaration itself and, like most Americans, assumed that the U.S. Bill of Rights was more or less synonymous with everyone's conception of human rights.

This assumption was profoundly limiting. I had been schooled by the decolonization, Civil Rights, and women's movements to appreciate the importance of rights-based claims in mobilizing social protest and achieving social reform. I admired the power of equal entitlement arguments but assumed that they had to be grounded on claims of invidious discrimination, either present or historical. I never dreamed that authoritative recognition had ever been accorded the idea that freedom from poverty and unemployment, access to health care and education, and a variety of other social entitlements could be claimed as human rights in and of themselves—irrespective of whether particular individuals or groups had been denied equal access to the benefits in question.

I learned of the economic and social provisions of the Universal Declaration (see Appendix) while doing educational consulting work for a church organization. I was stunned by the discovery and instantly accepted the truth of what the Universal Declaration proclaimed. It was a Eureka moment for me. It not only put a name to what I always had felt was wrong with market societies; it provided a conceptual framework for my work as an economist.

Markets are engines of technological innovation, economic growth, consumer autonomy, and certain kinds of economic efficiency; but they are not very good at securing the economic and social entitlements proclaimed to be

human rights in the Universal Declaration. They do not ensure that all members of society will be able to find decent work; they do not protect people who are unable to earn their own livelihood from impoverishment; and they do not distribute health care and education based on need and equitable entitlement. Other institutions, guided by non-market values, are needed to secure these entitlements for all persons.

I therefore came to view economic and social human rights as having a similar relationship to the market mechanism that minority rights have to majority rule. Just as strong safeguards for minority rights are needed to ensure that majority rule does not produce unacceptable political outcomes, so too strong safeguards for economic and social human rights are needed to ensure that the market mechanism does not produce unacceptable social outcomes. To recognize the entitlements included in the Universal Declaration as human rights means that societies have a duty to secure them and that this obligation should “trump” other economic policy goals.

In methodological terms, this explained the shortcomings of neo-classical economics in a way that situated the issue squarely within long-standing philosophical debates concerning the adequacy of utilitarianism as a social choice criterion. Neo-classical economic theory is founded on a double embrace of the concept of utility maximization. First, its positive model of economic institutions—indeed, its conception of what the study of “economics” properly encompasses—is founded on the assumption that the “economic” behavior (i.e., the revealed preferences) of both individuals and entities can be treated as an independent variable embodying the traits of rationality, possessive individualism and, most importantly, utility maximization. Second, it normatively assumes that utility maximization (actually the satisfaction of revealed preferences since utility cannot be directly measured) is the proper goal of both individual economic behavior and of the economy as a whole. The result is a discipline that asks no more of the economy than that it maximize the satisfaction of people’s self-regarding desires—hence the lionization of the market mechanism, an institution preeminently suited to achieving that goal. The promotion of other goals that may impact economic policy is viewed as a legitimate

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undertaking within this framework, but it is by definition a non-economic activity.

The existence of economic and social human rights has profound implications for both positive and normative economics. On the normative side, the recognition of economic and social human rights poses a fundamental challenge to the adequacy of the utility maximization norm. The potential for conflict between utility maximization and human rights protection has long been recognized in the social choice literature, but the practical implications of this theoretical possibility are greatly increased if economic and social entitlements are recognized as human rights. Theoretical discussions of the potential conflict between utility maximization and human rights protection tend to feature unrealistic scenarios that are unlikely to arise in the real world—for example, the possibility that a society of Nazis would derive more utility in the aggregate from persecuting a minority group living in their midst than the minority group would lose in the aggregate from the consequent violations of their human rights.

Utilitarians can and do dismiss scenarios such as these as so implausible that they do not call into question the practical adequacy of the utility maximization norm. It is not at all implausible, though, to imagine such scenarios involving the violation of economic and social human rights. Securing such rights may require policies that raise taxes, increase the size and regulatory activities of government, and are likely to increase inflationary pressures in the economy. A large majority of the population of a market society could easily feel a strong enough preference for lower taxes, smaller government, and reduced inflation that the aggregate utility they derive from neo-liberal economic policies will exceed the disutility suffered by the minority of the population whose economic and social rights are violated by those policies.<sup>3</sup>

This possibility is further amplified in neo-classical assessments of public policy choices, since the treatment of revealed preferences as a stand-in for utility, combined with the abandonment of any effort to make interpersonal comparisons of utility, leaves neo-classical economists no

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3. For a more extended discussion of this point, see Philip Harvey, *Human Rights and Economic Policy Discourse: Taking Economic and Social Human Rights Seriously*, 33 COLUM. HUM. RTS. L. REV. 363 (2002).

practical choice but to assume that the satisfaction of majoritarian preferences is utility maximizing. If a majority of the population reveal their preference for lower taxes by reducing or terminating public assistance benefits for poor families, a neo-classical economist has no grounds for assuming the decision is anything but utility-maximizing—thereby creating a direct conflict between the utility maximization norm and the claim that the policy violates the economic and social human rights of the affected families.

