

HUMAN NEEDS AND JUSTICE: THE CASE AGAINST REALISM

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Abstract: *Contrasting idealism and realism, the author of this article attempts to secure at least one component of distributive justice, namely recognition of rights grounded on basic needs in terms of rights stricto sensu. In the case of realism, this objective is defeated beforehand for reasons that link the position with the doctrine of logical correlativity. By choosing this strategy, however, exponents of realism are doing themselves a disservice. The case against realism includes a criticism on the basis of its own premises, with a view to facilitating corrections of the analysis of the relevant subset of economic/social human rights. It will appear that the theoretical disintegration of realism boils down to one and the same problem: the absence of a distinction between rights-recognition and rights-protection.*

Keywords: *Claim-rights, justice, ethics, idealism, logic, ideology, economics, realism.*

A. INTRODUCTION

Although a non-skeptical pro-rights philosopher, I readily admit that rights do not exhaust the domain of justice. There is more to justice than rights. Other considerations may outweigh rights in circumstances where political disagreement has caused a crisis of legality, thus making rights non-trumps. Following Jeremy Waldron, I concede that justice typically demands majoritarian decision-making procedures that can settle the issue of which rights there are or ought to be *without a priori limits* on the outcome.¹ At the same time, I realize that this is a potentially radical position, which is consistent with a no-rights declaration.² Such a risk is, however, unacceptable in the case of basic need-rights. To deny these is to permit people to go without the things that are necessary for their proper functioning and, more importantly for

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¹ Jeremy Waldron: *Law and Disagreement* (1st ed., Oxford: Clarendon Press 1999) 303.

² As pointed out by James W. Nickel, rights can be rendered non-trumps through non-compliance, which affects their fulfillment or enforcement. On the other hand, a no-rights declaration entails non-existence or non-conferment so as to say that (alleged) rights are rendered null and void. Analytically, therefore, the notion of non-trumps can be subsumed under rights-protection, be it primary protection (cf. fulfillment) or secondary protection (cf. enforcement), whereas a no-rights declaration is the outcome of a decision at the level of rights-recognition (cf. conferment). See James W. Nickel: *Making Sense of Human Rights. Philosophical Reflections on the Universal Declaration of Human Rights* (1st ed., Berkeley: University of California Press 1987) 16-19.

the sake of philosophical argument, to invoke certain premises that neither substantiate, nor warrant the implied loss of rights. The error in question is made by the type of theorists who swear allegiance to realism. Very briefly, this is the position whereby economics determine norms, including legal rights. While I intend to show that there is an irreversible leap from the logical to the ideological in the case of realism, I also want, in one sense at least, to give the realists as much credit as I can by providing a careful account of the principles that guide their procedures for rights-recognition. That said, my main hypothesis, namely that realism is a position that cannot escape theoretical disintegration, is also complemented by a preliminary defense of basic need-rights as candidates for the class of legal claim-rights. Given that claim-rights are ascribed status as rights *stricto sensu*, the contrast with realism can hardly be made any sharper. Furthermore, the principles I advance presuppose rather than cancel the distinction between rights-recognition and rights-protection. The last-mentioned points to a key difference between realism and the alternative position, which is best described as idealism. This is particularly so because – being anchored in ethics or morality – the implied principles serve as checks and balances on the legitimacy of legal, political and economic decision-making procedures.

While the next two sections present the main framework for the pro-rights hypothesis, the most dangerous challenge, namely the one that exponents of realism pose, will be discussed later. If basic need-rights can be disqualified, idealism fails. However, if idealism can rescue basic need-rights in terms of claim-rights, realism is defeated as a consequence.

B. IDEALISM

1. BASIC NEEDS

On the premises of idealism, basic need-rights, which belong to the core of economic and social human rights, are real in one important sense. This is to say that they exist, in the first instance, as fundamental moral rights; and that they, because of the nature of the interests involved, ought to be made legal claim-rights. The force of the term “ought” is not diminished by references to the exclusive place in the (rights-)hierarchy that is reserved for claim-rights as rights *stricto sensu* and, for the same reason, as rights *per excellence*. To the contrary. It is because claim-rights occupy the place that makes them primary carriers of the meaning and role of rights that rights *stricto sensu* are well-suited for the purpose of match-making.

Note that I use Joel Feinberg’s criteria for no-rights, to denote either mere claims which, unlike claim-rights, have no correlative duties; or demands which, unlike claims, have no moral basis in desert; or ideal directives which are morally justified principles that contain no potential as rights *stricto sensu*, that is, claim-rights; or *prima facie* rights which are both weaker or lower than claim-rights and which are *expressis verbis* conditional on the circumstances. See Joel Feinberg: *Social Philosophy* (1st ed., New Jersey: Prentice-Hall, Inc 1973) 68-75, 84-88.

³ David Wiggins: *Needs, Values, Truth* (3rd ed., Oxford: Clarendon Press 1998) 10.

⁴ *Idem*.

If the relevant subset of economic and social human rights arguably enables the holders to remain in the image of the species, this is the strongest possible support. But, while the pro-rights hypothesis aims at legalization as a goal, claim-rights per se cannot be reduced to the outcome of codification. Claim-rights transcend the legal sphere. Furthermore, it is the conceptual and normative features from moral claim-rights that are used as a model for their legal counterpart. The line of reasoning that characterizes the idealists' position is one that relies on moral principles as the ultimate sources of basic need-rights. However, in so far as basic needs can be said to be co-founders of rights, it is paramount to first give an account of the needs themselves. For this purpose, I draw on some of the insights from David Wiggins who uses the logic of extensionality to define a singular notion of needs and, furthermore, differentiate needs from wants.

Concerning basic needs, these constitute absolute cum objective and universal facts.³ As such, they are knowable by their own possessors, i.e., human beings. Furthermore, basic needs delineate a realm of necessities that apply independently of any beliefs about the status of the needs in question. By putting the criteria for credentials-checking on a formula, the ontological and epistemological parameters can be further explicated as follows.

If X is a basic need, then X is something which the need-holder, Y, cannot be or do without, without at the same time, suffering serious harm (cf. the harm condition). Furthermore, it holds that (if X is a basic need, then) X is something which Y, or anybody else for that matter, is unable to change by changing the way he thinks or feels about X (cf. the immunity condition).⁴ It is not possible to un-need X just through choosing to believe (per Waldron, to hold the view) that, e.g., "X is a myth."

In the light of this, it is unproblematic to claim that the general norm for humanity encompasses all the things that the majority of the members of *homo sapiens* cannot be or do without *simply because* they are who they are. Paradigms include nutritious food, clean water, unpolluted air, sleep and similar physiological needs.⁵ Other examples, which qualify as needs that are just as basic, belong to the class of what might be called developmental human needs.⁶ For example, most human beings are born with the capacity to develop into rational and autonomous agents – which is what is commonly taken to be part of the concept of the adult – and, consequently, children and adolescents have a need to receive the things that facil-

⁵ In international law, no human right to sleep or other necessities that are indisputable, for example, excretion or, to accommodate Johan Galtung's approach, to public facilities that grant people easy, free and unhindered access in the case of (urgent) need, has been recognized. By the same token, there exists no qualified human right to unpolluted air or, for that matter, clean water. This suggests a need for legal reform. See Johan Galtung: *Human Rights in Another Key* (Oxford: Polity Press 1994).

⁶ The developmental needs have a higher degree of generality than those which characterize some elderly people, such as the need for a walking stick, a wheelchair, etc. The last-mentioned could be called third age needs since they apply to the late stages of life. Contrary to developmental needs, however, these depend upon a wide range of societal and individual factors (work conditions, life style, environment, etc.) and, for the same reason, they must be relativized in accordance with the same factors. This is not the case with developmental needs. They apply to everybody everywhere, that is, every child or adolescent regardless of time, place and circumstances. That granted, it is possible to talk about "special needs" for younger members of the species. If so, the terminology presupposes a disability.

itate the process that places them within the norm, such as nurture, training and education.

