

# Minimalism About Human Rights: The Most We Can Hope For?<sup>1</sup>

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## 1. Hope

At the conclusion of his illuminating book on *Human Rights*, Michael Ignatieff says that “we could do more than we do to stop unmerited suffering and gross physical cruelty.” Efforts to halt such suffering and cruelty are, he says, the “elemental priority of all human rights activism: to stop torture, beatings, killings, rape, and assault to improve, as best we can, the security of ordinary people.”<sup>2</sup> Ignatieff describes this focused concern on protecting bodily security as a *minimalist* outlook on human rights. And he distinguishes human rights minimalism from more expansive statements about the content of human rights and more ambitious agendas for their promotion.

The 1948 Universal Declaration of Human Rights presents one such more ambitious agenda. Its account of human rights extends well beyond minimalist assurances of bodily security, to comprise rights associated with the rule of law, education, culture, work, and political participation. And neither of the 1966 Covenants on human rights (which entered into force in 1976) is a minimalist charter—certainly not the Covenant on Economic and Social Rights, but equally not the International Covenant on Civil and Political Rights, with its provisions on self-determination, political participation, equality before the law, and rights of peaceable assembly. In response to the criticism that minimalism is simply a

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<sup>1</sup> I presented earlier versions of this paper at the 50<sup>th</sup> Anniversary celebration of the MIT Center for International Studies, and the Center for Ethics and the Professions at Harvard’s John F. Kennedy School of Government. I am grateful for comments from Charles Beitz, Patrizia Nanz, and Alyssa Bernstein.

<sup>2</sup> *Human Rights*, p. 173.

political strategy—and not an especially plausible one—for defusing authoritarian objections to human rights by reminding authoritarians that they do not have to do very much, Ignatieff denies that minimalism is strategic. Instead, it is, he says, “the most we can hope for.”<sup>3</sup>

In the *Critique of Pure Reason*, Kant says that the three great philosophical questions are: “What can I know?,” “What ought I to do?,” and “What may I hope?” The first question expresses the interests of our reason in its theoretical use; the second question expresses the interests of our reason in its practical use. The third joins the interests of both: given the demands of morality and what we know about how the world does and might work, what sort of world, we ask, is it reasonable to hope for, and to strive to achieve? The world that the minimalist imagines—a world without torture and with genuine assurances of bodily security for all—is no small hope, and I do not wish here to dispute Ignatieff’s assertion about elemental priorities—about the relative importance of rights of bodily security. But I do wish to dispute the idea that human rights minimalism is “the most we can hope for.” Minimalism may be more than we should ever reasonably expect. But hope is not the same as expectation. And minimalism draws the boundaries of hope too narrowly.

This is a large thesis, and I do not propose to argue for it fully. Instead, I will concentrate here on one apparently attractive route to minimalist conclusions. The route I have in mind begins with an emphasis on the value of toleration and an embrace of ethical pluralism and ends in human rights minimalism. Ignatieff offers a crisp statement of the argument, when he says that: “The universal commitments implied by human rights can be compatible with a wide variety of

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<sup>3</sup> *Human Rights*, p. 173.

ways of living only if the universalism implied is self-consciously minimalist.

Human rights can command universal assent only as a decidedly ‘thin’ theory of what is right, a definition of the minimal conditions for any life at all.”<sup>4</sup> If human rights are to apply to all, as basic demands on social and political arrangements, then it seems desirable that they be acceptable to all. And if we want them to be acceptable to all, then—in view of the wide range of religious, philosophical, ethical, political outlooks that are now endorsed in different societies, and that we can expect to persist into the indefinite future—the content cannot be very demanding, perhaps no more than a statement of the protections required “for any life at all.”

To describe this route to minimalism more precisely—the argument from the importance of compatibility with a wide variety of philosophies of life to a very thin set of normative principles—I need to distinguish two views that play a role in theoretical discussions of human rights. Although both views have claim to be described as minimalist, they are very different from one another in content and role.<sup>5</sup>

The first view is *Substantive Minimalism*, which is a position about the content of human rights and, more broadly, about norms of global justice. The central idea of substantive minimalism—as I will be using the term from here on—is that human rights are about the protection of negative liberty: and more particularly, about ensuring against restrictions on negative liberty that take the form of forcible intrusions on bodily security.

The second idea I will call *justificatory minimalism*. Here, in contrast with substantive minimalism, we have a view about how to present and defend a

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<sup>4</sup> *Human Rights*, p. 56.

conception of human rights, as an essential element of a conception of global justice for an ethically pluralistic world—as a basic feature of what I will be referring to as “global public reason.” Justificatory minimalism is animated by an acknowledgement of pluralism and embrace of toleration. It aspires to present and defend a conception of human rights without connecting it to a particular ethical or religious outlook; deflationary in spirit, it minimizes theoretical aspirations with the aim of presenting a conception that is capable of winning broader public allegiance—whether the relevant public is global. In the service of practical reason it minimizes philosophical depth. That practical ambition is important, but it needs to be properly understood. And when it is, substantive minimalism does not—contrary to the line of thought sketched above—issue from it.

