

The Alternative of Dissent

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Despite the fact that our century measures itself by events as ominous as Auschwitz, Gulag, or Hiroshima —and the list could of course be extended to include other similar ones of yesterday or even today—writers on the subject of our topic have occasionally yielded to the temptation to express a comprehensible optimism. Indeed, never before have human rights enjoyed as much legal recognition throughout the world as they do today. And this degree of recognition transforms those rights into something like incontrovertible fact —beyond or beneath their not infrequent violation where they are in effect and their pervasive lack of application where they are only nominally in force.

That the law is a fact —to use a famous and cherished example —does not excuse us from reflecting, and especially from reflecting philosophically, on that fact. As Kant taught, the mission of philosophy is indeed no other than to provide a rationale for these seemingly incontrovertible “facts.” In an attack on what they term “the ideology of human rights,” Alain de Benoist and Guillaume Faye —themselves ideologues of the so-called French “New Right” —once reproduced, with malicious delight, a well-known anecdote told —with no hint of malice, but with a certain sorrow —by Jacques Maritain years ago in his introduction to a collective volume, *The Rights of Man*, published by UNESCO: when, in a commission of that body, someone expressed surprise at the ease with which members of clearly opposing ideologies were able to agree on a list of rights, he was told that “they were in agreement as to the rights on the list, but on condition they not be asked why.” However, this is a typical question that philosophers, ex officio, may not avoid asking, inasmuch as “providing a rationale” is simply an attempt to respond to this query about why. In all likelihood philosophy, which is far from a science,

cannot pride itself on being beyond ideology, whether of the Right or the Left, but if it cannot be reduced to mere ideology, this is certainly due to its impenitent habit of demanding reasons.

And if a given philosopher, as in my case, almost claims—with appropriate modesty, but with conviction—to be a “rationalist,” clearly these will have to be reasons to the second power, in other words, will have to be *reasonable reasons* and not just Pascalian “reasons of the heart.” The subject of human rights is one in which the latter reasons may well be unavoidable. Thus, one might declare himself a fervent supporter of human rights and be irretrievably skeptical about providing a grounding for them, which to me seems not only perfectly respectable but undoubtedly preferable to its opposite: the position held by those who, considering rights grounded in theory, do not hesitate to infringe them in practice. Still, no matter how deep their respect for reasons of the heart, philosophical rationalists will never be satisfied with them. Whenever I speak in what follows of “the ethical founding of human rights,” understand that I mean their *rational foundation* or, rather, the attempt to found them rationally, so that we will be concerned about this class of “reasonable reasons”—rather difficult to find, by the way, which hardly assures me of success.

But, to begin in earnest, what are we to understand henceforth by “human rights”? For the purposes of this lecture I want to begin by subscribing to a definition that a philosopher of law, Professor Antonio E. Pérez Luño, has given us in an authoritative book on the subject.¹ In his view, human rights are “a group of faculties and institutions that, in each historical moment, embody those *demands* of human dignity, liberty and equality, that *ought to be* positively recognized in the legal statutes both nationally and internationally.”² Here is a brief, concise definition that

¹ A. E. Pérez Luño, *Derechos humanos, estado de derecho y constitución* (Madrid, 1984).

² *Ibid.*, 48.

admirably focuses on the heart of the matter and which is prefaced by the author with some twenty-odd pages dedicated to guaranteeing its plausibility.³ Thus, although it amounts to a stipulation, his proposal is by no means a “Humpty-Dumpty definition,” since it rests both on a lexicographical study of the linguistic limits of the defined term and on something even more important, that is, a conceptual circumscription of its context.