The truth about humanity is that its members cannot function properly qua human beings, unless their basic needs are met. If these needs are not met, proper functioning will either be impaired temporarily or discontinued entirely, resulting in death. In both cases, the dysfunction constitutes serious harm.⁷

The definition of basic needs is empirically optimized. It is the closest approximation to reality. Any alleged need can be tested, respectively, verified or falsified as a fact. For example, if five-year-old Fatima is hospitalized in shock on account of diabetes, not administering insulin to her will suffice as a test to prove the link between need and harm. Empirically, the need for insulin stands – regardless of what Fatima or other people believe. Furthermore, both the type of need in question and the measure for its fulfillment are tied to medical care. It is insulin that Fatima cannot do without. Christian Scientists would disagree, of course, and instead propose prayer as the only possible cure for diabetes. While medical scientists may wish to be open-minded, the limit still has to be drawn by considerations to do with Fatima's bodily well-being. Unlike insulin, prayer has not been proven effective. It is true that while needs are knowable, some may actually be subject to future discovery.⁸ But, the method for demarcating good and bad scientists will continue to be based on the evidence they provide. As it happens, empiricism belongs among the most authoritative truth-recognition technologies in history, according to Felipe Fernández-Armesto.⁹

Regarding types of needs and measures of fulfillment, there is room for trans-categorical classifications. For example, if eighty-five-year-old Mrs. Smith suffers from dehydration, providing her with water is tantamount to remedying an imbalance in the human organism that would occur in *anybody* whose daily fluid intake drops below a certain amount. The point is that dying from thirst or, for that matter, starvation is typically not perceived in terms of a medical diagnosis per se, subject to certain qualifications. If, for example, the cause of being seriously underweight is bulimia or anorexia nervosa, the affected individual can be described as a hospital patient rather than, say, a poor person who does not have the money to buy food. For the same reason, the implied needs and measures would have to be revised so as to accommodate the relevant pathology. The hospital patient is “sick,” not the poor person.

It is important to note that subjectivism and relativism have no application in the case of basic human needs. If, say, food were an individual preference subject to choice (cf. subjectivism), people who are starving could save themselves simply by replacing their food pref-

⁷ The link between death and serious harm should be qualified. To be human is to be mortal and therefore death is part of the norm for humanity. For the same reason, it could be argued that third age needs do not belong to the class of basic human needs. To maintain the opposite is to challenge the final fate that Mother Nature has built into the natural constitution of everybody everywhere. Even assuming growing old is, by analogy with growing up, about realizing inherent human potentials, to (eventually) die is to comply with the norm.

⁸ The history of the discovery of needs shows how description is often one step behind reality. In illustration of this, see Kenneth J. Carpenter: *The History of Scurvy & Vitamin C* (1st ed., Cambridge: Cambridge University Press 1988).

⁹ Felipe Fernández-Armesto: *Truth. A History and a Guide for the Perplexed* (1st ed., New York: St. Martin's Press 2001) 5-6.

erence with a no-food preference, something which they do not have the power to do, being who they are. Furthermore, if it were true that basic needs vary from one belief system to another in accordance with time, place and circumstances, then the human species itself must be shown to vary accordingly. In other words, relativists would have to prove the impossible.

OTHER NEEDS

That granted, there are absolute cum individual needs, as well as absolute cum cultural or social needs.¹⁰ Both types of needs are either less basic or non-basic. But, because they comply with the requirements of the functionalistic formula, they should be recognized. In other words, there are things without which *that particular individual* cannot function properly being who he is, just as there are things that constitute necessities for people in order to be able to function properly *qua members of that particular culture or society*. For example, it makes sense to claim that “The musician, Mr. Henderson, needs a new violin (otherwise he will suffer harm in his individual capacity).” Similarly, it is true that “Women in Iran need a headscarf” because that is what the norms of the relevant society prescribe. If women do not cover their head in the public domain, they will not be perceived as being “one of us.”¹¹ Instead, they belong elsewhere.

To accommodate individual and cultural/social needs, absolutism only has to qualify one aspect. While they apply objectively, they do not apply universally. In other words, individual and cultural/social needs stand – regardless of what the need-holder/s or, for that matter, all other people who are either unconventional or complete outsiders think or feel. Consequently, by testing need-statements as either true or false propositions, disputes can, once again, be settled on the basis of empiricism.

NEEDS AND WANTS: A GENETIC SIMILARITY

Analytically, all needs contrast with wants – as well as desires and preferences – on the basis of considerations to do with their status (cf. the systematic aspect) as opposed to their origin (cf. the genetic aspect). Unlike needs, wants – as well as desires and preferences – come and go in accordance with the beliefs, opinions or feelings of particular individuals. It follows that if I want X, then X constitutes a want because I am in favor of having X. This entails that subjectivism applies to the relevant category. As groups are also in a position to determine what “we want,” relativism too has a pull.

Because wants depend on the beliefs, opinions or feelings of their holders, the immunity condition is cancelled. Furthermore, want-holders do not suffer harm through non-fulfillment, although they may want X to the extent where it is true for me or for us that “Without X, harm will follow.” In reality, however, this is not the case. If X constitutes a want, then not having X will, at worst, result in frustration, a sort of mental discomfort which can be discontin-

¹⁰ Wiggins, *supra* note 3, at 11.

¹¹ According to Gilbert Harman’s analysis of relativism, people who visit another culture are not obligated to follow the normative prescriptions that prevail in the relevant place, at least not if the prescriptions refer to conventional morality or ethics as opposed to etiquette. According to his account, principles deriving from conventional morality bind insiders, not outsiders. See Gilbert Harman: *The Nature of Morality. An Introduction to Ethics* (1st ed., New York: Oxford University Press 1977) 112.

ued by ceasing to (erroneously!) perceive *X* by analogy with a need. In actual fact, many wants are so non-hard, if not superfluous, that their holders would be better off if they used their needs as demarcation criteria for their wants. Such a rational approach would be harm-reducing in so far as it can be ascertained empirically that people often want things that are not good for them. If, for example, smokers changed their mind about cigarettes upon learning the statistics about lung cancer, the resulting (want) conversion would translate into a benefit for humanity.

In the final analysis, choice is the origin of wants. More importantly perhaps, this feature is shared by needs that apply to that particular individual and/or group. If statements are purely subjectivist and/or relativist, it holds that “It is *true for me* that I need *X*” and/or “It is *true for us* that we need *X*” in spite of the fact that things could be different for me as an individual and/or for us as a group. This suggests that there are alternatives to the current state of affairs. The needs do not have to be, they do not describe irrevocable necessities, although the implied measure of freedom competes with the powerfulness of the majority in the case of relativism. Unlike individual needs, cultural/social needs involve a numerical factor that one person cannot rise above unless, that is, he chooses to rebel, to not conform to *their way*.¹² However, the cultural/social needs themselves will continue to exist as long as there is sufficient support from the group as a whole. If most members decide to dismiss the norms from which the needs are derived, the world will be transformed, at least in one sense. This is to say that the change, whether radical or moderate, results in “a new way” that alters the form of existence within a given culture of society accordingly.

BEST PRACTICES IN TERMS OF BEST DECISIONS

The various need-classifications open up for two main positions pertaining to negotiations and, per Waldron, settlements. First, advocates of strict universalism argue that if basic and less basic needs compete, the interest in fulfillment of basic needs should be promoted as a First Priority (Principle). Having an identity as that particular individual and/or group not only involves rank-ordering one’s beliefs in accordance with ends (one aspires to) and means (with which to accomplish the ends), but also capacities.¹³ In other words, if that particular individual and/or group, be it a culture, a society or a sub-group within a culture or a society, ignores humanity in the process of defining values, the way that is constructed cannot but fail in the moral sense, however authentic and unique for that particular individual and/or group. It follows that subjectivism and/or relativism *must be consistent with* objectivism/universalism in order to be deemed appropriate. It should be observed that using objectivism/universalism as a measurement for morality is not something that excludes pragmatic reasoning. As it happens, the relevant notion of appropriateness is connected with a requirement for effectiveness whereby rights-protection should be with a specific view to maximization of security for humanity. In this manner, pragmatism is in the service of idealism, meaning that fulfillment or enforcement of rights is based on the assumption that the rights themselves are what they ought to be. This, in turn, entails a distinction between law and morality. For the

¹² It is observations of this nature that prompt Fernández-Armesto to declare that relativism is tantamount to majority tyranny. See Fernández-Armesto, *supra* note 9, at 165-166.