There are of course other reasons than a justificatory minimalist’s view about how to present and defend a conception of human rights that might suggest a substantively minimalist conception, with its focus on rights associated with bodily security. Three considerations are commonly offered for resisting more demanding standards of human rights: that such standards threaten to overtax the resources and disperse the attention required for monitoring and enforcing human rights; that they threaten an (undesirable) substitution of legal principles for political judgments, of often-uncompromising rights claims (“rights talk”) for informed and more supple political deliberation and judgment; and they threaten to subordinate the political self-determination of peoples (within acceptable limits) to the decisions of outside agents, who justify their interventions in the language of human rights. Though I will say something about

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<sup>5</sup> I believe that Ignatieff uses the term “minimalism” to cover both. See *ibid.*, pp. 55-56.

the third consideration near the end of the talk, my principal focus here is on the thought that pluralism and toleration, expressed in the idea of justificatory minimalism, lead us to a substantively minimal account of human rights.

## 2. Justificatory Minimalism

The central idea of justificatory minimalism is that a conception of human rights—including an account of their content, role, and rationale—should be stated autonomously: independent of particular philosophical or religious theories that might be used to explain and justify its content. Jacques Maritain—perhaps the central figure in mid-20<sup>th</sup> efforts to reconcile Catholic social thought with democracy and human rights, and who participated in discussions leading to the Universal Declaration—formulated the idea as follows: “Yes, we agree about the rights, but on condition that no one asks us why.” The point of developing a conception of human rights, capable of being shared by adherents to different traditions, he said was to create agreement “not on the basis of common speculative ideas, but on common practical ideas, not on the affirmation of one and the same conception of the world, of man, and of knowledge, but on the affirmation of a single body of beliefs for guidance on action.”<sup>6</sup>

Maritain’s point of view makes considerable sense if we think of a conception of human rights as designed to play a certain practical role, to provide “guidance on action,” as he puts it. The practical role, as I will understand it, is to provide a broadly shared outlook, across national boundaries, about the

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<sup>6</sup> Cited in Mary Ann Glendon, *A World Made New: Eleanor Roosevelt and the Universal Declaration of Human Rights* (New York: Random House, 2001). On the background of Maritain’s views of human rights in broader efforts to rethink the fundamentals of Catholic social thought—especially the relative significance attached to notions of the human person

standards that political societies, in the first instance, can be held to with respect to the treatment of individuals and groups; and correspondingly, the treatment that individuals and groups can reasonably demand, and perhaps enlist assistance from outside, in achieving. Or if not a shared outlook, at least a broadly shared terrain of deliberation about the standards to which political societies can reasonably be held, and when they are appropriately subject to external criticism or interference. An account of human rights is one element in, to use Rawls's phrase, an idea of *public reason* for international society.<sup>7</sup> Because that society comprises adherents to a wide range of distinct ethical and religious outlooks, justificatory minimalism, with its ideal of autonomous formulation, is an intuitively plausible desideratum. And its point is not simply to avoid a fight where none is necessary; the point is to embrace the value of toleration.

*Human Rights: Content, Role, and Rationale.* To develop these points more fully, I need first to say something more about what a conception of human rights is, and about what I have described as its practical role. Think of a conception of human rights, then, as having three elements. The first is a statement of a set of rights, of the sort that we find in the Declaration and the Covenants: there are many such statements, and substantial disagreement about the rights that belong on the list. This is of course the normal situation when it comes to issues of justice: disagreement comes with the territory. And the disagreement is genuine—not simply a matter of people talking past each

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and the common good—see John T. McGreevy, *Catholicism and American Freedom: A History* (New York: Norton, 2003), chap. 7.

<sup>7</sup> Rawls refers to the public reason of the “society of peoples.” See *The Law of Peoples* (Cambridge: Harvard University Press, 1999), pp. 54-57. I do not wish here to engage the

other, as it would be if their favored lists represented so many different ways of assigning meanings to the term “human rights.” Instead, there is broad agreement about the practical role of human rights, and disagreement about the content of the rights suited to that role.

Suppose, second, then, that the role is to present a set of important standards that all political societies are to be held accountable to in their treatment of their members. A statement of human rights presents, as is commonly said, a set of limits on internal sovereignty, or—perhaps better—presents conditions on which a state’s internal sovereignty is acknowledged.<sup>8</sup> The standards represent a partial statement of the content of a global public reason, a broadly shared set of values and norms for assessing political societies both separately and in their relations: a public reason that is global in reach, inasmuch as it applies to all political societies, and global in its agent, inasmuch as it is presented as the common reason of all peoples, who share responsibility for interpreting its principles, and monitoring and enforcing them. Of course, the precise ways of exercising that responsibility—who exercises it and with what instruments (ranging from monitoring, to sanctions, to force)—varies widely. Often, acting on the principles of global public reason may consist simply in observing the implementation of its principles by separate

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issue of whether “peoples” are the moral agents in international society. Thus the less theoretically-committed term “international society.”

