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## OBJECTIONS TO WESTERN CONCEPTIONS OF HUMAN RIGHTS

*Cornelius F. Murphy, Jr.\**

Projects for the realization of human rights on a global scale suffer from the lack of adequate instruments of enforcement. This deficiency, as Professor Watson observes,<sup>1</sup> can be traced to the absence of political institutions whose authority transcends that of the nation state. Nor is there a common preexisting social inheritance which can serve as a foundation for the substantive human rights norms which a supranational legal system would implement. This further deficiency reveals the absence of an authentic universal society. It also suggests deeper reasons why efforts to establish a worldwide system of human rights through the United Nations have met with limited success. Disagreement over the content of humanistic principles constitutes a deficiency of even greater magnitude than the absence of effective procedures. Professor Watson notes that legal systems do not precede the formation of political order.<sup>2</sup> But political stability itself depends upon an antecedent social consensus. The legal evolves from the political; the political is sustained by a general loyalty to fundamental principles which the polis embodies.

In this Article I endeavor to identify some of the major reasons for the lack of a general agreement over the content of universal human rights. Following these preliminary observations, I identify some of the ideological factors which impede the development of a concordance. Fundamental cultural and philosophical presuppositions which condition understanding of human rights are then addressed. Finally, I suggest changes in the academic treatment of the subject which may help to overcome some of the obstacles to a general agreement upon principles.

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1. Watson, *Legal Theory, Efficacy and Validity in the Development of Human Rights Norms in International Law*, 3 HUMAN RIGHTS NORMS L. F. 609 (1979).

2. *Id.* at 620-21.

## DIVERGENCE IN INTERPRETATION

Practical achievements in the field of human rights are, at certain levels, impressive.<sup>3</sup> But profound gaps remain between assertion and reality. A verbal consensus—whether in a declaration, resolution, or covenant—does not determine practice. The discontinuities are not only the result of ineffective enforcement. They also exist because the verbal formulations are susceptible of great variations in interpretation.

Where textual language is imprecise, the meanings attributed to the written words will not be uniform. This is generally understood with respect to domestic law. The great differences of meaning which the Justices of the Supreme Court can legitimately attribute to the Bill of Rights are illustrative.<sup>4</sup> Comparable difficulties inherent in the articulation of universal human rights are not sufficiently appreciated, particularly by those international scholars whose commitment is inspired by the American constitutional experience.

On the global level divergence in interpretation may arise for readily identifiable reasons. For example, South Africa's defiance of numerous resolutions by the General Assembly,<sup>5</sup> Security Council,<sup>6</sup> and other authoritative fora<sup>7</sup> flows from the apartheid policies of the ruling minority which refuses to accept a wide understanding of human equality. The beliefs concerning racial differences between human beings shared by those holding political power in South Africa are, from a universal perspective, morally repellent. But when we move beyond cases of unjustified resistance the problem of interpretative variation becomes much more complicated.

Consider, for example, the great division between the industrial nations and the developing world over the meaning of the individual right to own property;<sup>8</sup> or the differences between the

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3. See generally A. ROBERTSON, *HUMAN RIGHTS IN THE WORLD* (1972); Sohn, *The Human Rights Law of the Charter*, 12 *TEX. INT'L L.J.* 129 (1977).

4. See, e.g., Dworkin, *Hard Cases*, 88 *HARV. L. REV.* 1057 (1975); Grey, *Do We Have an Unwritten Constitution?*, 27 *STAN. L. REV.* 703 (1975).

5. E.g., G.A. Res. 2396, 23 *U.N. GAOR*, Supp. (No. 18) 19-21, *U.N. Doc. A/7218* (1968).

6. E.g., S.C. Res. 182, 18 *U.N. SCOR* 8-9, *U.N. Doc. S/5471* (1963).

7. E.g., E.S.C. Res. 1235, 42 *U.N. ESCOR*, Supp. (No. 1) 17-18, *U.N. Doc. E/4393* (1967).

8. For the reservations entered by the United States to the Declaration on the

Third World and Liberal Democracies over the meaning of freedom of expression,<sup>9</sup> or the difficulties surrounding the interpretation of self-determination.<sup>10</sup> In these cases, the different senses attributed to ambiguous language cannot be traced to opposing moral positions, one of whose illegitimacy is readily apparent. Here, general ideas about the nature of social life, the purposes of political authority, and the destiny of nations, as well as of individuals, are influential.<sup>11</sup>