In addition, Pérez Luño is well aware of the merits of his definition, which he believes avoids some of the more qualified charges against the very attempt to define human rights.⁴ In the first place his definition is not “tautological,” as a definition would be that read: “the rights of man are those that belong to him by virtue of his being a man,” since his definition not only specifies a series of human “requirements” but also mentions the historical character of this “specificity.” Second, neither is it a “formalist” definition, for example, “the rights of man are those that belong or ought to belong to all men, and of which no man may be deprived,” since Pérez Luño’s definition, in referring to the active recognition of such rights in the legal statutes, leaves enough margin for both the normative aspects of the “process of positive support in laws,” or legal recognition, and the techniques of protection and guarantees as to their actual implementation. Third and last, the definition means to avoid being “teleological,” as would be the case with definitions that allude to preserving ultimate values, ones ordinarily susceptible to diverse and contested interpretations, of the kind: “the rights of man are those necessary for the perfecting of human beings, for social progress or the development of civilization, and so on.” However, in my view it is by no means clear that Pérez Luño’s definition manages to avoid this third charge, if that is what it is, with as much ease or as

³ *Ibid.*, chap. 1.

⁴ On p. 25 the author draws on Norberto Bobbio’s “L’illusion du fondement absolu,” in the joint volume, *Les fondements des droits de l’homme* (Florence, 1966), 3–9; see also 49ff.

much success as the previous ones.⁵ That is, I do not think that “dignity,” “liberty,” and “equality” are values any less susceptible to diverse interpretations, or any less contested, than “the perfecting of the human being,” “social progress,” or “the development of civilization,” although, as we will see, I believe that from an ethical point of view they are rather more fundamental than the latter.

But my major disagreement with Pérez Luño’s definition has to do with the general meaning he attributes to it. In his opinion, “the proposed definition is intended to unite the two main dimensions of the general notion of human rights, that is, the jusnaturalist requirement as to their grounding and the techniques of its positive support in law and protection that assure their enjoyment.”⁶ Of course, Pérez Luño has every right, natural or not, to extract jusnaturalist implications from his definition, but not all of us who accept his definition can be expected to accept the burden of those implications.

From his definition it follows —or, more exactly, it is understood —that the demands of human dignity, liberty, and equality alluded to are prior to the process of positive support in law and that the reason why they ought to be legally recognized provides the grounding for the rights in question. But is that all? Jusnaturalism, as we will see, is nowhere in view, or at least not unless one acknowledges beforehand —as a jusnaturalist would undoubtedly be inclined to do —that the fact that those demands are prior to the process of legal recognition makes them natural rights.

To me such a presupposition seems gratuitous. But before taking up this point, I want to deal with another, less important, one. That is, the presupposition that values such as dignity,

⁵ In any case the supposed charge was not so much leveled at the “teleological” character of the definition —that is, at its goal of saving ultimate values —as at the vagueness and imprecision of the values in question.

⁶ Pérez Luño, *Derechos humanos*, 51.

liberty, or equality are the exclusive patrimony of the jusnaturalist tradition.

To concentrate for the moment on the first of these, who would assert that the jusnaturalist tradition and the tradition of human rights are coextensive? Pérez Luño adduces the case of Samuel Pufendorf, whose system of human rights indeed rests on the idea of the *dignitas* of man.⁷ And there is no doubt about Pufendorf's representing an important stage in the history of modern natural law. But, on the other hand, it is not as clear that we can discern the same jusnaturalist filiation in the Kantian notion of *Würde*, nor in Kant's philosophy of law.⁸ And the case of Kant is of particular interest to us here.

No one would deny that there are abundant traces of jusnaturalist influence in Kant, just as it is impossible to deny that the general division of the *Rechtslehre*, or "system of the principles of law," that he espouses opposes natural law (*Naturrecht*), which is based on a priori principles, to positive, or statutory, law (*statutarisches Recht*), which depends on the will of the legislator.⁹ But Kant's so-called "rational law" (*Vernunftrecht*) cannot simply be identified with traditional natural law, even of a rationalist lineage, not even if we find that it does not mind assuming — on the basis of quite different suppositions — some of the latter's functions, which it consequently inherits.¹⁰ And, especially, I do not believe we can or should interpret in a jusnatu-

⁷ Ibid. In this connection see Hans Welzel's classic *Die Naturrechtslehre Samuel Pufendorfs*, 2d ed. (Berlin, 1958).