<sup>8</sup> The idea that there are such limits on internal sovereignty is often said to be a fundamental departure from the Westphalian conception of sovereignty that prevailed from the mid-17<sup>th</sup> century until the end of World War II. According to Stephen Krasner, the norms of Westphalian sovereignty have persistently been violated by externally-guaranteed protections of rights. The change at the end of World War II, Krasner claims, was better understood as a shift from abridgements in the name of minority group rights to abridgements in the name of individual rights, rather than a shift in the basic conception of sovereignty. See Stephen D. Krasner, *Sovereignty: Organized Hypocrisy* (Princeton: Princeton University Press, 1999). Krasner is certainly right to emphasize that protections of minority rights were abridgements of conventional norms of internal sovereignty. But I suspect that the more recent

political societies, or perhaps in assisting in their implementation. The more immediate responsibility for interpreting and implementing the principles will typically fall to those political societies themselves, in part—though not only—because of the value of collective self-determination (by no means an absolute value).

Now it might be argued that the human rights identified by principles of global public reason are identical in content to the basic natural rights that individuals would have even in a pre-institutional state of nature. But—and here I follow an illuminating discussion by Charles Beitz<sup>9</sup>—that claim about identity of content, whatever its merits, should not be presented as issuing directly from a *conceptual* identification of human rights with natural rights. These concepts are fundamentally different, as is evident from the fact that many of the rights enumerated in the Universal Declaration and the 1966 Covenants—including rights to a fair hearing and the right to take part in government—have institutional presuppositions, and thus could not be rights in a pre-institutional state of nature, assuming there are such rights. Instead, a claim about identity of content between human rights and natural rights would need to be defended through a substantive normative argument to the effect that the rights implied by the most reasonable principles for global public reason—the standards of individual treatment appropriate to use in holding political societies accountable—are, contrary to the Declaration, the very same rights that would hold in pre-institutional circumstances. That conclusion, if true, would be very surprising.

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developments have changed the norms themselves, and not simply the content of the abridgements.

<sup>9</sup> Charles Beitz, “Human Rights as a Common Concern,” *American Political Science Review* 95 (2) (June 2001): 269-82; “What Human Rights Mean,” *Daedalus* (Winter 2003): 36-46; “Human Rights and *The Law of Peoples*,” unpublished.

Why should reasonable norms of global responsibility, in a world with separate political societies and substantial interactions—economic, political, cultural—across and among those societies, have the same content as the norms for a very different setting, in which there are no organized political societies at all? My point here, though, is not to dispute the thesis that human rights are identical in content to natural rights, but simply to characterize its status.

A third element in a conception of human rights is an account of why the rights have the content that they have. A conception of human rights is not given simply by a list of rights together with an account of the role of human rights, but also by some view about why certain rights are suited to that role: why it is appropriate to require that political societies ensure those rights. It is here that justificatory minimalism has real bite. Given the practical role of a conception of human rights, we need to avoid formulating the rationale for human rights (as well as their content) by reference to a particular religious or secular moral outlook. So we should avoid saying that, for example, human rights are preconditions of the autonomous moral agency prized by Kantians, or for fulfilling divinely-imposed obligations, whether the preferred statement of the obligations is found in Thomistic natural law theory, or some formulation of the shari'ah.

Instead, I propose that human rights norms are best thought of as norms associated with an idea of *membership or inclusion* in an organized political society. The relevant notion of membership is a normative idea—it is not the same as, for example, living in a territory—and the central feature of the normative notion of membership is that a person's interests are taken into account by the political society's basic institutions: to be treated as a member is

to have one's interests given due consideration, both in the processes of authoritative decision-making and in the content of those decisions. Correspondingly, disagreements about human rights may be seen as talking place on a shared terrain of political argument, and can be understood as disagreements about what is required to ensure membership. The importance of the notion of membership in an account of human rights is suggested by the breadth and substance of the rights in the Universal Declaration and the Covenants—including rights to education, work, and cultural inclusion, as well as assembly, expression, and participation. The guiding thought behind the capacious list seems to be that an acceptable political society—one that is above reproach, according to our global public reason, in its treatment of individuals—must attend to the common good of its members, on some reasonable conception of that good, and ensure the goods that people in the territory and subject to political rule need in order to take part in the political society. Failing to take account of the good of members is tantamount to treating them as outsiders, persons whose good can simply be dismissed in making laws and policies: no-counts, with no part to play in the political society.<sup>10</sup>

In emphasizing that acceptable arrangements acknowledge rights as a way to acknowledge and uphold membership, I do not wish to deny that human rights protections were particularly animated by more specific concerns about

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<sup>10</sup> One rationale for the emphasis on membership is suggested by the idea of political obligation. Thus, on a plausible account of political obligation, attending to the common good, on some interpretation of that good, is necessary if the requirements that a political society imposes on people under its rule are to have the status of genuine obligations and not mere forcible impositions. If this theory of political obligation is correct—and it certainly seems more plausible than a theory of obligation that ties political obligations to justice—then the rights that are required if individuals are to be treated as members would be identical to the rights that are required if the requirements imposed by law and other regulations are to be genuine obligations. See Ronald Dworkin, *Law's Empire*, chap. 6 (on associative obligations); Rawls, *Law of Peoples*.

genocide, torture, and other extreme forms of cruelty. But as the Declaration and Covenants indicate, the concerns were not confined to those evils, but included other forms of social exclusion, perhaps understood as both bad in themselves and opening the way to more hideous forms of treatment.