¹³ Alan Gewirth, *Self-Fulfillment* (1st ed., New Jersey: Princeton University Press 1998) 25, 40.

purpose of democratic legislation, therefore, parties with a direct mandate (cf. elected lawmakers) are duty-bound to see to it that the body of legal norms accords with the principles that summarize morality in the context of needs and rights.

Exponents of the second position counter-argue that humanity incorporates the cultural/social dimension. For the same reason, the distinction between basic and less basic needs is misleading. This is to say that the way in which people exist within a group defines humanity just as much as the fact that they need food in order to survive. The diversity that results should be accommodated normatively. Because the legitimacy of a representative democracy depends on acceptance and tolerance as core values, this system secures the foundation for ethically sustainable interaction. Locally, regionally and nationally, groups must treat each other accordingly, not stigmatize others as being inferior. The same is true of inter-state relations. Instead of cultural imperialism, equality should prevail. It is wrong to, for example, judge others – one has no right thereto. Why? Because others have a (fundamental) right to be free to be who they are and, as a consequence, to be free from external criticism, censorship or other attempts to disrupt or interfere with *our way*, including military intervention. Moral imperfections do not exist. There is no such thing as a “bad group,” only a “different group.” It follows that humanism functions as a position that pushes differences to the relativist extreme. By not only presupposing that each way is a priori morally valid, but also that the sum total of differences adds to the good of the world, the extreme becomes indistinguishable from radical pluralism.¹⁴ For the same reason, the regulations and limits that objectivism/universalism formulate have no pull unless, of course, the mindsets of different people in different places happen to coincide

In principle, the prescriptive carte blanche is also granted individuals. To avoid oppression, liberty should be distributed to each and every individual, perhaps with the exception of those who are unable to function as norm-givers in self-regarding matters, e.g., children. If so, the position is consistent with traditional liberalism, as formulated by John Stuart Mill.¹⁵

¹⁴ On Len Doyal and Ian Gough's account, radical pluralism is primarily an instrument for reform, that is, for democratization of the system. See Len Doyal & Ian Gough: *A Theory of Human Need* (1st ed., New York: The Guilford Press 1991) 17.

¹⁵ John Stuart Mill: *On Liberty and Other Essays* (John Gray ed.) (1st ed., Oxford: Oxford University Press 1991) 104-128.

On Mill's premises, people who lack rationality and autonomy are not subjects of liberalism, meaning that they do not have the capacity to function as norm-givers in self-regarding matter. In this case, liberalism is replaced by paternalism.

Concerning consideration or respect for others, traditional liberalism imposes two limits on the capable individual's liberty or freedom to act. If the individual's action (1) deprives others of their equal freedom or (2) inflicts harm on others, that same action falls outside the realm of that which is permissible.

As for the transition from acceptance and tolerance for groups to acceptance and tolerance for individuals as norm-givers, it should be noted that because it is difficult to determine what it takes to constitute a group (two individuals, three, more?), the distinction between relativism and subjectivism may not be sharp and significant. The point is that relativism may collapse into subjectivism.

2. RIGHTS

Consulting international law, radical pluralists can point to a list of human rights that, in their own view, support their interpretation and approach, ranging from group-rights to national sovereignty and self-determination, to rights to freedom of association, freedom of thought, conscience and religion, and to hold opinions without interference.

From the point of view of idealism, resorting to the law as a means of criticism of morality is an unacceptable strategy, which is also precluded by modern and moderate versions of legal positivism.¹⁶ The fact that international law confers rights that accord with subjectivism/relativism does not prove that basic need-rights are pseudo-rights or, alternatively, of secondary importance. Furthermore, the same law secures rights-recognition for several of the things that previously were listed as basic needs, including food and medical care, subsuming these under respectively the right (of everyone) to an adequate standard of living and the right (of everyone) to the enjoyment of the highest attainable standard of physical and mental health. This makes it necessary to describe international law as a mix or combination of objectivism/universalism and subjectivism/relativism, in essence, of social/economic and civil/political human rights. However, the point is not about description. Rather, the point is that *irrespective of what the law says*, the needs that belong under objectivism/universalism should be treated as foundational platforms for rights-conversions. A law with civil/political rights but without economic/social rights is inadequate even in circumstances of consensus among the majority of the states parties that have the political power to ratify or accede to international treaties. What matters – for rights – is morality. If theorists refer to customary international law in order to substantiate the thesis that morality too is just a majority issue, idealists would oppose this by pointing to the fact that the implied morality is of a conventional type, one that is ultimately based on the notion of normal state practice, that is, the way that most states act in the real world. On the premises of idealism, the entire international community may act in a way whereby, for example, (it is true for all of us that) “Torture is permissible,” and yet each and every state is still obligated to abstain from torture if this practice violates certain principles that are required by morality; and it does.

As a component of idealism, humanism derives its values from moral principles that mediate the relationship between needs and rights. Furthermore, the principles make the human rights terminology indispensable.

Basic needs, so it holds, are co-founders of fundamental cum human rights in that the Harm Principle links these facts (cf. reality) with norms (cf. morality).¹⁷ Because the argument is not directly from needs (from what “is”) to rights (to what “ought” to be), there is no risk of committing the so-called naturalistic fallacy.¹⁸ At the same time, it is true to say that

¹⁶ Herbert L. A. Hart: *The Concept of Law* (1st ed., Oxford: Clarendon Press 1961) 163, 181.

¹⁷ In traditional liberalism, the Harm Principle is a norm that functions to limit freedom of action in relation to others. See *supra* note 15.

¹⁸ For a philosophically thought-provoking account of the “is-ought” problem as one that can be resolved by considerations to do with the logical structure of action, see Alan Gewirth: *Reason and Morality* (1st ed., Chicago: The University of Chicago Press 1978) 16, 102.

harm functions as a bridge-concept to the extent that it helps give direction to morality. The general norm for humanity, viewed as a factual norm, delivers the materials that are common to our species. In and of itself, it does not prescribe conduct or behavior. Normativity in the strict sense does not enter into the equation until morality is treated as something that determines humanity as a value. Furthermore, when idealists claim that basic need-rights are real, the term “real” is primarily used to invoke the substance of the moral reasoning behind rights, as will be detailed below.

CREDENTIALS-CHECKING

Theoretically, it is the opposite of harm which forms an integral part of the definition of rights. This is to say that in order for something to count as a right the object of this must, as a necessary condition, constitute a benefit. Using Neil MacCormick’s word, “a law which is conceived as conferring on members of class C a right to treatment T, is envisaged as advancing the interests of each and every member of C on the supposition that T is (normally) a good for each and every member of C.”¹⁹

It should be observed that the qualifying term “normally” has no bearing on the question of logical consistency. If X has a recognized right to receive a bag of peanuts, X, being allergic to peanuts, will experience the enjoyment of the right involved as a source of potentially serious harm rather than a benefit. In all normal circumstances, however, the right to a bag of peanuts counts as a benefit – especially if there is no other way of meeting people’s basic need for proteins.

However, the notion of a benefit is not a sufficient condition. If and only if the object promotes the good of the intended recipient as an end in himself, is it correct to state that X’s right to T has been established. This point is crucial.

To determine whether benefits create entitlements, one particular question must be answered in the affirmative: will the benefits be provided or delivered for the right reason? In the context of basic needs, it holds that the interest in well-being must be promoted without, at the same time, reducing that same well-being to a means merely for other individuals or for social utility. Without such respect, construed along the lines of Immanuel Kant’s philosophy, there can be no rights.²⁰ Slaves receive food, water, shelter and clothes, but not for their own

¹⁹ Neil MacCormick: *Legal Right and Social Democracy. Essays in Legal and Political Philosophy* (1st ed., Oxford: Clarendon press 1982) 164.

²⁰ The Respect Principle is identical with Immanuel Kant’s categorical imperative.