⁸ On this subject, see J. G. Murphy, *Kant: The Philosophy of Right* (London, 1970); S. Goyard-Fabre, *Kant et le problème du droit* (Paris, 1975); Z. Batscha, ed., *Materialien zu Kants Rechtsphilosophie* (Frankfurt am Main, 1976); F. Kaulbach, *Studien zur späten Rechtsphilosophie Kants* (Würzburg, 1982); H.-G. Deggau, *Die Aporien der Rechtslehre Kants* (Stuttgart, 1983).

⁹ I. Kant, *Metaphysik der Sitten. I. Metaphysische Anfangsgründe der Rechtslehre*, Werke, Akademie Ausgabe, vol. 6, p. 237. All references to Kant's works are to this edition.

¹⁰ See below, in connection with Jürgen Habermas's interpretation of Kant's "rational law."

ralistic sense Kant's fundamental distinction between "morality" (*Moralität* and also *Sittlichkeit*), on the one hand, and "legality" (*Gesetzmlissigkeit* or *Legalität*), on the other, a distinction to which we will presently return.¹¹

In my view, Pérez Luño has too generous a notion of *jusnaturalism*, which leads him to swell unnecessarily the number of its adepts, even though he does indeed mention that the "open" definition of it that he holds helps him avoid the danger of making a "Procrustean bed" of his conception:¹² it is not such a bed — if this is understood in the sense intended by that legendary bandit, who, in order to fit his victims exactly to the bed, would shorten the protrusions of the taller ones or violently stretch the limbs of the shorter ones until he dislocated them; but, "generously understood," this Procrustean bed could contain a device that, as the occasion demanded, allowed the bed itself, and not the victims, to be made larger or smaller, so that whoever laid himself down there would run the risk of waking up a "jusnaturalist."

But I do not want my friendly discussion with Pérez Luño to seem an obsessive tirade. My aim is simply that my defense of ethics — the declared object of this lecture — not be in any way confused with the defense of a supposed *natural law*, a confusion I fear he is guilty of himself, since he writes that "only from the jusnaturalist point of view does it make sense to pose the problem of the grounding of human rights."¹³ This confusion in fact is not infrequent in the panorama of contemporary philosophy, as the case of Ernst Bloch makes clear in an exemplary way, which forces me to concede that Pérez Luño is ultimately in very good company.

From the title of Bloch's *Naturrecht und menschliche Würde* to its last page, we are always impressed, even deeply so, by the

¹¹ Kant, *Metaphysik. der Sitten*, 219.

¹² Pérez Luño, *Derechos humanos*, 136-37.

¹³ *Ibid.*

undoubted ethical pathos of his thought,¹⁴ even though Bloch never speaks there of “ethics,” but always of “natural law,” perhaps, it seems to me, because, in the Marxist tradition, it is easier to fly in the teeth of Marx’s “prejudices” about human rights¹⁵ than to overcome the embarrassment, disguised as *akribeia*, that kept him and his followers from acknowledging that at times what he was doing was *simply ethics*.

For my part I would say, in synthesis, that the “demands” of dignity, liberty, and equality included in Pérez Luño’s definition of human rights —demands that, according to his definition, “ought to be” legally recognized —are “moral demands,” and I would add that they should be awarded full status as human rights when they have passed the extra test of their legal recognition. In my case, I am not sure such a coarse and crude duality would be willingly accepted under the banner of the highly regarded “dual theory” of those rights.¹⁶ Like all dualisms that are too abrupt, perhaps mine too gives the impression of suffering from an obvious schizophrenia, the same one —consisting of separating *morality* and *legality* —that Hegel once accused Kant of, following which he reduced ethics, now changed to “ethicity,” to his philosophy of law (which, in any case, proves that Kant’s schizophrenia is preferable to Hegel’s paranoia, which was capable of swallowing up and “going beyond” in his philosophical system what Hegel was in the habit of referring to disdainfully as “mere

¹⁴ E. Bloch, *Naturrecht und menschliche Würde*, Gesamtausgabe, vol. 6 (Frankfurt am Main, 1961).