The implications of the existence of economic and social human rights for positive economic analysis is more subtle but equally profound. As noted above, neo-classical economic theory treats the structure and intensity of individual preferences as an independent variable properly constrained only by efficiency maximizing legal rules and market forces. As long as those legal rules are “efficient” in the utility-maximizing (or “wealth”-maximizing) sense of the term, the model works well. The legal rules require no change in behavioral assumptions because they are designed (or should be designed) to eliminate only those behaviors that tend to reduce aggregate utility (e.g., unremedied breaches of contract). That’s the whole point of neo-classical law and economics scholarship. But what if the legal rules constraining individual preferences include economic and social human rights obligations that may not be utility maximizing? The problem this poses for positive neo-classical analysis may not be great as long as it is assumed that the law does not affect individual preferences. Then you could use neo-classical analysis to explain economic outcomes in the same way it is used today to describe the effects of “inefficient” legal rules. Normative judgments concerning the desirability of those outcomes would be affected, but not the positive analysis of the outcomes themselves. Recognizing, though, that one purpose of the law is to shape preferences (thereby reducing enforcement costs), neo-classical economics would have to face the possibility that *homo economicus* might have to be replaced in their economic model with a less self-centered being who may not behave in accord with the model’s assumptions.

What would a neo-classical model look like in which investors manifested significant concern for the social consequences of corporate behavior as well as corporate

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profits, or in which consumers manifested significant concern for the well-being of others as well as for their own? To concretize this problem, ask yourself what a neo-classical model of the economics of family life would look like—not the family’s economic dealings with the rest of the world but their economic dealings with one another. How are decisions made about who will engage in which productive activities within the household? How are goods and services that come into the family’s possession shared among its members? How are less productive or incapacitated members of the family cared for and supported? While neo-classical economists like Gary Becker have attempted to model some familial decisions, nothing approaching a comprehensive neo-classical model of the family has ever been attempted precisely because the neo-classical methodology depends on behavioral assumptions that do not adequately capture the motivations that drive economic behavior in that context.

Energized by both the normative attractiveness of the economic and social human rights norms recognized in the Universal Declaration and the political potential I saw in using the language of human rights to promote social reform, I began to conceive of my work as an economist as the design of socio-economic institutions and policies capable of securing economic and social human rights at smallest sacrifice of economic performance defined in neo-classical terms. That was my definition of economic efficiency,<sup>4</sup> and one of the first questions I asked myself was whether and how a market society could secure the right to work for all job-seekers. I began my first serious research on that subject in the fall of 1984 and decided at the same time to go to law school. Given the rights orientation of the research I was undertaking, I thought I needed some legal training.

I arrived at law school in the fall of 1985 expecting to pursue what I thought of as a career in law and economics research. Talk about culture shock. I discovered that what passed for economic analysis in legal scholarship was even

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4. Efficiency is an engineering concept defined simply as output divided by input. Miles per hour, miles per gallon, dollars per hour and dollars per gallon are all measures of efficiency. They simply define what they are interested in maximizing and/or minimizing differently. Maximizing aggregate output (or utility) while minimizing costs of production is similarly just one of many possible definitions of economic efficiency.

more conservative and constrained by neo-classical assumptions than the work of most neo-classical economists. I also discovered that most liberal legal scholarship was as innocent of economic and social rights talk as my own thinking had been a few years earlier (with the limited exception of by-then abandoned discussions of a possible constitutional right to “welfare”). Finally, I discovered that “left” legal scholarship tended to be hostile to “rights talk” because of its presumed jurisprudential implications. The good news was that the field of studies I wanted to pursue—the law and economics of the right to work—was open to me. I could pursue my interest without stepping on anyone’s toes. The bad news was the same as the good: The field was open to me because no one else was interested in it.

In retrospect, I realize that the smart thing to do would have been to redirect my work to issues that were being debated at the time, either in the law and economics literature or the human rights literature. But, feeling like a kid in a candy shop, I pursued my own research agenda, producing a book and a series of articles on the subject of the right to work that hardly anyone has read or felt compelled to answer.<sup>5</sup>

One of the issues that I could have pursued if I had followed a wiser course would have been the jurisprudential foundations of human rights law—including the topic I am belatedly addressing in this essay. I was aware from early on, of course, that economic and social human rights claims have been criticized on the grounds that the so-called rights

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5. See, e.g., PHILIP HARVEY, *SECURING THE RIGHT TO EMPLOYMENT: SOCIAL WELFARE POLICY AND THE UNEMPLOYED IN THE UNITED STATES* (1989); Harvey, *supra* note 3; Philip Harvey, *Combating Joblessness: An Analysis of the Principal Strategies that Have Influenced the Development of American Employment and Social Welfare Law During the 20th Century*, 21 *BERKELEY J. EMP. & LAB. L.* 677 (2000); Philip Harvey, *Direct Job Creation*, in *COMMITMENT TO FULL EMPLOYMENT: MACROECONOMICS AND SOCIAL POLICY IN MEMORY OF WILLIAM VICKREY* 35-54 (Aaron Warner et al. eds., 2000); Philip Harvey, *Joblessness and the Law Before the New Deal*, 6 *GEO. J. ON POVERTY L. & POL’Y* 1 (1999); Philip Harvey, *Liberal Strategies for Combating Joblessness in the Twentieth Century*, 33 *J. ECON. ISSUES* 497 (1999); Philip Harvey, *Fashioning A Work-Based Strategy for Welfare Reform Based on International Human Rights Doctrine*, 16 *J. PUB. HEALTH POL’Y* 269 (1995); Philip Harvey, *Paying for Full Employment: A Hard-Nosed Look at Finances*, 25 *SOC. POL’Y* 21 (1995); Philip Harvey, *Employment as a Human Right*, in *SOCIOLOGY AND THE PUBLIC AGENDA* 351-74 (William Julius Wilson, ed. 1993)..