On analysis, there are three formulations of the categorical imperative: (1) “Act only in accordance with that maxim through which you can at the same time will that it become a universal law; (2) “So act that you use humanity, whether in your own person or in the person of any other, always at the same time as an end, never merely as a means;” and (3) “So act that you think of yourself as legislating universal laws through your maxims.” According to Christine M. Korsgaard, the three formulations “are equivalent.” They can be referred to as, respectively the Principle or, per Korsgaard, Formula of Universal Law, the Principle/Formula of Humanity, and the Principle/Formula of Autonomy or the Kingdom of Ends. See Christine M. Korsgaard: “Introduction”, in Immanuel Kant: *Groundwork of the Metaphysics of Morals* (Mary Gregor, ed. & trans.) (1st ed., Cambridge: Cambridge University Press 1998) xxii-xxv.

For an elaboration of Kantian respect as an analytical feature of human rights, see Anja Matwijkiw:

sake. Instead, they receive such essentials for subsistence so as to enable their masters to take advantage of them, to exploit them for their own ends.

Disrespect for fellow human beings translates, using moral terms, into a lack of decency. This, in turn, adversely affects the victims' dignity on the basis of humanity. Both decency and dignity have applications that extend beyond the case of slavery. Therefore, human rights ethics demands compliance with other principles besides the Harm Principle and the Respect Principle.

At least two additional principles play a role in the transition from needs to rights. One of these prescribes that "You should not discriminate against others on the basis of facts, traits or characteristics that the individuals or groups of individuals in question did not have a fair opportunity to acquire or avoid." According to this Fair Opportunity Requirement and Principle, wrongful discrimination and therefore indecent or undignified mistreatment occurs in those cases where victims can be said to lack the control or power to un-choose the relevant facts, traits or characteristics in accordance with their own subjectivist or relativist preferences.²¹ In other words, a serious injustice is done to people who are unable to, as it were, recreate themselves, but are yet denied respect (on the basis of humanity). For the purpose of rights-recognition, the point is that the rights that correspond to basic needs must be equal and universal. Irrespective of the concrete objects of the rights, they are always claims to fairness on behalf of everybody everywhere. More precisely, they are claims to absolute distributive justice, as a minimum, at the level where holders of human rights are appointed. It does not make sense conceptually and normatively to confer or recognize basic need-rights without using humanity simpliciter as a criterion. Technically, this is to say that the notion of humanity should not be specified by references to other qualities, such as rationality or autonomy.²²

"Rights for the Sake of the Individual as an End in Himself" (2000) 3-4 *Tidsskrift for Rettsvitenskap* [*Journal of Legal Science*] 738, 757. For an application that is tailored to the right to truth, see Anja Matwijkiw & Willie Mack: "Making Sense of the Right to Truth in Educational Ethics: Toward a Theory and Practice that Protect the Fundamental Interests of Adolescent Students" (2007) 2 *Intercultural Human Rights Law Review* 329, 354.

In the opinion of Jürgen Habermas, Kant's philosophy has influenced human rights to the extent where these can be described as an essentially Kantian project. See Jürgen Habermas: "The Kantian Project of the Constitutionalization of International Law. Does it Still Have a Chance?", in Manuel Escamilla Castillo (ed.): *Law and Justice in a Global Society* (1st ed., Granada: University of Granada Press 2005) 115.

²¹ Feinberg, *supra* note 2, at 117. See also William K. Frankena: "Some Beliefs about Justice", in Department of Philosophy: University of Kansas (ed.): *The Lindley Lecture Series* (Lawrence: University of Kansas 1966) 10.

²² The humanity simpliciter criterion contrasts with the philosophy of Kant, who believes that the value or worth of individual persons is determined by (humanity *in terms of*) rationality and autonomy. See Kant, *supra* note 20, at 37, 41.

By defining humanity in terms of rationality and autonomy, Kant puts a sign of equation between (normal) adults and human beings, thus disqualifying children as right-holders, together with adults who suffer from pathological conditions that impair rationality and autonomy, such as Alzheimer's Disease. In doing so, Kant excludes a numerically significant number of people from the moral community.

Finally, the Principle of Consideration comes into force in a manner that, in one sense, logically precedes the Harm Principle, the Respect Principle, and the Fair Opportunity Requirement and Principle. The reason for this is that the Principle of Consideration commits agents to be willing to care about other people and, in practice, to at least give everybody everywhere the same consideration on the basis of important interests or needs.²³ Without this consideration, the rest of morality cannot be activated. Because of the content of the principle itself, morality requires emotionality, as well as a conscience. Without consideration, agents cannot be expected to embrace decency, respect and dignity as values and, if only indirectly, merit and desert in the case of the Fair Opportunity Requirement and Principle. Although agents possess rationality, this will not be enlightened and guided by right reason. And, this is exactly why credentials-checking for human rights must accommodate the principles that define the values in question. On the premises of idealism, the sad fact that human rights function to protect human beings *against other human beings* is taken into account. Whenever other people are not willing to extend good treatment to fellow human beings in need, human rights serve to remind them of their due. Furthermore, fundamental wrong-doing is tantamount to excommunication from humanity. If people choose to violate the Harm principle, the Respect Principle, the Fair Opportunity Requirement/Principle and the Principle of Consideration, the minimum morality behind human rights, they also choose to no longer remain in the image of the species. According to idealism, morality is a norm for humanity. The point is that everybody loses out, the victims as well as the victimizers.

3. A TENTATIVE CONCLUSION

As an antidote to the might makes right dictum, idealism emphasizes the link between morality and democracy. In a democracy, as construed on the premises of idealism, morality provides a set of checks and balances which determines the legitimacy of the system. This is not a point about a value-neutral approach. At the meta-level, democracy is pulled in one particular direction. When it comes to values, democracy subscribes to partiality, and not impartiality. This decision cannot be challenged by radical pluralists or liberalists like Waldron. On scrutiny, he is putting liberalism in the service of capitalism, be it as a national or international arrangement. However, no negative implications follow, that is, ones that might jeopardize idealism and its adoption of the First Priority Principle, which is a feature of strict universalism.

More precisely, public discourse of the sort Waldron envisions, in essence, a “noisy scenario” where “everything is up for grabs,”²⁴ does *not* prove that there are no independent (cf. objective and universal) facts and no moral principles pertaining to basic need-rights which can, if accommodated in theory, censor idiosyncratic and misguided cum ill-founded opinions of men and women, who may or may not be taking rights seriously. The point is that once we have acknowledged that rights belong to the domain of justice, we come under certain constraints as to how we talk about them, treat them in conceptual analysis, and confer them in the first place. The more fundamental rights are, the more crucial it is to get rights right. Why?

²³ Bernard Williams: *Morality. An Introduction* (Canto ed., Cambridge: Cambridge University Press 1993) 9-13.

²⁴ Waldron, *supra* note 1, at 303-305.

Because, in a context of global economic/social justice, the procedures that are utilized will decide the destiny of the worst-off, of poor people in poor places, who may not know that morality extends its norms to them. If people are unaware of that which is owed or due to them, they are ipso facto at a serious disadvantage in the political processes which Waldron proposes as procedures for rights-recognition. Adding to the problem, Waldron's type of democracy entails a notion of respect which is inextricably linked with people's capacity to function as political participants. Consequently, the rule he advocates, namely a revised version of popular majoritarianism, is bound to result in moral and, ultimately, legal relationships that stress, *not* being human, but instead being up to the task (i.e., to hold and express a view about rights, to argue for and against opinions, to vote, etc.) as a basis for a reasonable expectation of consideration and inclusion, which is also the principle that "lies at the heart of the idea of rights."²⁵ It is this conclusion that makes it questionable whether Waldronian democracy qualifies as a proper rule of law.

For idealists, all human beings are subjects of human rights, first and foremost, basic need-rights. In a democracy that is not reduced to a marketplace of ideas (cf. "everything is up for grabs"), basic need-rights would be exempt from competition. Instead, this domain would be regulated *as much as is possible* by well-founded opinions only. Furthermore, if opinions in favor of basic need-rights lose out, the very foundation for effective participation in the political processes is undermined – at least for the worst-off. However, put to the choice, it appears that Waldron would prefer to accept this outcome (which accords with the might makes right dictum) rather than address his own lack of consistency.

Be that as it may, there are theorists who oppose idealism by arguing against basic human need-rights per se. However short the list of basic human needs with corresponding human rights is, the theorists in question will dismiss it on the basis of the following kind of reasoning: "If no X in the real world, then no right to X." Endorsing this, they subscribe to realism. Exponents of this position maintain to be invoking facts pertaining to fulfillment of rights as valid reasons for excluding these from the law. Thus presented, realism is a widespread view, not just among philosophers and legal thinkers, but also among laymen, legislators and politicians. As for thinkers like Waldron, he seems to embrace realism as if it were a self-explanatory position that does not require any further defense.