One of the unfortunate features of contemporary human rights scholarship is its tendency to pass over these interpretative difficulties. They may be ignored; or, if they are tacitly acknowledged, an effort is made to minimize their importance.<sup>12</sup> Theory and reality grow further apart as academics work zealously for the implementation of human rights *as they understand them*. Such a predisposition leads to the naive belief that human rights can be realized by the simple expedient of more effective procedures. It not only ignores political factors; it also obscures the fact that a general allegiance to fundamental values is indispensable to the progressive realization of human rights throughout the world.

### *The Influence of Liberalism*

One of the charges made by Professor Watson is that academics working in the field of human rights tend to reify their own conceptions.<sup>13</sup> Investing the necessary authority with a spurious reality, they ignore the facts of political power which are the real obstacles to reform. Watson's analysis can be pursued. For example, are the principles which these academics espouse concerning the dignity of the person and the individual's entitlements against the

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Establishment of a New Economic Order, G.A. Res. 3201, 6 (special) U.N. GAOR, Supp. (No. 1) 3, U.N. Doc. A/9559 (1974), see U.N. Doc. A/PV. 2229 (1974), at 41-50, reprinted in 13 INT'L LEGAL MATERIALS 744 (1974).

9. Maheu, *The Right to Information and the Right to the Expression of Opinion*, in HUMAN RIGHTS (UNESCO 1949).

10. For the divergent interpretations in the third committee discussions, see 6 U.N. GAOR, Third Committee (397th mtg.) 300, U.N. Doc. A/C.3/SR.397 (1952). See also Emerson, *Self Determination*, 65 AM. J. INT'L L. 459 (1971); Rosenstock, *The Declaration of Principles of International Law Concerning Friendly Relations: A Survey*, 65 AM. J. INT'L L. 713, 730-33 (1971).

11. See generally M. CRANSTON, WHAT ARE HUMAN RIGHTS? (1973); M. GINSBERG, ON JUSTICE IN SOCIETY (1965); POLITICAL THEORY AND THE RIGHTS OF MAN (D. Raphael ed. 1967).

12. See Watson, *supra* note 1, at 625.

13. *Id.* at 638-39.

State equally illusory? Are these principles merely personal preferences or the reflection of values identified with a particular cultural or historical experience? If so, how can they qualify as *universal* human rights?

These deeper questions are raised by the absence of a general consensus concerning the individual civil and political rights of which American academics are the primary advocates.<sup>14</sup> One way to address such questions is to consider the interpretations of such rights not only as expressions of the personal convictions of those promoting them, but also as reflections of general ideas concerning the individual person and his or her relationship to society.

Liberalism is the leading ideological influence in Western thought. Liberalism has general features which affect the objective validity of particular interpretations of human rights. It places the individual and his or her interests at the center of social, political, and legal theory.<sup>15</sup> Liberalism also implies certain ideas concerning the origins of social life. In the literature these ideas are contractarian. Each person is sovereign in a state of nature. All agree, in advance, to the terms of a social compact. Upon the formation of political society, natural rights to freedom, life, and property are exchanged for civil rights. The purpose of government is to secure and advance these civil rights.<sup>16</sup>

Since the eighteenth century, Liberalism has had a beneficial influence upon the evolution of rights and public policy in the Western democracies. Curbing abuses of governmental power, Liberalism has also encouraged the release of positive personal energies in all aspects of social, economic, and political life.<sup>17</sup> As lib-

14. See Sidorsky, *Contemporary Reinterpretations of the Concept of Human Rights*, in *ESSAYS ON HUMAN RIGHTS* 88 (D. Sidorsky ed. 1979). I am grateful to my colleague Kenneth Hirsch for referring me to these essays.

15. Two works by Professor Roberto Unger provide a general summary and critique of the principles of Liberalism. See R. UNGER, *KNOWLEDGE AND POLITICS* (1975); R. UNGER, *LAW IN MODERN SOCIETY* (1976). Although they take divergent positions on fundamental issues, the works of John Rawls and Robert Nozick are in the liberal, individualistic tradition. See R. NOZICK, *ANARCHY, STATE, AND UTOPIA* (1974); J. RAWLS, *A THEORY OF JUSTICE* (1971). For an evaluation of both works, see C. MURPHY, *MODERN LEGAL PHILOSOPHY* ch. 4 (1978).