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at issue are not enforceable. Indeed, my first law-related article addressed the enforcement issue.<sup>6</sup> Still, it is not a topic to which I have devoted much attention since then.

## II. UNENFORCED HUMAN RIGHTS

The Universal Declaration makes no distinctions among the different rights it recognizes, but it is not a treaty, and at the time of its adoption the prevailing view was that it did not impose legally enforceable obligations on individual governments. In contrast, the treaties that were subsequently promulgated to permit governments to accept such obligations do distinguish between civil and political rights, on the one hand, and economic, social and cultural rights, on the other hand. Governments that ratify the International Covenant on Civil and Political Rights (the ICCPR) incur an obligation to secure most of the rights recognized in the Covenant immediately; but governments that ratify the International Covenant on Economic, Social and Cultural Rights (the ICESCR) generally commit themselves only to work *toward* the realization of the rights recognized in the Covenant.

For legal positivists, this difference is crucial. Since unenforced rights are not rights at all according to this view, it can be argued that the economic and social rights recognized in the ICESCR are not really rights. Nations that ratify the agreement are obligated to promote the achievement of the rights it proclaims, but they don't promise to secure them; so even if the promotional obligation were taken seriously, it would create no enforceable entitlement to the promoted rights themselves.

This defect could be cured, of course, if the rights recognized in the ICESCR were made fully and immediately enforceable, but even strong advocates of economic and social rights express doubt that this would be possible for all the entitlements recognized in the document. This skepticism is expressed most frequently with respect to the right to work.

In a passionately argued plea for the legislative and executive branches of the federal government to recognize a

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6. Philip Harvey, *Monitoring Mechanisms for International Agreements Respecting Economic and Social Human Rights*, 12 YALE J. INT'L L. 396 (1987).

“constitutional right of access to work,”<sup>7</sup> Kenneth Karst nevertheless argues that the right cannot and should not be made judicially enforceable because of the “superabundance of causes for the harm of joblessness in today’s economy.” His point is that “[t]his diffusion of responsibility seriously complicates not only the identification of particular defendants and the crafting of judicial remedies, but also the definition of the wrong.”<sup>8</sup>

A similar skepticism concerning the possibility of creating a justiciable right to work has been expressed by Albie Sachs, a distinguished South African human-rights advocate who helped draft the post-apartheid South African Constitution, including a very progressive set of economic and social provisions, and now sits on the country’s Supreme Court. Sachs has noted that “[i]n drafting the section [of the South African Constitution] on social rights, we looked to the International Covenant [on Economic, Social, and Cultural Rights].” He went on to observe that “[a]ll of the rights contained in this section [of the Constitution] are fully justiciable,” including rights to education and health care. Nevertheless, “[w]e did not include the right to work in our draft Bill, because we are not sure that anyone, including Mandela, can guarantee full employment within a satisfactory time period. The government’s failure to deliver full employment would demean the entire document. Instead, we placed a duty on the state to reduce unemployment.”<sup>9</sup>

As a final example, Cass Sunstein offers the following comment in a recent book in which he endorses Franklin D. Roosevelt’s proposed “Second Bill of Rights,” a predecessor and source of the economic and social provisions included in the Universal Declaration of Human Rights. The first entitlement enumerated in FDR’s proposed bill of rights was “[t]he right to a useful and remunerative job in the industries or shops or farms or mines of the Nation.”<sup>10</sup> In

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7. Kenneth L. Karst, *The Coming Crisis of Work in Constitutional Perspective*, 82 CORNELL L. REV. 523, 553 (1997).

8. *Id.* at 554-55.

9. Symposium, *Economic and Social Rights and the Right to Health*, at <http://www.law.harvard.edu/programs/hrp/Publications/economic2.html> (last visited Sept. 24, 2004).

10. Franklin D. Roosevelt, Message to the Congress on the State of the Union (Jan. 11, 1944), in 13 THE PUBLIC PAPERS AND ADDRESSES OF FRANKLIN D. ROOSEVELT, at 41 (Samuel I. Rosenman ed., 1950).

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discussing the enforceability of FDR's proposed set of rights, Sunstein argues that

With respect to judicial enforcement, the difficulty with the second bill does not lie in ambiguity or vagueness but in the limited resources of government and the extreme difficulty of ensuring that the rights in the second bill are respected in practice . . . . No nation can ensure that every citizen has a job; a certain level of unemployment is inevitable.<sup>11</sup>

I think this skepticism concerning the feasibility of securing the right to work is unwarranted,<sup>12</sup> but I will not argue that point now, because the premise of these comments—that at least some of the economic and social rights recognized in the Universal Declaration are not only legally unenforceable but may be practically unenforceable—will be useful to my inquiry.