¹⁵ See in this regard Manuel Ajenza, *Marx y los derechos humanos* (Madrid, 1983).

¹⁶ The “dualistic conception” of human rights, which —as opposed to jusnaturalists and juspositivists —attempts to “integrate” their condition as “values” (prior to their recognition in any legal text) with their condition as valid “legal norms” (once legally recognized), has been maintained by Gregorio Peces-Barba in his *Derechos fundamentales* (Madrid, 1983), 24–27, 28ff.; in connection with our subject see also, by the same author, *Introducción a la filosofía del derecho* (Madrid, 1983), esp. 305–30; *Los valores superiores* (Madrid, 1984); and *Escritos sobre derechos fundamentales* (Madrid, 1988), esp. 215–26.

morality.”)¹⁷ Be that as it may, the *moral demands* in question would be “potential” human rights, whereas the human rights would in their turn be moral demands, “satisfied” from a legal point of view. And I would not give too much importance to purely verbal questions, since I am well aware that “human rights,” especially with this name, are such a powerful weapon today that it would be foolish to reduce their effectiveness by giving them the less usual name of “moral demands.”¹⁸ If we must, therefore, be confronted by the Janus face of human rights—one of whose sides has an ethical profile and the other a legal profile—I would be content simply to request that, in the first case, we consider them “rights” in a merely metaphorical sense, just as, for that matter, jusnaturalism has always done in speaking of “natural rights.”

What I would not so readily agree to is the ambiguous and confusing name of “moral rights” that they are so often given

¹⁷ See on this point Amelia Valcbrcel, *Hegel y la ética (Sobre la superación de la “mera moral”)*, prologue by J. Muguerza (Barcelona, 1988).

¹⁸ Another reason not to do this is the insistence with which the detractors of human rights—and not just their ideology—reject even the name, by invoking against them the well-known statement of such an illustrious reactionary as Joseph de Maistre: “There is no man in the world. In my lifetime I have seen Frenchmen, Italians, and Russians. I also know, thanks to Montesquieu, that one can be Persian: but as to man, I swear I have never met one in my life” (this text, which comes from his *Considérations sur la France* of 1791, is quoted by A. de Benoist and G. Faye in the dossier on *Les droits de l’homme* that appeared in *Éléments* 37 [1981]: 5–35. This “national-communitarian” point of view would allow for “the rights of [certain] men” (French, Italian, Russian, etc.) but not “the rights of man,” which, nevertheless, need not be—in contrast to what de Maistre believed—an abstract “universal man,” but rather Tom, Dick, or Harry, that is, a concrete “individual,” whose concreteness always outweighs his membership in a specific community, whether national or not. For a criticism of what he correctly calls the “fallacy of the concrete man” of de Maistre and his outdated contemporary followers, see Leszek Kolakowski, “Warum brauchen wir Kant?” *Merkur* 9–10 (1981): 915–24. In his turn, and from a position not at all sympathetic to human rights understood as “subjective rights,” Michel Villey has argued interestingly for the “nominalist” and individualistic origin of this latter notion in “La genèse du droit subjectif chez Guillaume de Occam,” *Archives de Philosophie du Droit* 9 (1964): 97ff., and *La formation de la pensée juridique moderne* (Paris, 1968), chaps. 4 and 5, a thesis I would have no trouble subscribing to if only I were allowed to see virtue wherever the author sees vice.

today, which is something I want to deal with apart from the question of jusnaturalism. I prefer to do it this way because not all who use the name are in debt to, nor would accept the designation of, jusnaturalists.¹⁹ And it seems to me at least questionable that a contemporary champion of “moral rights” like Ronald Dworkin, so often catalogued this way, should or could be included in the list.