16. The textual summary reflects the principles of Locke's political philosophy in J. LOCKE, *SECOND TREATISE ON GOVERNMENT* (1956). There is a collection of the social contract theories of Locke, Hume, and Rousseau in E. BARKER, *SOCIAL CONTRACT: ESSAYS BY LOCKE, HUME AND ROUSSEAU* (1975). For an attempt to restate Locke's theory in modern terms, see R. NOZICK, *supra* note 15.

17. See *WESTERN LIBERALISM* (E. Bramsted & K. Melhuish ed. 1978); C. FRANKEL, *THE CASE FOR MODERN MAN* (1956); cf. Katz, *Post-Emancipation De-*

eral values become transnational in scope, Western academics, especially American, are puzzled by resistance to their adoption as entitlements of all peoples. There are undoubtedly instances where the refusal to recognize such values as human rights is perverse—they constitute a threat to those wishing to exercise arbitrary power. But nonrecognition, or qualified acceptance of liberal values through restrictive interpretation of human rights documents, can reflect more complex motivations.

Resistance can be observed within societies with venerable, hierarchical structures, especially where changing political conditions have given ancient institutions a renewed vitality. In large sections of the Islamic world, for example, the association of liberal humanism with a secular view of life makes Western enthusiasm for personal liberty unacceptable. Additionally, the primacy afforded to the individual is often seen as incompatible with the preservation of social values.<sup>18</sup>

A human rights vision nurtured by liberal individualism has also been found wanting by those closer to home. Consider, for example, the appraisal of a Canadian philosopher:

North-American liberalism expresses the belief in open ended progress . . . . As liberals become more and more aware of the implications of their own doctrine, they recognize that no appeal to human good, now or in the future, must be allowed to limit their freedom to make the world as they choose. Social order is a man-made convenience, and its only purpose is to increase freedom . . . . The logic of this liberalism makes [value judgments subjective. Man] in his freedom creates the valuable. The human good is what we choose for our good.<sup>19</sup>

Legal scholars who advocate liberal values as universal rights are often unaware of the adverse consequences of unbridled individualism. There are many reasons for this failure of comprehension, but one is of paramount importance: These advocates fail to grasp the connections between the realm of ideas and the practical realization of values. When we consider rival philosophical and political systems, the interaction between thought and action is more systematically developed.

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*velopment of Rights: Liberalism and Universalism*, in *ESSAYS ON HUMAN RIGHTS*, *supra* note 14, at 282.

18. See, e.g., Mayer, *Libyan Legislation in Defense of Arabo-Islamic Sexual Mores*, 28 *AM. J. COMP. L.* 287 (1980).

19. G. GRANT, *LAMENT FOR A NATION* 56-57 (1965).

*The Marxist Critique*

The strongest criticism of liberal individualism has come from those who write in the Marxist-Leninist tradition. A refusal to take these criticisms seriously has contributed to our incapacity to appreciate fully the objections raised against Western conceptions of human rights. Socialist opposition is anchored in its belief that civil liberty as advanced by Liberalism is incompatible with deeper human needs and social development. This conviction is manifest in the writings of Karl Marx. Referring to the American Constitution and the French Declaration of the Rights of Man, he argues:

[T]he so-called *rights of man* as distinct from the *rights of the citizen* are simply the rights of a member of civil society, that is, of egoistic man, of man separated from other men and from the community.

What constitutes liberty?

. . . .

Liberty is . . . the right to do everything which does not harm others. The limits within which each individual can act without harming others are determined by Law, just as the boundary between two fields is marked by a stake. It is the question of the liberty of man regarded as an isolated monad, withdrawn into himself. [L]iberty as a right of man is not founded upon the relations between man and man, but rather upon the separation of man from man.<sup>20</sup>

Marx then moves to an evaluation of specific rights. Significantly, he sees the right of private property as the primary expression of the general principle of liberty:

The practical application of the right of liberty is the right of private property. What constitutes the right of private property?

. . . .