### III. THE INADEQUACY OF POSITIVIST CATEGORIES

How should we view the unenforced and possibly unenforceable “rights” proclaimed in documents like the Universal Declaration and the ICESCR? As mentioned above, I think the positivist answer to this question fails to come to terms with the special character of human rights claims. To explore this issue, consider the distinction that Stephen Holmes and Cass Sunstein draw between “moral rights” and “legal rights.”<sup>13</sup> Legal rights, in their view, are essentially what Bentham refers to as “*real* rights,” that is, rights which are recognized and enforced by a governing authority. The category of moral rights is broader. It includes many legal rights, but it also includes unenforced moral claims that are triable only before “the tribunal of conscience.”<sup>14</sup> Also consistent with Bentham's position, moral rights that do not have the status of legal rights are presumed inferior to legal rights. Bentham called them “imaginary.” Holmes and Sunstein call them “toothless”:

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11. CASS R. SUNSTEIN, *THE SECOND BILL OF RIGHTS: FDR'S UNFINISHED REVOLUTION AND WHY WE NEED IT MORE THAN EVER* 210 (2004).

12. *See generally* HARVEY, *SECURING THE RIGHT TO EMPLOYMENT*, *supra* note 6.

13. STEPHEN HOLMES AND CASS R. SUNSTEIN, *THE COST OF RIGHTS: WHY LIBERTY DEPENDS ON TAXES* 16-17 (1999).

14. *Id.*

When they are not backed by legal force . . . moral rights are toothless by definition. Unenforced moral rights are aspirations binding on conscience, not powers binding on officials. They impose moral duties on all mankind, not legal obligations on the inhabitants of a territorially bounded nation-state.<sup>15</sup>

In practice, rights become more than mere declarations only if they confer power on bodies whose decisions are legally binding (as the moral rights announced in the United Nations Declaration of Human Rights of 1948, for example, do not).<sup>16</sup>

One of the problems with the application of this distinction to human rights claims is its absolutism. It treats enforceability as though it were a switch with only two positions—on or off. Reality is far more complicated. For example, do African Americans have the legal right to attend integrated schools in the United States, and if so, at what point in time did they obtain that right? The Supreme Court declared that segregated schools were unconstitutional in 1954, but it did not order an immediate end to the practice, and it also did not explain what kinds of segregation were unlawful. School desegregation litigation addressed these issues over the next several decades, and a complex set of rules evolved for the enforcement of the Court's original order. But it would take a roomful of experts to explain what those rules are, and even then the practical enforceability of the rules depends on a range of other factors such as where a person lives, their socio-economic status, how much money they have to spend on legal fees, and the current state of public opinion. If we define "legal rights" as those "backed by legal force," then an accurate answer to the question of whether African Americans have the legal right to attend integrated schools must be that "It depends."

To cite another example, do American workers have the legal right to unionize without being fired? If the answer to that question depends on whether workers fired for their union activities are supposed to be protected by the National Labor Relations Act, the answer is yes, but if it depends on whether they can obtain a timely and *effective*

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15. *Id.* at 17.

16. *Id.* at 19.

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remedy for violation of the Act, the answer is probably no.<sup>17</sup> To define legal rights as synonymous with legal outcomes, or even “expected” legal outcomes, fails adequately to account for the grey areas and uncertainties that define the ground between what the law promises (or seems to promise) and what it delivers in fact.

These grey areas and uncertainties are especially large when it comes to the enforcement of human rights claims. The international agreements, constitutions and statutes in which such rights are recognized are frequently drafted in broad terms, and it generally is accepted that the ways in which such rights are enforced as well as their substantive contours are appropriately subject to change over time. The right to education and the right of association have both been “backed by legal force” in the United States, but each in dramatically different ways and to dramatically different extents over time. The legal enforceability of these rights is a work in progress, not a checklist item that can be marked either “yes” or “no.”

Another problem with Holmes and Sunstein’s distinction between enforceable and unenforceable rights is that it assumes the only kind of enforcement that can give a right “teeth” is the kind ordered by a court or other body “whose decisions are legally binding.” In other words, they equate enforcement of the law with judicial enforcement of the law. But consider again the South Africa example. Prior to the collapse of apartheid there was no domestic law guaranteeing equal rights to non-white South Africans, and the country had not assumed any international obligation to guarantee equal rights to all its citizens. Adopting Holmes and Sunstein’s distinction, we would have to say that while the moral rights of non-white South Africans may have been violated by apartheid, they suffered no violation of their legal rights, since there was no body “whose decisions are legally binding” that could have ordered the end of apartheid.

But if enforceability is the touchstone that distinguishes “legal” from “moral” rights, why shouldn’t we count as enforcement the actions of the anti-apartheid protest movement which forced the South African government to

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17. See LANCE COMPA, *UNFAIR ADVANTAGE: WORKERS’ FREEDOM OF ASSOCIATION IN THE UNITED STATES UNDER INTERNATIONAL HUMAN RIGHTS STANDARDS* (2000).

abandon apartheid? Those actions—ranging from petition-signing campaigns to armed struggle—were all taken with the specific intent of vindicating claims that apartheid violated the human rights of non-white South Africans. Weren't those claims "enforced" in this instance?