A conception of human rights, then, has three elements: a statement of what the rights are; an account of the role of human rights as potentially shared standards of practical guidance for the assessment of all political societies in their treatment of their members (in the language of the Declaration, “a common standard of achievement for all peoples and all nations”<sup>11</sup>); and a view about why the rights are as they are, given that role. The idea of justificatory minimalism is that each of these elements—including the account of membership and affirmation of its importance—should all be expressed autonomously, so that they can be affirmed by a range of ethical outlooks, for reasons provided by the terms of the outlook, and then used as a basis for further argument about and elaboration of the content of human rights.

*Justificatory Minimalism: Neither Skeptical nor Empirical.* To appreciate the force and plausibility of this requirement of autonomous formulation, we need to distinguish justificatory minimalism from two positions—skeptical and empirical—with which it might be conflated.

The first position is a set of familiar agnostic or skeptical claims about the need for so-called anti- or post-metaphysical political theorizing. Those claims deny the truth or reasonableness of traditional views about the foundations of human rights in philosophical theories about human nature or religious conceptions of the human person or right conduct. Thus Richard Rorty describes

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<sup>11</sup> *Universal Declaration of Human Rights.*

such views as “human rights foundationalism,” and urges that we put such foundationalism behind us—like all other efforts to shore up any of our practices, by suggesting that anything can or should be said on their behalf other than “that’s how we do things these days around here,” for some suitable specification of “here.”<sup>12</sup>

But justificatory minimalism is founded on an acknowledgement of pluralism and a commitment to toleration; neither *anti*-foundational nor *post*-metaphysical, it simply does not take a position for or against any particular foundational view, whether religious or secular, about the content and importance of human rights. It is, to coin a term, *unfoundational*, rather than anti-foundationalist. Justificatory Minimalism does not require denying anything, much less asserting (with Rorty) that pragmatic arguments for human rights should replace metaphysical ones (as though Rortyeen pragmatism, or its antecedents in Romantic conceptions of self-creation, is somehow less committal than other metaphysical theories).

Instead, because human rights ideas are intended to provide part of a framework of political deliberation whose practical role, as a partial specification of the content of a global public reason, requires that it be shared among people who endorse very different ethical positions, we ought to free the statement of the outlook from any one of those views. No unnecessary hurdles should be placed in the way of embracing the ideas. When the Universal Declaration came before the United Nations in 1948, proposals to include references in the Declaration to God or nature were rejected by the body, at the urging of C.K.

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<sup>12</sup> Richard Rorty, “Human Rights, Rationality, and Sentimentality,” in *On Human Rights*, eds. Stephen Shute and Susan Hurley (New York: Basic Books, 1993).

Chang.<sup>13</sup> Those views were not rejected as false or outdated. Instead, the Declaration was presented in a way that left adherents of different views to work out the relations between their broader philosophy of life and the account of human rights. And working out those relations is important for adherents, and thus of practical importance for the acceptance and efficacy of the human rights idea.

Having said this, I need—here is the second distinction—to set justificatory minimalism off from the view that ideas of human rights are somehow to be “found” within each religious and moral tradition, or located at the intersection of those different traditions, taking their content as fixed and given. Call this the *empirical interpretation* of justificatory minimalism.<sup>14</sup> If this interpretation were correct, then we might plausibly expect substantive minimalism to follow. After all, what more could possibly be expected to lie at the de facto intersection of different ethical traditions than prohibitions on infringing on bodily security—and, more generally, assurances of the conditions of any life at all?

But justificatory minimalism is not about locating the de facto intersection of different ethical traditions, taking those traditions as fixed and given. That idea in any case has uncertain content, inasmuch as each ethical tradition has competing formulations, with often sharp contests within the tradition about which formulation is best—a point that is tirelessly reiterated by postmodernists and postcolonialists. Instead, the formulation of a conception of human rights is, as I

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<sup>13</sup> For discussion, see Glendon, *World Made New*.

<sup>14</sup> The empirical interpretation parallels a conventional misunderstanding of Rawls’s conception of an overlapping consensus. For discussion of the misunderstanding, see Joshua Cohen, “Moral Pluralism and Political Consensus,” *The Idea of Democracy*, eds. David Copp,

have said, an independent normative enterprise, which aims to present reasonable global norms and standards to which different political societies can be held accountable. In pursuing that enterprise, we recognize in general terms that global public reason is intended to provide a public reason for people who belong to different ethical traditions. But the specifics of those traditions are not in view. To see the force of the idea that the normative enterprise is independent, suppose—with Rawls' *Law of Peoples*—that we think of the principles of global public reason as the object of an initial compact among different peoples (or among the members of those peoples). Then the idea of justificatory minimalism would be modeled by an agreement made with awareness of the fact that there are fundamentally different ethical traditions, and that each has competing formulations. But the agreement would not be made with awareness of the content of those traditions or their political distribution.