[It is] the right to enjoy one's fortune and to dispose of it as one will; without regard for other men and independently of society. It is the right of self-interest. This individual liberty, and its application, form the basis of civil society. It leads every man to see in other men, not the *realization*, but rather the *limitation* of his own liberty.<sup>21</sup>

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20. Marx, *On the Jewish Question*, in THE MARX-ENGELS READER 26, 42 (2d R. Tucker ed. 1978).

21. *Id.* (emphasis in original).

This critique of liberal individualism forms one of the principal themes of the ideological struggle between the Socialist States and the Western Democracies. Their political competition has been reflected in the human rights field, especially within the United Nations system. While the Universal Declaration of Human Rights provides that "Everyone has the right to own property alone as well as in association with others,"<sup>22</sup> this entitlement is not reflected in the international covenants designed to implement the Declaration.<sup>23</sup> Resistance to the Western conception of private property has also been of major importance in the conflict over the nationalization policies of developing countries. In human rights terms, Western claims of private ownership and demands for full compensation in case of a taking are met by a Third World preference for a collective right of peoples to self-determination and permanent sovereignty over natural wealth and resources.<sup>24</sup>

Socialist theory views claims of private property as the benchmark of Western Liberalism. In the development of international law and policy during the past twenty years, general ideas concerning the adverse consequences of private ownership, inspired by Socialist theory, have supported the rising expectations of the developing world. During this period, American foreign policy was strongly oriented toward the protection of foreign investment.<sup>25</sup> Attempts to universalize American conceptions of property values probably impeded our broader efforts to advance human

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22. G.A. Res. 217A, U.N. Doc. A/810, at 71 (1948), *reprinted in* M. CRANSTON, *supra* note 11, at 90.

23. *See* M. CRANSTON, *WHAT ARE HUMAN RIGHTS?* ch. 4 (1964).

24. *See* Declaration on the Establishment of a New International Economic Order, G.A. Res. 3201, 6 (special) U.N. GAOR, Supp. (No. 1) 3, U.N. Doc. A/9556 (1974). The collective rights also appear in the first article of the International Covenant on Economic, Social and Cultural Rights, G.A. Res. 2200, 21 U.N. GAOR, Supp. (No. 16) 49, U.N. Doc. A/6316 (1966) and the International Covenant on Civil and Political Rights, G.A. Res. 2200, 21 U.N. GAOR, Supp. (No. 16) 52, U.N. Doc. A/6316 (1966). For the aspirations behind these value assertions, see Fatouros, *International Law and the Third World*, 50 VA. L. REV. 783 (1964).

25. *See* the Hickenlooper Amendments to the Foreign Assistance Act of 1961, 22 U.S.C. § 2370(E) (1976), voiding *Banco Nacional De Cuba v. Sabbatino*, 376 U.S. 398 (1964). *See also* RESTATEMENT (SECOND) FOREIGN RELATIONS LAW OF THE UNITED STATES § 188 (1962) (full value as just compensation). For an analysis of these developments, see Murphy, *State Responsibility for Injury to Aliens*, 41 N.Y.U. L. REV. 125 (1966).



rights<sup>26</sup> and obscured our deep commitments to personal freedom and human dignity. In light of this recent history, academics should be more sensitive to the belief of many that the transformation of Western values into universal human rights signifies the primacy of private interests and a denial of an interest in the promotion of general economic welfare.

The task of separating noneconomic personal rights from those associated with private property may first appear to be relatively simple. Prohibitions against slavery and arbitrary arrest, the right not to be subject to torture,<sup>27</sup> equality under the law: these, and related principles, are widely accepted. They are obviously not derived from libertarian values related to private property. But beyond such fundamental distinctions there are complexities which Western human rights advocates often do not take into account.

Consider, for example, the question of freedom of expression. Western nations have made efforts to achieve an expansive understanding of this preferred freedom as a universal human right. In international contexts these efforts have encountered difficulties. Some are related to an aversion to human liberty; others are grounded in commitments to other values that are also deserving of respect.