To argue, as legal positivists might, that what the anti-apartheid movement did was force a change in the law, creating legal rights where only moral claims had existed before, is nothing but a linguistic shuffle. The reality is that non-white South Africans living under apartheid claimed that they possessed legal rights of a higher order than those granted by South African law; and when the South African government refused to recognize those rights, they called upon supporters of their claims inside and outside South Africa to enforce their human rights by extra-judicial means. It took decades, but this "enforcement" action ultimately proved successful ending apartheid. To suggest that the human rights claims of non-white South Africans were "toothless" because they were not "backed by the force of law" is simply wrong. Those claims obviously did have bite.

Nor is the South African example exceptional. The most interesting and historically important examples of the vindication of human rights claims have always involved the use of extra-judicial means to enforce what is perceived to be a higher species of law. The American Revolution exemplifies this pattern, but the same is true of situations in which courts have played a more prominent role—such as the *Brown v. Board of Education* decisions ending de jure segregation in the United States. First, the *Brown* decisions themselves would have been inconceivable without the decades of protest that preceded them in which the claim was repeatedly advanced that Jim Crow violated the rights of African Americans, irrespective of what the Supreme Court had said in *Plessy v. Ferguson*. Second, the degree and manner in which the *Brown* decisions themselves have been enforced has similarly depended far more on the politics of civil rights protest and backlash than it has on court orders. The *Brown* Court effectively conceded its inability to enforce the rights it recognized by ordering that school desegregation proceed with "all deliberate speed"—a formulation essentially the same as the one embodied in the ICESCR. And the type and extent of desegregation ultimately "ordered" by the Court was

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effectively determined by what the Court thought was politically possible. Courts obviously comprise part of the constellation of forces that determine the enforceability of particular rights, but they are hardly the only actors in that drama.

Whatever language we adopt to distinguish between legal and moral claims or between enforceable and unenforceable claims, the relationship between the categories we define will be complex. Moral rights are an important source of legal rights, but it also is true that legal rights influence the content of moral rights. Indeed, one of the functions of the creation of legal rights is to influence public opinion as to what is and is not a moral right. Because of this interplay, the declaration of a legal right may influence behavior even if the right is not enforced, and the enforcement of rights by extra-judicial means always supplements and sometimes supplants their enforcement by the judicial proceedings we normally associate with the law. Properly situating human rights in this context is especially challenging because their moral and legal status is likely to be particularly tangled and the ways in which they are enforced can and do vary so dramatically. Human rights comprise a species of law that defies pigeonholing. To be understood properly, it must be analyzed with this complexity in mind.

#### IV. WHAT THE NATURAL RIGHTS ARGUMENT DOESN'T EXPLAIN

The natural rights argument has been expressed in many forms, but what all forms of the argument share in common is the assumption that human rights can be discovered—in the will of God, the natural order of things, or in philosophical principles—rather than having to be created in real historical time. Therein lies their problem. If no human agency (other than that of the philosopher or theologian) is required to establish the existence of human rights, what does it mean to say that they exist?

Legal positivists have a point. To assert that someone has a right without citing any tangible evidence of its existence other than a well-reasoned argument justifying the right leaves us with a pretty empty concept. If human agency is required to discover but not to create human rights, does that mean humans have always possessed

them? Did our hominid ancestors possess them? Do we now possess human rights that philosophers have not yet discovered? And how do we handle the fact that philosophers and theologians disagree with one another in the justifications they offer for human rights claims and in the lists of human rights they recognize? Surely one person's belief is not enough to establish the existence of a human right, but if broad assent or consensus is required to establish the existence of a particular right, then why isn't it the consensus that creates the right rather than the justification on which the consensus is based?

To avoid this tangle, perhaps we should acknowledge that theological and philosophical justifications of unenforced human rights are not intended to demonstrate their existence. Instead, they merely justify human institutions or practices grounded on particular human rights claims (such as the General Assembly's action in adopting the Universal Declaration). But if that is the case, isn't it those institutions and practices which give the rights their existence rather than the philosopher's endorsement? Isn't the philosopher's or theologian's contribution merely to offer an argument supporting the continued existence and possible expansion of those institutions and practices which they argue are justified?

If that is our view, then the question we have to answer in explaining the existence and nature of unenforced human rights is the following. What institutions and practices are sufficient to support a conclusion that a particular right exists? This query drives us back in the direction of the legal positivists' argument, but it doesn't mean we have to adopt their answer to the question. Perhaps institutions and practices that fall short of, or at least are different from, court enforcement (or its administrative equivalent) should be deemed sufficient to establish the existence of unenforced human rights. The problem is that natural rights theorists have not really tried to answer that question.

In arguing along these lines I am not dismissing the value of philosophical and theological justifications of human rights claims. I am simply trying to identify their proper role in the set of institutions and practices that actually do explain the existence of human rights. The practice of seeking and articulating philosophical or theological justifications for particular human rights claims



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may comprise a key element of the constellation of institutions and practices that cause the rights to come into existence, but that doesn't mean those justifications, by themselves, are capable of creating or even explaining the existence of the rights.

## V. THE CONTOURS OF A BETTER EXPLANATION

This brief assessment of the positivist and natural rights arguments identifies a similar shortcoming in each. They both fail to provide an adequate account of the historical process that gives rise to human rights claims and the role such claims actually play in history. To fill that gap I believe three key characteristics of human rights claims need to be recognized. The first is their aspirational character. The second is their contingent character. The third is their evolutionary character. Taken together, these characteristics provide the building blocks of an account of the nature and meaning of unenforced human rights that incorporates both the positivist and natural rights arguments without being constrained by the limitations of either.