Because the formulation of the ideas and principles of global public reason is not undertaken with an eye to finding common ground among specific ethical traditions, the enterprise of showing that those ideas and principles can win support within different ethical traditions may require fresh elaboration of those traditions by their proponents—where it is understood that the point of a fresh elaboration is not simply to fit the tradition to the demands of the world, but to provide that tradition with its most compelling statement. Thus the fit between constitutional democracy, with its conception of individual rights and principles of religious toleration, and Catholic natural law theory required the fresh elaboration associated with Vatican II. With the Vatican II “Declaration of Religious Freedom,” the Catholic Church rejected the traditional doctrine that “error has no

rights” (the “exclusive rights of truth”), and the associated thesis that religious toleration is an accommodation to political weakness. Instead, the Church embraced a principled commitment to religious toleration founded on the idea of the dignity of the human person. The idea of a special dignity and responsibility owing to our creation in God’s image was always a centerpiece of Catholic natural law doctrine. But according to older doctrine, “as a rational and moral being, man is constituted in his proper dignity by his adhesion to what is true and good.” Because human dignity was associated with living in the truth, “the erroneous conscience has no right to external social freedom.... In particular, it has no right publicly to propagate or disseminate its belief.”<sup>15</sup>

To bring a principled commitment to religious toleration into Catholic social thought, this conception of human dignity needed to be reinterpreted so that dignity no longer was seen to require living according to the truth. Instead, human dignity was seen as issuing in an account of political legitimacy that imposed principled limits on the state’s authority in matters of religious faith and practice.<sup>16</sup> Dignity still is understood to impose an obligation to seek the truth and embrace it. But while the “one true religion subsists in the Catholic and apostolic Church,” the pursuit and embrace of truth must—in view of modern cultural and political experience—comport with our nature as free beings “endowed with reason” and the dignity owing to that nature. And this requires immunity from “external coercion,” as well as “psychological freedom.” Once more, this reinterpretation was not seen as a matter of accommodating Catholic social thought to the brute facts of modern political life, but rather was animated by a

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<sup>15</sup> John Courtney Murray, “The Problem of Religious Freedom,” in *Religious Liberty: Catholic Struggles With Pluralism* (Louisville: Westminster, 1993), p. 131.

need to reformulate political ideas in light of truths about the human person that modern “cultural and political experience” had made manifest.

*Two Illustrations: Confucianism and Islam.* To illustrate this point about the fresh elaboration of a doctrine in relation to an autonomously-formulated account of human rights, I want to consider two illustrative cases: Confucianism and Islam. My aim is to show how the fundamentals might be interpreted in a way that supports a conception of human rights. In neither case do I aim to show that the best interpretation of either outlook leads to an endorsement of human rights; that argument proceeds within Confucianism and Islam.

In a collection on *Confucian Traditions in East Asian Modernity*, Tu Wei-ming says two apparently—but only apparently—inconsistent things about Confucianism: first, that “In its political philosophy the Confucian tradition lacks concepts of liberty, human rights, privacy, and due process of law;” and second, that “the Confucian concern for duty is not at variance with the demand for rights.”<sup>17</sup> Putting the two comments together, the point seems to be that though the Confucian tradition does not have a conception of human rights, to be discovered by inspecting its contents—say, reading the classical texts—such a conception can nevertheless be brought within its sphere. I think that this assertion is correct, and want to sketch a way of doing that. If what I say is right, the conclusion would not be that the idea of human rights is essential to Confucian moral and political thought, but that the central ideas associated with the Confucian tradition can be presented so that they are fully consistent with an acknowledgement of certain basic rights. The fundamentals are not hostile to the

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<sup>16</sup> See “Declaration on Religious Freedom,” 1.2.

<sup>17</sup> Tu Wei-ming, *Confucian Traditions in East Asian Modernity* [[ref]].

idea of human rights, at least not when they are understood as aspects of membership in an acceptable political arrangement.

To see why not, think of Confucianism as having three main elements: a philosophical anthropology (theory of human nature), an ethic (understood broadly, to include rules of conduct, appropriate human ends, and ideals of character), and a political conception about the proper role and form of government.

1. The central element in the account of human nature is the idea of human beings as standing in relations of various kinds to others: in particular, relations to others in a family, extending across generations, but also political relations (say, relations between rulers and officials, or officials and thus subject to their decisions). Thus persons are not conceived of as free and equal individuals, or as principally choosers of their ends (as in a comprehensive liberal philosophy of life, but as standing in relations from which their ethical identity and obligations derive.

2. The ethic includes at least four important elements:

- (i) An account of the duties associated with human relationships, say, duties of filial piety and brotherly respect that are required to ensure the proper ordering of those relations;
- (ii) An account of self-cultivation — of education in the broadest sense — that enables the person who stands in these relations to understand and fulfill the responsibilities associated with them. In the case of the political relation, fulfilling these responsibilities may require refusing to serve, when the demands imposed by the ruler are wrong;

- (iii) An account of the human virtues—humaneness, wisdom, fidelity, loyalty, and observance of ritual—required for conduct that fulfills the responsibilities ingredient in human relationships;
- (iv) An ideal of the kind of person we should aspire to be: someone whose cultivation is sufficient to understand the virtues and act on them (the “gentleman”). According to Tu Wei-ming, Confucianism also embraces a conception of human dignity associated with the capacity for such cultivation. And, he might have added, in at least some of its formulations, Confucianism assumes this capacity to be widely distributed among human beings.

3. Finally, the political conception includes an account of the responsibilities of political officials to care for the common good of subjects, perhaps consulting with them (see Mencius) on how best to achieve their good. This responsibility is in part an expression of the duties associated the position of official, and in part an expression of the demands of the virtues—in particular the demands of humanity—as applied to the case of the official.