The International Convention on the Elimination of All Forms of Racial Discrimination, adopted by the General Assembly in December 1965,<sup>28</sup> provides that states who are parties,

with due regard to the principles embodied in the Universal Declaration of Human Rights . . . [s]hall declare an offence punishable by law all dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination, as well as all acts of violence or incitement to such acts against any race or group of persons or another colour or ethnic origin . . . .<sup>29</sup>

The United States voted for the convention as a whole, finding itself in agreement with its general objectives. Explaining this country's vote, Ambassador Goldberg stated that the quoted language

26. See sources cited note 25 *supra*.

27. See the memorandum submitted by the United States in *Filartiga v. Penarala*, No. 79-6090 (2d Cir. 1980), reprinted in 19 INT'L LEGAL MATERIALS 585 (1980). But see Hazelton, *Respectable Terrorism*, HARPER'S, Oct. 1980, at 28, 31.

28. G.A. Res. 2106A, 20 U.N. GAOR, Supp. (No. 14) 47, U.N. Doc. A/6014 (1965).

29. *Id.* at 48.

could not be interpreted, under the law of the United States, as preventing citizens from "expressing their views on any subject no matter how obnoxious they may be or whether they are in accord with government policy or not."<sup>30</sup> Whether or not the Ambassador's views accurately reflect American constitutional law,<sup>31</sup> they illustrate that where an entitlement such as free expression is being globally expanded, genuine disagreements will exist as to its appropriate range.

American scholars might profitably consider whether absolutist interpretations of civil and political rights can be reconciled with the need to build a general consensus concerning the nature and scope of fundamental liberties. Initially, they might analyze the relationship between liberal political theory and various interpretations of freedom of expression. They should also examine how concentrations of political and economic power qualify the exercise of free expression in the field of global communication.

In 1978, in deliberations before the International Commission for the Study of Communication Problems, the Honorable M. Mustapha Masmoudi, Tunisian Secretary of State for Information, presented a document entitled *The New World Information Order*.<sup>32</sup> The document attacked the monopoly position of the largest transnational news agencies. It contended that their control over the flow of information between the developed and developing nations was a remnant of the colonial period, that it distorted realities, and that it disregarded the cultural, moral, and political values of the weaker states.<sup>33</sup> Accompanying these allegations were demands for restrictions upon the capacity of the dominant agencies to penetrate developing societies freely and for greater access by the Third World to the channels of communication.<sup>34</sup> These claims are, of course, highly controversial. To draw attention to their existence within the global human rights dialogue is worthwhile,

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30. 54 DEP'T STATE BULL. 214 (1966). The United States has signed, but not ratified, the Convention. Recent cases point up the importance of the question of government interference with expression. See, e.g., *Collin v. Smith*, 578 F.2d 1197 (7th Cir.), cert. denied, 439 U.S. 916 (1978).

31. Compare *Smith v. Collin*, 439 U.S. 916 (1978) (Blackmun, J., dissenting denial of certiorari, joined by White, J.) with *Beauharnais v. Illinois*, 343 U.S. 250 (1950).

32. M. Mustapha Masmoudi, *The New World Information Order* (July 10-12, 1978). The author obtained this document through the facilities of Freedom House in New York.

33. *Id.* at 5-7.

34. *Id.* at 16-21.

however, if only to illustrate how the Western understanding of human rights, with its individualistic ethos, is not prepared to deal adequately with them.

#### TOWARD UNDERSTANDING THE NATURE AND PURPOSE OF HUMAN RIGHTS

International attacks upon Western values rely considerably upon the language of domination, exploitation, and alienation,<sup>35</sup> reflecting the influence which Socialist thought has had upon the formulation of human values in the developing nations. But Western principles of freedom have also been influential. They have penetrated the boundaries of Socialist States as well as those of the Third World. The remarkable commitment of the physicist Andrei Sakharov to intellectual freedom,<sup>36</sup> the witness of Alexander Solzhenitsyn against Stalinist tyranny,<sup>37</sup> and the recent successful strike by Polish workers<sup>38</sup> all point to the pervasive, positive influence of libertarian principles and attest to their transcultural value as human rights. These experiences demonstrate that our convictions are not completely conditioned by our own cultural and historical experience.