Not a right-wing radical and certainly not a reactionary by any standards, Joel Feinberg's version of realism is suitably illustrative. In Feinberg, there is even an element of sympathy for the case. However, he will *not* convert basic need-rights into legal claim-rights.

C. REALISM

1. THE NO-RIGHTS DECLARATION

Following Feinberg, the distinction between civil/political and social/economic human rights is equivalent to the one between, on the one hand, negative and/or positive rights to non-economic goods and, on the other hand, positive rights to economic goods. Examples include the

²⁵ Ibid., at 312.

right not to be tortured and the right to a fair trial (respectively, negative and positive rights to non-economic goods), and rights to the things specified by articles 22-27 of the UN's Universal Declaration of Human Rights, among other things, to work, to free choice of employment, to rest and leisure, to periodic holidays with pay, to food, clothing, housing, medical care, education, to enjoy the arts, and to share in scientific advancement and its benefits (positive rights to economic goods).

Social/economic human rights are explicitly characterized as "rights" in "the manifesto sense" by which Feinberg means that they are claims to something which are not also necessarily claims against someone.²⁶ The reason for this has to do with the objects of the rights. As positive rights to economic goods, they are rights to things that can be in scarce supply. This is true, of course, irrespective of whether they are basic, less basic or non-basic. That granted, Feinberg has a distinction between necessities and luxuries, which is discordant with the previous identity between basic and fundamental rights. What counts as "basic needs" varies – so Feinberg argues – in accordance with the level of material wealth in a given society or nation state, S. Consequently, there may be basic need-rights to televisions, cars and telephones in the US while, at the same time, there may not be rights to the essentials for subsistence in Sudan.²⁷ In the final analysis, this need-relativization, which affects the corresponding entitlements, makes impossible a meaningful application of the terminology of human rights. Although "basic needs" are given a paradigmatic use that overlaps with things like food, medicine, housing and clothing, the (allegedly) inconstant status of such needs cannot be ignored in a critical appraisal of realism.

In the moral sphere, Feinberg concedes that (the paradigmatic use of) basic needs ground actual claims, that is, claims that are justified by the Harm Principle. Owing to this fact, the claims in question can also be treated as rights because, in the moral sphere, recognition does not depend on the practical possibility of fulfillment but, on the other hand, on human worth, understood as an attitude of respect caused by the psychological impact of regarding other people from the so-called "human point of view."²⁸ If we confer equal and universal human rights in the moral sphere, then this is because our ability or capacity to experience empathy has moved us from our own to other people's "shoes" so as to see them from their own point of view and, through that mental or cognitive exercise, we come to hold and express "You are human. Therefore, I respect you!" Needless to say, those who are unwilling to wear other people's shoes remain disrespectful, individuals who subsume differences under the notion of The Other, the one who is not like me or us. The leap from their immoral attitude to immoral action or omission of action may be a small one. If deemed worthless, the relevant people's claims to fairness or, per MacCormick, good treatment T will be dismissed.

Feinberg never cancels the inverted commas when talking about manifesto "rights" (inverted commas which are exclusive, it should be added, for this class). Furthermore, asking the question "which manifesto "rights," if any, ought to be made legal rights," Feinberg invokes the Ought Implies Can Principle for the rights that he takes most seriously, namely

²⁶ Feinberg, *supra* note 2, at 64.

²⁷ *Ibid.*, at 110-112.

²⁸ *Ibid.*, at 93-94.

²⁹ *Ibid.*, at 84-85.

“ideal rights,” that is, rights that ought to be protected as legal claim-rights.²⁹ Applying the Ought Implies Can Principle, manifesto “rights” can make the transition from actual claims to claim-rights only if the circumstances C in S are such that there is moderate abundance of the goods or resources in question. If the level of material wealth is insufficient, say, there is extreme scarcity, then this means that it is practically impossible to appoint at least one other person (besides the right-holder) as the party who fulfills the right as a matter of duty. And, if there is no duty-bearer, then this means, in turn, that it was wrong to assume that there was a right-holder in the first place. This conclusion follows because Feinberg maintains that the doctrine of logical correlativity is “unassailable” for the class of legal claim-rights.³⁰ On his own interpretation, the doctrine in question says that in order for A to have a claim-right there must – as a logically necessary condition – exist at least one other person, B, who has a duty towards A. Hence, we can derive what might be called the Duty-Principle for Rights. According to this, it holds that “rights(-recognition) if and only if duties.”

In the light of this, we can summarize and formalize realism as a position in the following manner:

The existence of legal claim-rights is conditional on the existence of other-directed correlative duties (cf. the Duty-Principle for Rights) which are, for their existence, conditional on the practical possibility of fulfillment of these something which is, again, conditional on the presence of circumstances C = moderate abundance of the goods or resources in question. Therefore, only if the circumstances C = moderate abundance, is it practically possible and, consequently, required by morality to turn manifesto claims into legal claim-rights (cf. the Ought Implies Can Principle). Realistically speaking, the two principles work together in all cases where claims qualify as ideal rights.³¹

Such are the official premises for dealing with the question “which manifesto claims, if any, ought to be made legal claim-rights.” It soon turns out, however, that manifesto claims are disqualified *ab initio* as plausible candidates for the class of ideal rights. Given the status of legal claim-rights, the exclusion is no less than a catastrophe, at least for theorists who attach importance to social/economic human rights. In the absence of claim-rights, people are deprived of that which is owed or due to them and, consequently, they can neither expect decency from others on the ground of desert, nor respect themselves.³² This suggests that, without claim-rights, everything is at stake.

Unfortunately, necessary evils and unhappy facts make it *a priori* impossible to establish a link between manifesto claims and rights. According to Feinberg, the real world is such that (1) there are many places where the goods are in such short supply that it is impossible to provide them for all who need them. Furthermore, the world is such that (2) the circumstances C can easily change so that even in places where the goods are not in short supply here and now at time *t*, the circumstances may be very different in the near future at time *t'*, that is, there may be extreme scarcity at time *t'*.³³

³⁰ Ibid., at 62.

³¹ The proposed procedures of rights-conferment are shared by some of the most prominent contemporary rights-theorists, e.g., Herbert L.A. Hart, Hillel Steiner and Onora O’Neil to mention a few.

³² Feinberg, *supra* note 2, at 58.

³³ Ibid., at 66, 95.

The fact that the circumstances C can easily change is sufficient to draw the conclusion that all manifesto claims, including those that involve basic human needs, do not qualify as plausible candidates for the class of potential legal claim-rights *other things being equal* with respect to moderate abundance in S here and now at time t. Any S, be it a rich or poor place, is empirically powerless in the sense that it is unable to make predictions and, for that reason, it cannot give future-oriented and categorical guarantees about fulfillment of rights. The (possible) risk of failing provision of the goods or resources that are necessary in order to fulfill basic need-rights, thus inviting (possible) conflicts and exceptions, signifies that manifesto claims cannot satisfy the condition of absoluteness.³⁴ Because negative rights are rights to things that cannot, by their very nature, be in scarce supply (namely omission of action or non-interference), only civil/political human rights can, realistically speaking, qualify as candidates for the class of ideal rights defined as potential legal claim-rights.

While a claim-rights monopoly for civil/political human rights is unavoidable, this does not entail that we can now forget about social/economic rights altogether. Two cases serve to show how manifesto claims create commitments according to the circumstances.