These elements, of course greatly simplified, enable us to see how Confucianism is compatible with human rights. Consider the Universal Declaration, in particular, the Articles requiring rights to life, liberty, and security; condemning slavery, torture, degrading treatment, arbitrary arrest and detention; and mandating rights to an adequate standard of living. Three considerations within the Confucian view support such rights.

First, basic human rights can be thought of as conditions for fulfilling the obligations associated with human relationships: slavery, torture, and threats of arbitrary arrest, as well as poor health, lack of education, and absence of

sufficient economic means will all infirm the ability of people to confidently fulfill the obligations that flow from their relationships. As a bearer of such obligations, a person can claim both that others *ought to* assure them freedom from arbitrary arrest and detention, and also that those others owe it *to the person* with the obligations to provide such assurance. The essential point is that the relational or role-based obligations, essential to the ethical view, explain why the assurances must be provided. The idea is not simply that people benefit from a generalized obligation to be humane and decent, though that is true, too: more than that, they can demand certain kinds of treatment as conditions for fulfilling the obligations they are assumed to have, given their social position and the responsibilities associated with it. They do not make the demands independently from those obligations, but in their name.<sup>18</sup>

Second, if human worth turns on being in a position to fulfill responsibilities, then people can demand of others—as a condition of acknowledging that worth—that those others assure the conditions required for fulfilling responsibilities.

Third, the basic human rights flow as well from the responsibility of officials to care for the common good: say, the peace and security of the people. How, we might ask, can officials fulfill their responsibility of caring for the good of members if they fail to provide the protections required by a code of human rights? Consider in this light Mencius' claim that "If beans and millet were as plentiful as water and fire, such a thing as a bad man would not exist among the

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<sup>18</sup> In this case, the human rights belong, as Rawls puts it, to "an associationist social form . . . which sees persons first as members of groups—associations, corporations, and estates. As such members, persons have rights and liberties enabling them to meet their duties and obligations and to engage in a decent system of social cooperation." Rawls, *Law of Peoples*, p. 68.

people.” Or his opposition to an excessive use of conscripted labor and to savage penalties: both in the name of government guided by the virtue of humanity (*jen*).

These three considerations suggest reasons for supporting a conception of human rights without relying on a liberal conception of persons as autonomous choosers, but instead drawing on an ethical outlook that understands persons as embedded in social relations and subject to the obligations associated with those relationships. The notions of persons standing in relations and bearing duties associated with positions in those relations remain fundamental in that the rights are presented as flowing from the demands of those duties and an account of the worth of human beings that is tied to their fulfilling social responsibilities. This ethical outlook can be interpreted as providing support for an independently-elaborated conception of human rights without relying on the idea that persons as fundamentally choosers of their aims, or that obligations are self-imposed, or that individuals have special worth or dignity because they possess a capacity to formulate and revise their aims.

Once more, I do not say that we can “find” a conception of human rights in this ethical tradition. Instead, there are ways of elaborating an ethical outlook that is nonliberal in its conception of the person and political society, but that also consistent with a reasonable conception of standards to which political societies can reasonably be held. Similar elaborations can be (and have been) developed for other ethical traditions.

Thus consider, more briefly, the case of Islam.<sup>19</sup> Here, in contrast with Confucianism, persons are not conceived of as in the first instance members of groups or a community. Instead, individuals are the ultimate locus of responsibility and accountability: “And fear the day when ye shall be brought back to Allah. Then shall every soul be paid what it earned, and none shall be dealt with unjustly.”<sup>20</sup> Or again: “But how will they fare when we gather them together against a day about which there is no doubt. And each soul will be paid out just what it earned” (3:25). And “On the day when every soul will be confronted with all the good it has done and all the evil, it has done, it will wish there were a greater distance between it and its evil” (3:30). Moreover, the fundamental duty of commanding right and forbidding wrong is assigned to individuals: “command right and forbid wrong, and bear patiently whatever may befall thee” (31:17). In his study of this duty, Michael Cook says that it assigns to “each and every legally competent Muslim an executive power of the law of God.”<sup>21</sup>

Nevertheless, trouble for an idea of human rights might be seen as emerging from a way of interpreting the fundamental conception of God as sovereign.<sup>22</sup> Thus suppose we think of God as exercising His authority by setting down strictures (expressed in shari’ah) that provide a fully detailed specification of the right way to live, a dense order of requirements that determine, for every

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<sup>19</sup> For an illuminating discussion of approaches to interpretation within Islamic law, see Wael B. Hallaq, *A History of Islamic Legal Theories: An Introduction to Sunni Usul Al-Fiqh* (Cambridge: Cambridge University Press, 1997), esp. chap. 6, which describes both contextualist/historicist and holistic styles of interpretation.

<sup>20</sup> *Qur’an*, 2:281.

<sup>21</sup> See Michael Cook, *Commanding Right and Forbidding Wrong in Islamic Thought*, p. 583.