Yet, there are nuances which impartial inquiry cannot avoid. One of the disturbing features of Solzhenitsyn's achievements is its qualified enthusiasm for Western values. His dislike of the media is notorious. He has also laid bare some of the philosophical presuppositions of Liberalism: Its desire for absolute personal autonomy; its subjective conception of happiness; and its refusal to accept any

35. See, e.g., *id.* The fifteenth session of the General Assembly adopted a Declaration on the Granting of Independence to Colonial Countries and Peoples, G.A. Res. 1514, 15 U.N. GAOR, Supp. (No. 16) 66, U.N. Doc. A/4684 (1960). Paragraph 1 provides: "The subjection of peoples to alien subjugation, domination and exploitation constitutes a denial of fundamental human rights, is contrary to the Charter of the United Nations and is an impediment to the promotion of world peace and cooperation." *Id.* at 67. See also Programme of Action on the Establishment of a New International Economic Order, G.A. Res. 3202, 6 (special) U.N. GAOR, Supp. (No. 1) 5, U.N. Doc. A/9559 (1974).

36. See A. SAKHAROV, PROGRESS, COEXISTENCE AND INTELLECTUAL FREEDOM (1968). See also Solzhenitsyn, *As Breathing and Consciousness Return*, in FROM UNDER THE RUBBLE 3 (A. Solzhenitsyn ed. 1975).

37. See, e.g., A. SOLZHENITSYN, THE GULAG ARCHIPELAGO (1974). See also Litvinov, *The Human Rights Movement in the Soviet Union*, in ESSAYS ON HUMAN RIGHTS, *supra* note 14, at 113.

38. See Darnton, *60 Days that Shook Poland*, N.Y. Times, Nov. 9, 1980, § 6 (Magazine), at 39.

order of objective values superior to the individual will.<sup>39</sup> Liberalism's contempt of the spiritual and its refusal to recognize distinctions between good and evil impoverishes the Western ideal of humanism. When the boundaries of freedom are determined exclusively by reference to legal criteria, the total regime invites the selfish use of liberty.

Solzhenitsyn concludes that he would not propose the Western model for adoption in his native land. Nor would he recommend Socialism as an alternative. Many of the same principles of autonomous, materialistic humanism which debase Western culture permeate Socialist ideals.<sup>40</sup> Whatever its limitations, his critique makes an important point that bears upon the future development of universal human rights.

The Western Democracies and Socialist States are, respectively, advocates of the two principal expressions of human rights in international law: the International Covenant on Civil and Political Rights<sup>41</sup> and the International Covenant on Economic, Social and Cultural Rights.<sup>42</sup> Each covenant promotes a specific vision of human values as a universal and comprehensive ideal;<sup>43</sup> yet each fails as a complete explanation of human destiny. The values embodied in each covenant provide a valid, partial insight into a whole system of human rights.<sup>44</sup> Together, these documents offer a

39. Address by Alexander Solzhenitsyn, *A World Split Apart* (June 8, 1978) (Harvard University Commencement), *reprinted in* 44 VITAL SPEECHES OF THE DAY 678, (1978).

40. *Id.* But see Shafarevich, *Socialism in Our Past and Future*, in FROM UNDER THE RUBBLE, *supra* note 36, at 26.

41. G.A. Res. 2200, 21 U.N. GAOR, Supp. (No. 16) 52, U.N. Doc. A/6316 (1966).

42. G.A. Res. 2200A, 21 U.N. GAOR, Supp. (No. 16) 49, U.N. Doc. A/6316 (1966).

43. This point is more fully developed in Murphy, *Ideological Interpretations of Human Rights*, 21 DEPAUL L. REV. 286 (1971). From the beginning of the human rights movement within the United Nations, connections were perceived between civil and political rights and economic, social, and cultural rights. The relation between the two sets of fundamental values is examined in McKeon, *The Philosophic Bases and Material Circumstances of the Rights of Man*, in HUMAN RIGHTS, *supra* note 9, at 32. The conflict between the two is the theme of the International Political Science Association Symposium on Human Rights. POLITICAL THEORY AND THE RIGHTS OF MAN, *supra* note 11. See also J. MARITAIN, MAN AND THE STATE 103-07 (1951). Maritain emphasizes that the recognition of the right of man as a working person, entitled to share in the material, social, and cultural aspects of civilized life, is not the exclusive realm of Marxism or any other ideology.