1. *Aspirational Law*. The most frequently expressed criticism of economic and social human rights is that they are mere aspirations to which governments may pay lip service but have no duty to secure in practice. What these critics fail to note is that this is true of virtually all human rights claims when they are first accorded formal recognition.

The uncompromising assertion in the U.S. Declaration of Independence that "all men are created equal" was drafted and adopted by slave owners and those willing to tolerate slavery to achieve their goal of independence from England. Viewed from this perspective it was a profoundly hypocritical assertion. Yet on some level Jefferson and his compatriots probably did believe it was true, and generations of abolitionists and equal rights activists whose belief in equality was less hypocritical fought to achieve in fact what Jefferson and the other signers of the Declaration asserted in principle.

It took nearly 90 years and a civil war to end slavery in the United States, and the struggle for real equality continues unabated today. Does that mean the Declaration's recognition of the inherent equality of all

persons was a meaningless gesture? Of course not. The formal recognition accorded the equality principle in the U.S. Declaration of Independence provided both encouragement and tangible political support for the efforts of those who fought to end slavery—as it does the continuing efforts of those who carry on the fight for equality today. Nor is this an exceptional case. Purely aspirational assertions like the ones contained in the U.S. Declaration of Independence commonly play a crucial role in facilitating the historical changes that lead to their practical enforcement over time. Indeed, the aspirational recognition of unenforced rights may be a necessary stage in their historical development. I would posit that it is.

It is easy to forget this fact in retrospect. Even the United States Bill of Rights, which we now think of as fully enforceable law, lay largely unenforced by the courts until more than a century after it was formally adopted, and the Fourteenth Amendment lay similarly dormant as a means of protecting the rights of African Americans (for whose benefit it was enacted) for the better part of a century after its adoption.

The Universal Declaration is still a young document, and given the institutional difficulties involved in enforcing internationally-recognized human rights, it probably will take much longer for the rights recognized in the Declaration to win effective enforcement than rights recognized in national constitutions. In the meantime, those who argue that formal recognition of international human rights cannot be deemed authoritative until the rights are enforced in practice do worse than ignore the normal historical process which leads to such enforcement. They offer support to those seeking to slow or reverse the process. Imagine a legal positivist carried back in time to the years immediately following the American Revolution, belittling Jefferson's language because the rights he asserted were unenforced—"toothless," as Holmes and Sunstein would say. That is exactly the role played by those who belittle the unenforced rights recognized in the Universal Declaration as not comprising "real" rights.

Rather than expressing the rules we currently are willing to live by, human rights norms tend always to exceed our reach. They are a kind of law by means of which human societies "legislate" goals for themselves. By asserting that everyone has these rights, even when we are

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not prepared to honor them in practice, we challenge ourselves to live up to our own aspirations and pre-authorize actions—including actions that violate existing law—to bring our practice into compliance with our aspirations. That may not sound like true law, but given the power of human rights claims to drive the historical process, it would be foolish to dismiss human rights proclamations as toothless or lacking in legitimacy simply because the struggle to enforce them has yet to be won. If the law consists of the rules by which a society regulates the conduct of its members and their collective institutions, then aspirational law is true law. The unenforced and possibly unenforceable rights originally proclaimed in documents like the U.S. Declaration of Independence, the U.S. Bill of Rights, the Fourteenth Amendment of the U.S. Constitution, and the Universal Declaration of Human Rights can regulate and direct the actions of the members of a society just as surely as legal rights that are routinely enforced by courts of law. We just have to recognize that the process by which that regulation occurs may extend over a broad expanse of time with highly contingent outcomes.

2. *Contingent Law.* Because of its aspirational nature, human rights law also has a strongly contingent character. To appreciate just how contingent, we must consider the life cycle of a human rights claim beginning well before it is formally recognized in documents like the Universal Declaration. The true origins of human rights claims lie beyond our capacity to document historical events. Consider, for example, where the idea originated that all persons have a right to life. Who was the first person to perceive a generalized injustice in the arbitrary taking of another's life and form the idea that people have (or should have) both a right to be free of such interference and a duty to respect the same right in others? We will never know. An act of abuse or interference inspires resentment, and resentment seeks justification in the notion that a wrong has been committed. "It's not fair." Even four-year olds pop out with it.

It is easy to imagine this happening over and over again without any impact on history; but it also is easy to imagine such ideas attracting broader support among groups of people whose circumstances caused them to suffer the same type of abuse or interference. Conversely, those who committed the abuses in question would have sought to

justify their own actions—either to vindicate themselves in their own eyes or to silence the grumblings of their victims. In this way theories of special privilege probably emerged simultaneously, even symbiotically, with claims of violated rights. The difference is that the justifications of special privilege were articulated by the powerful and hence were backed by the full weight of the economic, political and religious power they controlled. The predictable result would normally be the suppression of incipient claims of generalized or universal (i.e., human) rights.