<sup>22</sup> I have been helped in my discussion here by Khaled Abou El Fadl, “Islam and the Challenge of Democracy,” *Boston Review* (April-May 2003).

circumstance of choice, the right way to act.<sup>23</sup> Suppose, too, that God has created human beings with the intellectual capacities required for understanding those requirements and also with the exalted status of vicegerents (2:30), who are assigned among others, an obligation to promote justice: not simply to act rightly, but also to “command right and forbid wrong.” Now it might be argued that fulfilling this obligation, which is assigned to all, actually requires a variety of basic rights: that if individuals are to fulfill the moral demands of vicegerency, by forbidding wrong and promoting justice, they must have rights of expression and association, and perhaps rights of participation, as well as the circumstances of health, education, and security that are preconditions for fulfilling their obligations. But that attractive conclusion does not follow so easily. For the contents of right and wrong are given in the first instance by the densely ordered strictures of this non-latitude God. So the submission to God’s will that is Islam arguably consists in individual rectitude and an enforcement of the rectitude of others, where rectitude involves compliance with those strictures, as expressed in some formulation of shari’ah. And although God “careth for all” and is “truly the cherisher of all,” “Allah loveth not those who do wrong” (3:57).<sup>24</sup>

This line of thought suggests, in barest outline, a case from within Islam that works against the idea that political societies must ensure conditions of social membership for each person. It seems instead to favor extending basic

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<sup>23</sup> See Kevin Reinhart’s Introduction to Laleh Bakhtiar, *Encyclopedia of Islamic Law: A Compendium of the Major Schools*, p. xxxiii.

<sup>24</sup> Qutb’s account of freedom of conscience and responsibility seems to be of this kind. See Sayyid Qutb, *Social Justice in Islam*, trans. John B. Hardie (Oneonta: Islamic Publications International, 1953). Thus freedom of conscience is a matter of, among other things, freedom from false worship, fear (of death, injury, and humiliation), and false social values (pp. 53-68). And each person has a personal responsibility to “cleanse and purify” his appetites and “make them follow the path of righteousness” (80). The fundamental metaphysical idea in Qutb’s view—his idea of the absolute unity of existence—appears to limit any role for basic human rights.

rights only for those who can be expected to act rightly—freedom of opinion for those with correct opinions, freedom of assembly for those who assemble to forbid the wrong.

But an alternative elaboration of these fundamentals suggests a different conclusion. Three points are essential to the alternative. The first is a distinction between the true propositions of law—that is, standards of right conduct—as set down by God and historically-situated human interpretation of those laws, which is both fallible and contextual. Failure to acknowledge and give sufficient weight to the distinction between law and human interpretation is a form of idolatry, a failure to distinguish sovereign and vicegerent. But drawing the distinction creates space for the disagreement and error that inevitably comes with the territory of human interpretive activity, and also for efforts to improve understanding of right conduct and reinterpret those requirements under changed conditions.

The second is a distinction between human responsibility—to seek to understand what is right and provide moral instruction—and God’s responsibility—to enter final judgment on the sincerity of belief and righteousness of conduct. Associated with this is the principle that there is to be “no compulsion in religion” (2:256). Usurping final judgment is another form of idolatry: “can they, if Allah wills some penalty for me, remove his penalty? Or if he wills some grace for me, can they keep back His grace” (39:38). By accepting these two distinctions—while also acknowledging the commanding responsibility to command right and forbid wrong—we have a case for wider assurances of basic rights, as conditions of membership, rather than for extending them only to those

who have what are presumed to have correct beliefs, as given by some interpretation of shari'ah.

The third idea is that a diversity of religious communities is a natural human condition: “To each among you have We prescribed a law and an open way. If Allah had so willed he would have made you a single people. But His plan is to test you in what He hath given you; so strive as in a race in all virtues. The goal of you all is to Allah; it is He that will show you the truth of the matters in which ye dispute” (5:48). If the first two points suggest a basis for a wider extension of rights within an Islamic community, with diverse interpretations of the law, the third suggests a basis for supporting a doctrine of human rights with global reach.

### **3. Substantive Minimalism**

I have been sketching a way to interpret the idea of justificatory minimalism, as neither skeptical nor empirical, and showing how the autonomous formulation of a conception of human rights might enable it to win support from a range of ethical and religious conceptions. What then about substantive minimalism? Does autonomous formulation lead to the minimalist focus on rights associated with personal security?

I have provided a partial answer already, by distinguishing justificatory minimalism from a search for de facto points of overlap. Substantive minimalism may seem straightforwardly plausible as a statement about the overlap of competing ethical outlooks. But its plausibility diminishes on the account of justificatory minimalism I have suggested here.

To pursue the question further, however, I need first to enter a point of clarification. I have been identifying substantive minimalism with the view that human rights are essentially confined to rights of bodily security, or, more generally, to the rights that are required “for any kind of life at all.”<sup>25</sup> Minimalism, thus understood, is not the view—endorsed, for example, by Rawls in *Law of Peoples*—that human rights are only a “proper subset” of the rights embraced by any of the reasonable views of justice for a democratic society.<sup>26</sup> More precisely, substantive minimalism is one instance of the proper subset view, but other instances of it embrace a more expansive set of rights than minimalism—say, rights to an adequate standard of living, and to adequate levels of health and education—though not a full complement of liberal-democratic rights—say, not full equality of political rights.