44. In the preparation of the International Covenants, the official position of the Socialist states was that civil, political, economic, social, and cultural rights should be the subject of a single covenant. See Przetacznik, *The Socialist Concept of Protection of Human Rights*, 38 SOC. RESEARCH 337, 349 (1971). Before that position

comprehensive view of fundamental values which, in turn, reflect that general consensus indispensable to the establishment of political institutions with effective enforcement power.

The intellectual task is to attain a deeper understanding of the nature and purpose of human rights. As a beginning, it may be suggested that academics move back from postures of zealous advocacy<sup>45</sup> and engage in a more reflective enterprise. Greater concentration upon the philosophical premises of Western values can help to clarify the content and limits of the civil and political liberties which constitute the Western contribution to an emerging universal society. And increased attention should be given to the vision of human entitlements held by those who, directly or indirectly, are influenced by Marxist Socialism.

The effort to arrive at universal human rights standards should be transferred from the domain of political argument to intellectual dialogue, and the issues separating the two ideologies reduced to essentials. To take a basic example: What is the true relation between liberty and property? Are private initiative and the accumulation of wealth egoistic, as Marxists claim, or are they socially, as well as personally, beneficial?<sup>46</sup> Further, why should the fate of the human person be a matter of international concern? Leaving questions of effective human rights protection aside, can we articulate the moral foundations of such supreme consideration? Marxist ideology has no integral concept of the human person.<sup>47</sup> But does the West have anything more than a passionate attachment to individualism? Or, as Solzhenitsyn charges, has the severance of modern Western thought from a domain of higher values left it incapable of maintaining an intellectual or moral defense of personal freedom? Without answers to such questions, Western scholars cannot repudiate the Marxist view that man liberates himself by becoming absorbed in community.

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is dismissed as a political posture, it should be remembered that the United States and United Kingdom opposed the inclusion of economic, social, and cultural rights in the covenant which was to implement the Universal Declaration of 1948. See Alston, *The United Nations' Specialized Agencies and Implementation of the International Covenant on Economic, Social and Cultural Rights*, 18 COLUM. J. TRANSNAT'L L. 79, 83 (1979).

45. For a general discussion on the inordinate demands of moral passions in modern times, see Polanyi, *Beyond Nihilism*, in KNOWING AND BEING ch. 1 (M. Grene ed. 1969).

46. Compare M. GINSBERG, *supra* note 11, at 94-117 with R. TAWNEY, *THE ACQUISITIVE SOCIETY* (1920).

47. See J. MARITAIN, *MORAL PHILOSOPHY* 234-40 (1964).

In orthodox Marxism, the problem of individualism is resolved by the historical dialectic. When society was divided into rival classes and capitalists were dominant, contradictions existed between the individual and the state. Where Communism triumphs, the problem is resolved because the government is the collective individual.<sup>48</sup> One has only to reflect upon recent events in Indochina to grasp the human suffering which can be caused by such an abstraction. But what powers of mind do we possess to refute Marxist theories?

If the personal freedoms associated with Western culture are to be extended globally, the relationships between value preferences and general theory must be taken more seriously. Human rights are not self-explanatory. Nor do they evolve from the moral imperatives of individual consciences.<sup>49</sup> Behind all claims of right lie antecedent beliefs about the nature of the human person and the structure of society. Unless scholars critically examine these presuppositions, it is impossible to oppose the gradual elimination of individuality which is the challenge of Marxism.

The competition between Western Liberalism and Marxist Socialism<sup>50</sup> raises ultimate questions concerning political authority. Both International Covenants provide that "[a]ll peoples have the right of self-determination,"<sup>51</sup> but the quoted language is not supported by a common understanding of its terms. It is subject to collectivist interpretation, especially by groups seeking to justify their political status in the name of a Hegelian or Marxist ideal. On the other hand, Liberalism traces all authority back to individual consent. This provides it with a powerful weapon for resisting arbi-

48. See generally Tchechko, *The Conception of the Rights of Man in the U.S.S.R. Based on Official Documents*, in HUMAN RIGHTS, *supra* note 9, at 158.

49. Professor Dworkin's *Hard Cases* thesis, Dworkin, *supra* note 4, is a recent example of such an approach in the realm of judicial decisionmaking. This propensity of modern thought is traced in C. PERELMAN, *THE IDEA OF JUSTICE AND THE PROBLEM OF ARGUMENT* 72-75 (1963). Perelman documents the general transition from transcendent religious norms to the imperative of practical reason as the measure of right and justice.