Only in exceptional circumstances would these claims command the tangible support necessary to be voiced in historically noticeable ways. This kind of support was probably first provided by dissenting religious movements operating in periods of political upheaval. This is one reason so many human rights claims were first expressed in religious terms. The so-called “diggers” movement that arose during the English Civil War provides a textbook example of this phenomenon. A bankrupt merchant, Gerard Winstanley, became the spokesperson for this quasi-religious movement of radical “levellers.” Believing that the upper classes had usurped the right of all persons (including men and women equally) to both rule themselves and claim equal access to the land, Winstanley led and encouraged groups of poor people to establish communist settlements on common lands in defiance of English law (but in accord with what they claimed was a higher law).<sup>18</sup>

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18. See, e.g., GERARD WINSTANLEY ET AL., *THE TRUE LEVELLERS' STANDARD ADVANCED* (1649), reprinted in *COUNTER-TRADITION: A READER IN THE LITERATURE OF DISSENT AND ALTERNATIVES*, at 70-71 (Sheila Delany ed., 1971):

In the beginning of Time, the great Creator Reason, made the Earth to be a Common Treasury, to preserve Beasts, Birds, Fishes, and Man, the Lord that was to govern this Creation; for Man had Domination given to him, over the beasts, Birds, and Fishes; but not one word was spoken in the beginning, That one branch of mankind should rule over another.

And the Reason is this, Every single man, Male and Female, is a perfect Creature of himself; and the same Spirit that made the Globe, dwells in man to govern the Globe; so that the flesh of man being subject to Reason, his Maker, hath him to be his Teacher and Ruler within himself, therefore needs not run abroad after any Teacher and Ruler without him, for he needs not that any man should teach him, for the same Anointing that ruled in the Son of man, teacheth him all things.

But since human flesh (that king of Beasts) began to delight himself in the objects of the Creation, more than in the Spirit Reason and

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These settlements survived less than a year, and the economic rights Winstanley advocated are still strongly contested, but his advocacy of the right of all persons to rule themselves has fared better over time.

This illustrates another key feature of the life cycle of human rights claims. Particular claims do not take hold in a society and become institutionalized unless they serve the interests and attract the enduring support of strategically powerful interest groups. In the period following the English Civil War, John Locke emphatically and expressly rejected Winstanley's claim that all members of society retained an equal right to the land. On the other hand he endorsed crucial aspects of Winstanley's claim that all persons possess the same natural capacities and retain the same right to rule themselves.<sup>19</sup> In articulating these positions Locke is widely recognized as having represented the interests of the emergent bourgeoisie which wanted to establish its equal right to rule with the nobility but just as clearly did not want to acknowledge any right on the part of the lower orders of society to share the land of the wealthy.

My point is that human rights law is contingent, but its development is not arbitrary. It follows many twists and turns over time, but it also reflects the influence of the same historical forces that drive other institutional developments in society. It is aspirational, but not all aspirations are achievable in a particular historical context. It is simultaneously a powerful force in history and a product of history.

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Righteousness, . . . then he fell into blindness of mind and weakness of heart, and runs abroad for a Teacher and Ruler: And so selfish imaginations . . . working with Covetousness, did set up one man to teach and rule over another; and thereby the Spirit was killed, and man was brought into bondage, and became a greater Slave to such of his own kind, than the Beasts of the field were to him.

And hereupon, the Earth (which was made to be a Common Treasury of relief for all, both Beasts and Men) was hedged into inclosures by the teachers and rulers, and the others were made Servants and Slaves: And the Earth that is within this Creation made a Common Storehouse for all, is bought and sold, and kept in the hands of a few, whereby the great Creator is mightily dishonored, as if he were a respecter of persons, delighting in the comfortable Livelihoods of some, and rejoicing in the miserable poverty and straits of others. From the beginning it was not so.

19. JOHN LOCKE, *TWO TREATISES OF GOVERNMENT* (Peter Laslett ed., Cambridge Univ. Press 1988) (1690).

3. *Evolutionary Law.* The last characteristic of human rights law that I want to note is its evolutionary nature. It is a type of law that builds on itself in a distinctive way. I have emphasized that human rights claims articulate goals which, as a practical matter, may not be within political reach when the claims are first advanced and even when they first win general acceptance. Certainly this was true of the equal rights principle embraced by Americans in their Declaration of Independence. Yet over time, bits and pieces of an articulated human right often are secured, and as that happens two things occur. First, possibilities for securing more aspects of the right emerge. The abolition of slavery was necessary before the goal of securing equal voting right could even be approached. The second thing that happens when a right is partially secured is that the aspirations embodied in the right also tend to expand. People reconceive the practical policy goals embodied in the right, raising their sights in a way that always leaves the right beyond their grasp. In other words, the right remains aspirational.

Consider, for example, the right of all persons to an education referenced in Article 26 of the Universal Declaration. This right achieved widespread acceptance and also began to be enforced in the northern United States during the second quarter of the 19th century (after having been strongly advocated in earlier years by people like George Washington and Thomas Jefferson). As conceived at the time, however, the right to education embodied only a limited entitlement to primary schooling with no implication that the poor were entitled to equal educational opportunity with the wealthy. In the South, because of slavery, even this limited entitlement was not recognized until after the Civil War. Nevertheless, building on the achievements of early public school advocates like Horace Mann, the aspirations embodied in the right to education steadily expanded over time. The right gradually came to be seen as including access to higher levels of education and, eventually, to equal educational opportunity in general. Presumably the right to education will continue to expand as our aspirations expand. That tendency is inherent in the nature of human rights and guarantees that they always will remain controversial.