THE CASE OF THE RICH SOCIETY

The first is the case of the Rich Society. On behalf of this, Feinberg does not hesitate to put legislators under an obligation to convert basic need-claims into *prima facie* rights. In comparison to claim-rights, *prima facie* rights are weaker or lower-ranking rights. Furthermore, as *prima facie* rights, basic need-rights are not “honoured in the breach” with apology.³⁵ The essential point is that there is no need for apology. If circumstances change from abundance to scarcity, violations cannot occur because the rights in question are, by definition, conditional on the practical possibility of their fulfillment. If there is scarcity, they automatically lapse back into mere claims. For example, if both A and B (allegedly) have a right to an apple and the circumstances change from two apples to one apple, then the rights-situation changes accordingly so that it is either A or B who has a right, and if it is A, then nobody has to say “Sorry B! We did not intend to wrong you, but we know we did...” Nobody has to make excuses. The “entitlement” has ceased to (be strong enough to) entail a duty. The risk of rights-reduction does not apply to claim-rights because even if the guarantee with which they come were set aside through conscious choice, the rights would stand in one important sense. This is to say, the political circumstances may be so that they militate against enforcement, but – in return as it were – rights are spared from reduction to mere claims in that they are still met with recognition. It is the last-mentioned characteristic that translates the situation into a violation, and this always constitutes a serious wrong; a “sacrifice of legality itself, of justice.”³⁶ It seems, therefore, that realists ascribe value to rights-recognition for its own sake.

A no-rights declaration for civil/political rights remains a possibility, but it would be deemed unacceptable by Feinberg even if it were signed by all participants of Waldronian majoritarianism. When it comes to rights, decisions must be made. Agents are forced to be

³⁴ Ibid., at 87-88.

³⁵ Ibid., at 75.

³⁶ Ibid., at 82.

selective. More precisely, they have to be realistic. Because the world is the way it is, it would be absurd to not choose civil/political rights. People cannot do without claim-rights. These invoke values that are regulated by decency and respect. In one important sense, claim-rights are necessities. Given that their fulfillment consists in omission of action or non-interference, there is no good reason to engage in the kind of permissiveness that radical pluralism allows for. Why? Because this might prove counter-productive. However, the fact that claim-rights may be deconstructed to formal protections does not prompt Feinberg to check his own position for theoretical consistency.³⁷ Furthermore, discussing just rights-conferring procedures and positive rights, the realists require that rights be “modified to be realizable.”³⁸ Ultimately, this means that the theory of human rights must give way to compossibility,³⁹ which is the technical notion for the idea that human rights depend, for their existence, upon the practical possibility of equal and universal fulfillment in S. Meta-theoretically, the real point is that economic/social justice is not on the realists’ agenda, not as a security for humanity issue anyway. This is why a no-rights outcome is *not* a moral catastrophe by any standards. What is more, prima-facie rights cannot be trumps; only claim-rights can.

THE CASE OF THE POOR SOCIETY

Feinberg’s second case is the Poor Society. Here the circumstances C = extreme scarcity. In such a society, basic need-claims can and, consequently, ought to be treated as “ideal directives,” that is, directives for present legal aspirations and policies addressed to the state and relevant parties in appropriate positions such as legislators, judges, adjudicators, and moral agents.⁴⁰ As ideal directives, basic need-claims constitute moral principles that (1) hold for the world community as a global partnership of nation states, and (2) commit each partner at home to (a) recognize basic need-claims as morally justified claims and, with this, as potential (prima facie) legal rights in S, and (b) to do their best for the values and interests involved

³⁷ Besides the opinion that negative rights are primary because they are negative, what reason is there for translating the distinction between prima facie rights and claim-rights into one between, respectively, conditional enforcement and recognition (for prima facie rights) and conditional enforcement and unconditional recognition for claim-rights? If non-interference as a duty can in fact be unfulfillable, this makes civil/political rights subject to realism.

The distinction between the two classes of rights can also be challenged by pointing to the fact that claim-rights may come into conflict. Feinberg proposes, as a way out of the implied dilemma, a redefinition of the rights-boundaries by appending exceptive clauses that serve as an “encumbrance.” The conditionality of prima-facie rights, on the other hand, hinges upon the unspecified and open-ended nature of “more urgent considerations.” That granted, Feinberg’s method does not provide a guarantee against the occurrence of future conflicts for “there is no reason why the process (of appending exceptive clauses) cannot go on indefinitely.” However low the flux factor is, it is constant. The issue is, once again, about the guarantee which should differentiate claim-rights from all other types of rights. On scrutiny, the guarantee is very problematic. See Feinberg, *supra* note 2, at 68-79.

³⁸ Hillel Steiner: *An Essay on Rights* (1st ed., Oxford: Blackwell Publishers 1994) 3.

³⁹ Feinberg, *supra* note 2, at 202.

⁴⁰ *Ibid.*, at 71.

in the claims. In a poor society, the best “will unhappily not be very much.”⁴¹ Certainly, the best amounts to nothing in terms of converting claims into legal rights, at least here and now at time *t*.

2. HOW REALISTS ERR IN RESPECT TO RIGHTS

On realists’ scheme of things, the question “which human rights, if any, ought to be made legal claim-rights?” is one which, if dealt with appropriately, invites us to ask “are the goods or resources available in *S* to meet the claims in question?” Furthermore, the link between realism and the doctrine of logical correlativity entails that legislation is primarily about duties. If rights are conferred (by realists) then we can infer, retroactively, that the condition of fulfillable duties has already been met.

Theoretically speaking, however, realism is vulnerable to serious criticism on account of the assumption that the doctrine of logical correlativity is true. In the next paragraphs, I will show that (1) the link between the doctrine of logical correlativity and realism is *not* analytical, and that (2) the result that Feinberg achieves by making the doctrine of logical correlativity an integral part of realism is completely opposite to the intended one.

Feinberg argues as if the doctrine of logical correlativity commits us to realism. The case of manifesto claims clearly demonstrates this. On Feinberg’s own account, manifesto claims constitute an exception to the doctrine of logical correlativity *because* the practical possibility of fulfillment of other-directed correlative duties is conditional on *C* = moderate abundance, something which cannot be guaranteed categorically in *S* because, again, *C* can easily change. This explains their status as claims to something which are not also claims against someone. But, the exception is no coincidence. More precisely, the exception shows how realism gets in the way of conceptual accuracy.

The doctrine of logical correlativity alone does *not* say that the existence of claim-rights is conditional on the practical possibility of fulfillment of other-directed correlative duties. Furthermore, it does *not* say that the existence of other-directed correlative duties is conditional on the practical possibility of fulfillment of these, *nor* that the practical possibility of fulfillment of duties is conditional on the presence of circumstances *C* = moderate abundance.

The doctrine of logical correlativity says something about the existence of rights in relation to the existence of duties. The doctrine says that other-directed duties exist logically prior to correlative claim-rights. That is all it says.

That is enough, though. It is obvious that realists are reading too much into the doctrine. Setting aside the alleged link between “rights(-recognition) if and only if duties” and the principle that outlines the conditions pertaining to duty-fulfillment (cf. Ought Implies Can), the doctrine of logical correlativity cannot deliver the truth that is otherwise necessary in order for realism to work as a theory that combines the two principles. This is so regardless of whether the rights in question belong to people qua citizens of a given society or nation state, *S*, or whether they are ones that people have qua their membership of the species.

⁴¹ Ibid., at 72.

In his study of national law, MacCormick discovers “at least the possibility” of claim-rights as logically prior to other-directed duties thereto.⁴² Focusing on his test-case, viz., children’s right to be nurtured, cared for, and, if possible, loved, it appears that in order for a given child, A, to have the right in question there does not have to exist, as a necessary condition, at least one other person, B, who has a duty towards A. This is to say that A’s right is *not* something that can be reduced to be a bare reflex or an adjunct to B’s correlative duty which is, at a deeper level, a logical prerequisite for A’s having the right. A does not have the right to be nurtured, etc. because B has a duty towards A. Rather, B has a duty because A has a legal (or, *mutatis mutandis*, moral) right. B’s duty exists *because* A’s right exists. Hence, the existence of B’s correlative duty is necessarily conditional and consequential upon the existence of A’s right.

MacCormick’s test-case, which concerns basic needs, is very convincing. It does not make sense to argue, for example, that “the three-month-old baby, Eric, has a right to milk because his mother has a duty to feed him.” If this were the case, the death of Eric’s mother would entail that leaving Eric on his own (so that he will perish too) is not a serious wrong – although the law is designed with a specific view to protecting children from that kind of serious harm. Even if the parental duty was redefined to include anybody in a position to help, the procedures of rights-recognition would not change. Eric loses his right if no duty-bearers are appointed, if the doctrine is true. That granted, it is exactly a universal extension of the duty which discloses the implied predicament because Eric’s temporary no-right so-called comes to function as the incentive to look for other people who are suited to stand in *locus parentis*, be it a guardian, the state or other parties. In other words, there must be more to rights than duties, and explanations of this “more” are *not* consistent with the doctrine of logical correlativity. Consequently, reasoning about rights and duties has to be reversed so that the argument proceeds from rights to duties. Furthermore, the nature of the relationship between rights and duties entails a distinction between rights-recognition and rights-protection.