50. To simplify analysis I have used these generic labels. The actual political divergences within the two general categories are recognized in Murphy, *supra* note 43, at 288.

51. International Covenant on Civil and Political Rights, G.A. Res. 2200, 21 U.N. GAOR, Supp. (No. 16) 53, U.N. Doc. A/6316 (1966); International Covenant on Economic, Social and Cultural Rights, G.A. Res. 2200A, 21 U.N. GAOR, Supp. (No. 16) 49, U.N. Doc. A/6316 (1966). Both covenants provide: "All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development."

bitrary power. And Liberalism's emphasis upon personal entitlements accentuates the right of each individual to participate in the political life of his or her country.<sup>52</sup> But is such an individual right meant to imply nothing more than the assertion of self-interest—of "man separated from other men,"<sup>53</sup> entitled to pursue political power simply to achieve personal ends?

For Liberalism, political activity is a temporary necessity. It is undertaken to assure the order which makes possible the individual pursuit of happiness in the private realm. This attitude makes "public life entirely secondary and instrumental of private life."<sup>54</sup> As the separate person stands in a negative relation to public authority, it is assumed that men will not find fulfillment in public affairs.

The Universal Declaration of Human Rights provides that the will of the people shall be the basis of government.<sup>55</sup> At the level of philosophical reflection it is difficult for Liberalism to provide a cogent defense of this principle. Its espousal of an atomistic conception of social life is an impediment. If each person is sovereign, and society is an aggregate of individual wills, how does one realize that the people, as a body politic, possess ultimate sovereign authority? Without some articulation of the foundations of government it is impossible to effectively challenge the distortions of self-determination which are the currency of Marxist-inspired interpretations of the International Covenants.

In the Anglo-American experience, the whole populace, and not a class or party, is understood to be the supreme source of all legitimate power. In political dialogue with Marxists, defenders of Western democracy have understood how deeply this tradition separates the two ideologies. Speaking of the prospects for coexistence, George Kennan once remarked that the Communist system was essentially unacceptable because

it does not fully recognize the organized expression of the popular will. There would be no one quicker than I to admit that all parliamentary systems, all systems of elections, are im-

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52. Cf. International Covenant on Civil and Political Rights, G.A. Res. 2200, 21 U.N. GAOR, Supp. (No. 16) 55, U.N. Doc. A/6316 (1966).

53. See text accompanying note 20 *supra*.

54. Schaar, . . . *And the Pursuit of Happiness*, 46 VA. Q. REV. 1 (1970); cf. J. HABERMAS, *THEORY AND PRACTICE* (1973) (critique of Liberalism).

55. Universal Declaration of Human Rights, G.A. Res. 217A, U.N. Doc. A/810, art. 21(3).

perfect . . . . But it is this which lies at the heart of our disagreement with you. We feel that until there exists on the Communist side a disposition to accept expressions of the popular will, however imperfect, as the ultimate basis of political action and as the determination of political authority, there will remain a contradiction between the concept of ideological competition . . . and the concept of coexistence.<sup>56</sup>

With its fear of the tyranny of majorities Liberalism has not given the expression of popular will a primary role in its political theory.<sup>57</sup> If that approach is modified the Western democracies will then be able to offer to the world a complete, coherent vision of human rights.

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56. Kennan, *On Coexistence* 26 (Occasional Paper, Center for the Study of Democratic Institutions 1965).

57. Compare J.S. MILL, *ON LIBERTY* (1859) with R. DWORKIN, *TAKING RIGHTS SERIOUSLY* (1977). But see Henkin, *Rights: American and Human*, 79 *COLUM. L. REV.* 405 (1979):

Originally—in some hypothetical conceptual state of nature—the individual is autonomous, his or her own master. In society, the autonomy of each individual is combined with that of other individuals, and transformed into sovereignty of the people. Sovereignty of the people implies self-government by the people, directly or through chosen representatives. But every individual retains some of his or her original autonomy as “rights” which are protected even against the people and their representatives.

*Id.* at 408. For a discussion of the notion of general authority of the people, see *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819); J. STORY, *COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES* §§ 326-339 (1970).