This constant “raising of the bar” prevents human rights from ever being fully enforced. Indeed, I would posit

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that a right which is fully and routinely enforced should no longer be categorized as a “human right” because it no longer performs the essential function of this species of law. That is, it no longer challenges society to do more than it currently is willing to do to protect fundamental entitlements. Rights that are so widely accepted that violators are viewed as social deviants are rarely referred to as human rights, because they do not possess the oppositional character of human rights and do not require the exceptional enforcement measures required to secure human rights. I am not suggesting that all aspects of a particular human right must remain unenforced for the right to be viewed as a genuine human right, only that the right must be perceived as encompassing unmet goals. It must remain a work in progress rather than a finished project.

#### VI. WHAT ARE HUMAN RIGHTS AND WHERE DO THEY COME FROM?

This inquiry leads me to suggest the following set of propositions as a substitute for both the positivist and natural rights explanations of human rights.

(1) Humans do not possess any inherent rights. Human rights must be asserted and claimed to come into existence. The philosophical or theological rationales commonly offered to justify the existence of human rights may justify an assertion that a particular right exists, but without that assertion the justification is not capable of either creating the right or verifying that it exists.

(2) On the other hand, human rights do not have to be enforced by judicial or administrative bodies to exist. They are not the same thing as “legal rights” in the positivist sense, although they can achieve that status if efforts to secure their enforcement by judicial and administrative bodies are successful.

(3) Human rights are a form of *aspirational law* by means of which humans establish goals for themselves concerning the kind of species they are committed to becoming (a species that respects these rights) and the kind of societies they are committed to creating (the kind of societies that secure and protect these rights).

(4) The positive acts required to create human rights consist of an accumulation of individual and collective acts

of acceptance (assertions that the rights at issue are or should be human rights) and advocacy (through actions designed to win enforcement of the rights). These acts of acceptance and advocacy normally culminate in formal assertions of the existence of the rights in manifestos, declarations, constitutions or agreements.

(5) It is impossible to determine the exact point in time a human rights claim becomes a genuine human right, because the characteristic feature of its achieving that status consists of a process of acceptance rather than a discrete legislative, judicial or administrative act; but the *sine quo non* of that status is broad acceptance of the right combined with practical advocacy that has some impact on historical events.

(6) The enforcement of a particular human right can be achieved by any of the means by which historical change is accomplished in human societies—from violent rebellion and a radical restructuring of social institutions to gradual changes in attitude achieved through educational initiatives.

(7) The success of efforts to enforce human rights is highly contingent and is influenced by all the factors that drive or restrain historical change in general. Consequently, some human rights will be easier to secure than others during particular historical eras.

(8) Efforts to secure particular human rights have many way stations but no real terminus, because the aspirational character of the rights gives them a natural tendency to expand over time.

(9) The struggle for human rights is a struggle to shape the human identity and the course of human history. It is not predicated on a denial of either our natural behavioral tendencies or the constraining effect of existing realities. It merely recognizes that humans have the capacity to shape their own preferences, discipline their own behavior, and shape the social institutions that regulate their everyday life. In other words, we have the capacity, within bounds, to create our own future. This is what makes human rights so distinctively *human*.

(10) Given the aspirational role human rights play in human societies, the category is best reserved (and in practice generally is reserved) for claims that are not yet fully or adequately enforced. Human rights law is aspirational law.



## APPENDIX

## UNIVERSAL DECLARATION OF HUMAN RIGHTS

*Adopted by the General Assembly of the United Nations  
by a vote of 48 to 0 with 8 abstentions on Dec. 10, 1948*

## Article 22

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

## Article 23

(1) Everyone has the right to work, to free choice of employment, to just and favorable conditions of work and to protection against unemployment.

(2) Everyone, without any discrimination, has the right to equal pay for equal work.

(3) Everyone who works has the right to just and favorable remuneration ensuring for himself and his family an existence worthy of human dignity, and supplemented, if necessary, by other means of social protection.

(4) Everyone has the right to form and to join trade unions for the protection of his interests.

## Article 24

Everyone has the right to rest and leisure, including reasonable limitation of working hours and periodic holidays with pay.

## Article 25

(1) Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability,

widowhood, old age or other lack of livelihood in circumstances beyond his control.

(2) Motherhood and childhood are entitled to special care and assistance. All children, whether born in or out of wedlock, shall enjoy the same social protection.

#### Article 26

(1) Everyone has the right to education. Education shall be free, at least in the elementary and fundamental stages. Elementary education shall be compulsory. Technical and professional education shall be made generally available and higher education shall be equally accessible to all on the basis of merit.

(2) Education shall be directed to the full development of the human personality and to the strengthening of respect for human rights and fundamental freedoms. It shall promote understanding, tolerance and friendship among all nations, racial or religious groups, and shall further the activities of the United Nations for the maintenance of peace.

(3) Parents have a prior right to choose the kind of education that shall be given to their children.

#### Article 27

(1) 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.

(2) Everyone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.

#### Article 28

Everyone is entitled to a social and international order in which the rights and freedoms set forth in this Declaration can be fully realized.

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