For the purpose of rights-recognition, it does not make a difference if Eric’s mother is able to fulfill the duty by breastfeeding him, or other people can buy milk, or, if worst comes to worst, there is no milk or milk substitute available in the world. Even if left without any of the things that are necessary for his care and nurture, Eric would still maintain his right, according to MacCormick. In these circumstances, there would not be anybody in a duty-position because other people can only be required to do that which is practically possible. In spite of the absence of a duty-bearer and the measures for duty-fulfillment, Eric continues to have the right to be cared for, nurtured and, if possible, loved. That granted, the existence of the correlative duty, as derived from the right, is to ensure that Eric is given his due. The duty is a means for rights-protection and, therefore, it should be imposed as a categorical imperative whenever possible. If the intended beneficiary, Eric, cannot receive the things he is entitled to for his own sake, the situation amounts to a rights-violation. This means that Eric must be perceived as a victim, but his loss is not comparable, of course, to the no-rights outcome that realism would cause. On MacCormick’s premises, a victim is not a rightless individual. Instead, he is somebody whose right has been denied either primary protection (cf. fulfillment) or secondary protection (cf. enforcement), or both. Notwithstanding, something has to be done to put things right again, to at least try and keep trying in *principium ad infinitum*, if

⁴² MacCormick, *supra* note 19, at 161.

nothing can be done here and now at time *t*. The normative stimulus that the right emits commits other people to balance reality and morality as much as is possible.

Turning to the UN's method of rights-recognition, it is not just a possibility, but a reality that hard international law secures the existence of fundamental rights in a manner that clearly breaks the alleged analytical link between claim-rights and other-directed duties correlative thereto. What is more, the International Covenant on Economic, Social and Cultural Rights (ICESCR) turns out to be primary proof of the thesis that rights are logically prior to correlative duties.

Following the Preamble to the ICESCR, recognition of social and economic human rights is unconditional. First conferred, their status as equal, universal and inalienable rights remains intact *regardless* of the issue of correlative duties. The emphasis is on the inherent dignity of the human person in addition to species, that is, membership of "the human family," and that is taken as necessary and sufficient for the declaration of human rights.⁴³ Their existence is *not* derivative from any other sources, including real world facts concerning resources and fulfillment. This does not mean that the UN is ethically indifferent about whether the right-holders receive the things or goods which the rights entitle them to. To the contrary. The notion of duties plays a central role in conjunction with rights-protection through its promissory language on behalf of the states parties. Article 2 in Part II of the ICESCR, for example, states that

Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.⁴⁴

The steps in question cover all aspects of rights-protection, from implementation into national law, to enforcement in national as well as international law, and fulfillment. Aiming at full realization, furthermore, social and economic rights *generate obligations* to provide individuals with the objects of the relevant rights in accordance with the economic circumstances. If the goal, that is, actual rights-fulfillment, cannot be realized here and now at time *t* (and the

⁴³ International Covenant on Economic, Social and Cultural Rights, GA Res. 2200A (XXI), 21 UN GAOR Supp. (No. 16) at 49, UN Doc. A/6316 (1966), 993 UNTS 3, entered into force January 3, 1976 [ICESCR].

Under hard international law, the same notions (the inherent dignity and the human family) are repeated for civil and political rights. See the International Covenant on Civil and Political Rights, GA Res. 2200A (XXI), 21 UN GAOR Supp. (No. 16) at 52, UN Doc. A/6316 (1966), 999 UNTS 171, entered into force March 23, 1976 [ICCPR].

The notion of "the human family" implies that it is impermissible to make contingent facts about humanity grounds for discrimination. The list of such facts (*inter alia*, age, sex, I.Q., skin color, race, social rank, hereditary caste, nationality, language, property, ethnic or cultural origin, religion, political or other opinion) is a check-list for rights-recognition procedures on the basis of the Fair Opportunity Requirement and Principle.

⁴⁴ ICESCR, *supra* note 43, at 5.

assumption is that it cannot in many places), human rights generate – in the second instance – obligations to try to create, step by step and through specific programs, the conditions whereby it *becomes possible* to give people that to which the rights are rights to. It is these instrumental *meta-obligations* which are intrinsic to the ICESCR's notion of programmatic obligations.⁴⁵

Once the states parties have taken all the steps that are connected with purely means-related obligations, they reach the stage where it can be proclaimed that the construction phase is over or, at least, that it is sufficiently advanced to require that more be done. This is to say that the states parties can now undertake the task of fulfilling the directly end-related obligations, which have so far been awaiting the moment for the corresponding rights to be able to release their full potential legal energy, thus ensuring that people can enjoy their rights. The ideal is always to be able to enjoy rights in addition to having them. But, being without the objects of rights does not, as should be clear by now, lower or weaken rights per se. Without rights, furthermore, we would not have good and strong *reasons* for making claims to a specific treatment from other people, to their actions or omissions. We also have to be realistic, however, and ask only what is practically possible. According to the UN, rights together with the circumstances determine which duties there are or ought to be. Thus, the two principles that can be derived state, respectively, “if rights, then where possible duties” and “duty implies can.”

D. CONCLUSION

1. REALISM AS IDEOLOGY

Having ascertained de jure that the UN disconfirms the doctrine of logical correlativity, the final parameters for an assessment of realism have been provided.

The situation is both simple and complex. On the one hand, it is necessary to distinguish between what the doctrine of logical correlativity says and what realism says. Axiomatic “if no duties, then no rights” dictums, e.g., that claim-rights cease to exist if other-directed correlative duties cannot be fulfilled, because duties cease to exist if they cannot be fulfilled, are *extra-logical*. These dictums are not implicit in or derivative from the doctrine of logical correlativity. On the other hand, the doctrine is built into realism so as to give rise to the very same dictums. As pointed out earlier, realism requires both the Ought Implies Can principle and the doctrine of logical correlativity (cf. The Duty-Principle for Rights) working together. But, because the doctrine in question reflects mistaken beliefs about the nature of the relationship between claim-rights and other-directed correlative duties, especially as documented in international law, it cannot lend realism authority, weight and credibility. As a matter of fact, realism falls to the ground as a result of asserting, proceeding, relying and depending upon the assumption that the doctrine of logical correlativity is true.

In conclusion, there is an irreversible leap from the logical to the ideological. The realists’

⁴⁵ For an account of this notion, see David M. Trubek: “Economic, Social, and Cultural Rights in the Third World: Human Rights Law and Human Needs Programs”, in Theodor Meron (ed.): *Human Rights in International Law. Legal and Policy Issues* (1st ed., Oxford: Clarendon Press 1984) 209.

answer, therefore, to the question “which rights qualify as plausible candidates for the class of ideal rights” merely expresses a preference in favor of civil and political human rights. It is a case of ideology for the sake of ideology. Their version of idealism (cf. ideal rights = potential legal claim-rights) is tantamount to liberalism.⁴⁶ Furthermore, while using legal rights as a model, the model itself fails. That is what follows from the analysis of the law. This focuses on the importance of interests for the purpose of conferring fundamental rights *rather than* discretionary and/or remedial powers, which are highlighted by the type of rights-theory that advocates of liberalism typically swear allegiance to.⁴⁷

In this manner, the realists end up with *prima facie* basic need-rights which are hardly rights at all but, on the other hand, momentary gifts or favors, in essence, instances of charity because the appropriate response is that to which A has a basic need-“right” is forthcoming, is (according to Feinberg) “I am grateful” and *not* “I am deserving” or “it is my due” (cf. claim-rights). Furthermore, if that to which A has a basic human need-“right” is not forthcoming, the appropriate response is (once again, according to Feinberg) “I am unlucky” and *not* “I am indignant” (cf. claim-rights).⁴⁸

The choice between weaker rights and no-rights is highly objectionable in the case of basic needs for several reasons. First, the absence of claim-rights automatically cancels the attitude of respect toward Self and Other. Furthermore, the fact that species really matters conceptually and normatively – according to the UN’s human rights-recognition procedures – is being ignored by the realists in the legal sphere, who instead focus solely on wealth and membership of S, that is, nationality and citizenship. Their exclusion of The Other, meaning the

⁴⁶ Paradoxically enough, the preference for civil/political rights is defeated by the Choice Theory of Rights, which advocates of liberalism typically swear allegiance to. Incorporating the doctrine of logical correlativity, the theory says that the holder of a claim-right, X, is a small-scale sovereign who has (i) a bilateral liberty to waive the primary duty or leave it in existence as he chooses (cf. discretionary powers). Furthermore, in the typical case, X may (ii) – if the primary duty is breached – enforce the secondary duty, e.g., by suing for compensation (cf. remedial powers) just as X may (iii) waive the secondary duty. See Herbert H. L. Hart: “Bentham on Legal Rights”, in A. W. B. Simpson (ed.): *Oxford Essays in Jurisprudence* (1st ed., Oxford: Oxford University Press 1973) 192.