There are, I think, good reasons for endorsing the proper subset view—for thinking that standards of human rights should be different from and less demanding than standards that we endorse for our own society. But these are reasons that operate from within an autonomously-formulated conception of human rights, and reflect the values associated with that conception. They are not the results of a search for de facto points of intersection among competing ethical outlooks. And they do not lead to minimalism.

Suppose, by way of example, that you endorse the first principle of Rawls’s theory of justice, requiring equal liberties of conscience, expression, association, and participation. You might still, for three reasons, resist the idea that this principle should be applied to the whole world as a human rights principle, so that a society must satisfy it to be beyond reproach—for three

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<sup>25</sup> Ignatieff, *Human Rights*, p. 56.

reasons think that different norms are suited to different cases, and that, for example, an Islamic democracy with restrictions on office-holding or political party formation would not violate human rights, even if it is unjust.

First, a plausible element of any conception of human rights is a principle of collective self-determination, whose satisfaction requires that collective decisions be based on a process that represents the interests and opinions of members. Suppose that that principle is satisfied, and there are no gross infringements of other fundamental interests. Then we should resist the idea that the political society should be held to a liberal standard that is rejected by its own members and may have no real resonance in the culture, even if we think that the liberal principles represent the truth about justice. But the case for this conclusion seems stronger to the extent that the political society can plausibly claim that it does accommodate and advance the good of all its members, by providing more than minimalist guarantees of bodily security (say, in health, education, and basic economic security).

A second consideration turns on the distinction between what justice requires and what people in a society have an obligation to do. It is widely agreed that the members of a society have obligations to obey even when laws are not fully just. But if the members of a society have an obligation to obey—if the institutions meet those standards—then outsiders ought to show some reluctance to pressure for changes, and certainly a reluctance to intervene forcibly in the name of the more demanding norms of justice. So if human rights standards are standards for treating members whose violation warrants stringent

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<sup>26</sup> *Law of Peoples*, pp. 78-81.

external criticism, then the distinction between standards of justice and standards of obligation have some additional downward pressure on those standards.

A third point concerns toleration. If you endorse a liberal principle of equal liberties, such as Rawls's first principle, then you think that non-liberal political arrangements—such as an ideal Islamic democracy—are unjust. But you also endorse the idea that, on complex normative issues, reasonable people disagree: a commitment to toleration is another part of your outlook. The idea of tolerating reasonable differences suggests that the standards to which all political societies are to be held accountable will need to be less demanding than the standards of justice one endorses. This point about toleration should not be confused with an endorsement of relativism about justice: the point is that a political society can, within limits, be unjust but beyond reproach, from the point of view of an acceptable global public reason. Of course there are limits on toleration: and an aim of the conception of human rights is to set out those limits. But the observation here is simply that, once we take into consideration the value of toleration, we will be more inclined to accept differences between what we take to be the correct standards of justice—and the rights ingredient in those standards—and the human rights standards to which all political societies are to be held accountable.

Of course the value of toleration is not absolute, but it is profoundly important. And that importance owes to the connections between the respect that shows to a political society, by treating it as beyond reproach, and the respect shown to the members of that society, who ordinarily will have some identification with that political society and its way of life. Not extending toleration has serious costs, which sometimes must be paid. But the costs are real: in Rawls forceful

words, “lapsing into contempt on the one side, and bitterness and resentment on the other, can only cause damage.”<sup>27</sup> And they operate to create some distance between the requirements of justice and the rights that are part of a doctrine of human rights.

But while these three considerations all work to reduce the requirements of human rights with respect to the requirements of justice, none of them leads to substantive minimalism. Indeed the first point—about collective self-determination—suggests something very different: that the rationale for not insisting that international standards match standards of liberal justice is that such insistence would be incompatible with collective self-determination. But the requirements of collective self-determination—whatever their precise content, and while they are less demanding than norms of democracy—extend well beyond the demands of minimalism. For example, any reasonable conception of collective self-determination that consistent with the fundamental value of membership and inclusion, will—as with the Declaration and the Covenant on Political and Civil Rights—require some processes of interest representation, even if not equal political rights for all.

#### **4. Conclusion**

To conclude: justificatory minimalism aims to avoid imposing unnecessary hurdles on accepting an account of Human Rights (and justice), by intolerantly tying its formulation to a particular ethical tradition. It is left to different traditions—each with internal complexities, traditions of argument, and (perhaps) canonical texts—to elaborate the bases of a shared view of human rights within

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<sup>27</sup> *Ibid.*, p. 62.

their own terms. To be sure, it is desirable that that view be capable of winning wide support, from different ethical traditions: “international human rights norms,” as An-Na’im says, “are unlikely to be accepted by governments and respected in practice, without strong legitimation within national politics.”<sup>28</sup> And such legitimation has at least in part to do with the availability of a justification within different religious and ethical traditions.

But we do not specify the content of doctrine by looking to those traditions, taking them as fixed and given, and searching for points of de facto agreement. Instead, we hope that different traditions can find resources for fresh elaboration that support a doctrine of justice and human rights that seems independently plausible as a doctrine of global reach. That, and not substantive minimalism, is the best we can hope for. Or at least it is something we may reasonably hope, consistent with a theoretical knowledge of human pluralism and a moral commitment to respecting it.

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<sup>28</sup> “Islam and Human Rights: Beyond the Universality Debate.”