If the Choice Theory of Right were true, some of the most fundamental civil/political rights would fall outside the domain of rights, in the final analysis, because they imply unwaivable immunities. This is to say that the right-holders are rendered as powerless as the duty-bearers for the purpose of protecting the important interests of the right-holders. Personal freedom is one example. In this case, the right-holders are unable to forfeit their own freedom. Technically, they are under an absolute disability just like the duty-bearers who are not permitted to enslave them.

The alternative to the Choice Theory of Rights, which can be described as a revised version of the classical Interest Theory of Rights, accommodates unwaivable immunities in terms of rights *stricto sensu* because things like personal freedom normally constitute a benefit for the sake of the intended recipient as an end in himself. Note also that the rights that result match the UN’s procedures for human rights-recognition in so far as these count as inalienable, *in addition to* being ascribed the status of equal and universal rights.

⁴⁷ See *supra* note 46.

⁴⁸ Feinberg, *supra* note 2, at 58-59.

poor, the stateless and the foreigner from the class of right-holders, is arbitrary because it depends on contingent and therefore irrelevant characteristics, according to the UN.

Only naively can the realists' unfair procedures be interpreted as the result of an anachronistic dichotomy between national law and international law. In a world where equal, universal and inalienable human rights have been on the agenda since 1945, there are no good reasons to treat S as a hermetically closed system. Separating "us" from "them" serves as an ancillary strategy for declaring "no-rights... for them!" which is why the realists never get to the point of discussing economic/social (re)distributive justice, however poor people in other places are. Talking about this kind of justice is meaningful only on the basis of rights... and rights belong to people qua members of S. That is the realists' vicious circle. The implication of this, namely the withholding of rights from those people who, in one sense, most need them, is not consistent with idealism in the context of objectivism/universalism and humanism.

The way out of the vicious circle is to invoke pure idealism for rights, whereas idealism and realism can be combined for the purpose of imposing duties that bind the parties against whom the claims are directed to provide the objects here and now at time t. By doing this, a *global guarantee* of rights-recognition can be secured in spite of gross inequalities pertaining to subsistence, inequalities which may or may not be eliminated in the future. The main point is that human rights ethics is not determined by economics. Furthermore, if agents let ethics come first, then this introduces a Zero Tolerance Veto in circumstances where political disagreement arises over whether there ought to be any social and economic rights in the first place.

In the light of this, the question "which rights, if any, can be trumps?" can be answered in Waldron's style by stating the following: *we all know, being who we are, that unless we set limits on the outcome of our decision-making procedures, then we will have a majority elite in S = a rich society which will try to get away with as much as is possible – for themselves – by analogy with the minority elite that often rules in Third World countries.* Without basic need-rights as trumps, the law itself is ultimately at risk. This is a paradox only as long as agents ignore the fact that fulfillment of basic need-rights is instrumental for the enjoyment of all other rights, including civil and political rights.

2. AN UNHAPPY ENDING – FOR REALISTS

One rights-theorist, who would support idealism as a position, is Henry Shue. He contributes to the dispelling of the realists' myth by showing that material conditionality and, with this, the issue of which goods can be in scarce supply, is not reserved for the class of social/economic human rights. It may be possible to avoid violations of, for example, the rights to personal freedom and physical security through the imposition of other-directed correlative duties of non-interference. It is *impossible*, however, to *secure protection* without imposing duties to provide a wide range of social/economic goods, such as police forces, criminal courts, lawyers, judges, penitentiaries, guards, etc., *goods that cost* at least as much as those required for protection of basic human need-rights. In other words, it is incorrect to translate the distinction between civil/political and social/economic rights into the one between negative and positive rights.⁴⁹

Ideally, security for humanity encompasses both civil/political and social/economic rights, as also argued by Robert Rotberg.⁵⁰ While more progressive liberals can agree to this

in theory, they nevertheless reconfirm the link between realism and liberalism when social/economic rights are discussed in relation to duties. For example, Alan Gewirth makes it hold that freedom and well-being are necessary for agency. However, unlike freedom, well-being depends, as a right, on the availability of resources.⁵¹ This seems to suggest that the error of confusing rights-recognition and rights-protection may “only” be the outcome of an analytical oversight. If so, the relevant theorists have to rethink the distinction between real and ideal rights while correcting their credentials-checking for rights.

As for the realists who insist that civil/political rights are primary because they are negative, there is only one possible conclusion: if sincere, they must face the facts. If they do, they will put themselves in a better position to promote the rights they deem important enough to protect as legal claim-rights. Admittedly, this is a real paradox – for them. It seems that realists have to “choose” between theoretical disintegration from within or negating the part of their position which makes them who they are in the first place (theorists who insist that civil/political rights are primary because they are negative). Whichever way they turn, they will get nowhere.

⁴⁹ Henry Shue: *Basic Rights: Subsistence, Affluence, and U.S. Foreign Policy* (2nd ed., New Jersey: Princeton University Press 1996) 36-39. For a defense of social/economic human rights in the context of international criminal law, see Anja Matwijkiw: “A Philosophical Perspective on Rights, Accountability and Post-Conflict Justice – Setting up the Premises”, in M. Cherif Bassiouni (ed.): *Post-Conflict Justice* (1st ed., New York: Transnational Publishers 2002) 155.

⁵⁰ Robert I. Rotberg (ed.): *When States Fail: Causes and Consequences* (1st ed., Washington DC: Princeton University Press 2004) 1-49.

With security as the parameter whereby the effectiveness of the state’s response to the needs and interests of the majority of the people is measured, the state that fails is one that tests positive in more or all of the 15 indicator areas of Rotberg’s Security (for Humanity) Performance Model for Statehood:

(1) The state fails to end the internal violence that results from relative anarchy; (2) the state fails to secure authority over its own national territory; (3) the state fails to secure a rule of law; (4) the state fails to secure fundamental civil and political human rights, as well as economic, social and cultural human rights; (5) the state fails to secure democracy, defined as popular participatory politics and transparency; (6) the state fails to secure a centralized government; (7) the state fails to secure educational institutions; (8) the state fails to secure the physical infrastructures; (9) the state fails to secure the structures for finance, including a central bank; (10) the state fails to secure civil society; (11) the bureaucracy carries out the orders of the executive and the state fails to remedy this dependency, which is typically imposed; (12) the state fails to secure protection against corruption, and is typically implicated in that same practice; (13) the state fails to secure protection against exploitation and oppression, including anomic and opportunistic behaviors, such as child trafficking; (14) the state fails to secure consensus and support from its citizens. The state does not enjoy domestic recognition, that is, the state is generally perceived as illegitimate; and (15) the state fails to secure national unity on the basis of diversity, which manifests itself negatively in the form of antagonistic relationships between different groups of society and which, in turn, explains the relative state of anarchy.

According to Rotberg, and in disagreement with Nicolas van de Walle, the state fails to provide security partly through inability and partly through will. See *ibid.*, at 14, 29.

⁵¹ Alan Gewirth: *Reason and Morality* (1st ed., Chicago: Chicago University Press 1978) 63-103, 330-332.