I will not say, as Jeremy Bentham did of natural rights, that “moral rights” are a *nonsense upon stilts*,²⁰ but I will say that they are at least a contradiction.²¹ Perhaps neither syntactic nor semantic, as when one speaks of “a square circle” or of “wooden iron,” but rather pragmatic, like the one that would pertain if we were to speak, let us suppose, of “laws of traffic” without there being any actual highway code. Before such existed, it would make no sense to say that the small sedan traveling the road “has the right” to cross ahead of a big truck approaching from the left. Yet the truth is that according to certain current interpretations, moral rights are conceived of precisely as “prior to” any possible recognition of them in legal statutes. Is such an interpretation defensible? Whether it is or not, one must acknowledge that it has in its favor our use of such expressions as “I have a right to . . .” in ordinary language, expressions that we most often use without intending an appeal to any article of the legal statutes. And, despite old Bertrand Russell’s warning about the ordinariness of being bound by analyses of ordinary language, perhaps it would

¹⁹ I am not certain, to quote a few examples of philosopher-compatriots, if Professor Eusebio Fernandez would at all approve of such a cataloguing (see his *Teoría de la justicia y derechos humanos* [Madrid, 1984], esp. 104ff.), but I know that Professor Francisco Laporta (see his “Sobre el concepto de derechos humanos,” in *Actas de las X Jornadas de Filosofía Jurídica y Social, Alicante, December 1987*, [in press]) would be vexed with me if I listed him as a jusnaturalist.

²⁰ [The words “*nonsense upon stilts*” were in English in the original; J.M.’s italics.]

²¹ J. Bentham, *Anarchical Fallacies, Being an Examination of the Declaration of Rights Issued during the French Revolution*, in *Works*, ed. John Bowring (Edinburgh, 1838; repr. New York, 1962), 2:500.

not be beside the point to notice what we usually mean when we say, “I have a right to an explanation (a satisfaction, a redress, or anything else).” In many instances, “I have a right to something” is simply another way of saying that “I require (demand, ask for, etc.) that something,” where the notion of right plays no part. But of course on occasion the first expression, “I have a right to something,” would require a paraphrase like “I deserve that something” or “I am owed such and such a thing,” where the paraphrase might cause difficulties if we took *ad pedem litterae* the so-called thesis of the “correlativity of rights and duties” held by Wesley Hohfeld among others.²²

To put it in too sketchy terms, the thesis of correlativity can be summed up in the assertion that the idea of a “right-holder” (*sujeto de derecho*) and that of a “duty-bearer” (*sujeto de [el correspondiente] deber*) are coimplicating ideas. Now then, this sort of correlation seems to function more clearly in the case of institutional rights and duties — for example, with legal rights and duties — than in the case of noninstitutional ones, as would presumably be the case with moral rights and duties. If it is my legal right that Peter fulfill what is stipulated in a contract we have signed, Peter has a legal duty or obligation to fulfill it. And vice versa. But the relevancy of the “vice-versa” clause here becomes less clear when we move from the legal plane to the moral one. I am not sure that the preceding description would also serve to describe the reciprocal pacts Robinson Crusoe and Friday agreed to, so that Friday would be authorized to infer that he “has a right to such and such” from the declaration that “Robinson owes him such and such.” At least I am not certain that this inference would be of much use to him in the absence of a judge on the island to oversee compliance with such pacts. But, in any case, it does seem clear that the phrase “X owes Y such and such”

²² For a review and an up-to-date discussion of Hohfeld’s thesis, see Carl Wellman, *A Theory of Rights: Persons under Laws, Institutions, and Morals* (Totowa, N.J., 1985).

does not always imply that “Y has the (moral) right to receive such and such from X.” For example, I am absolutely convinced that we humans have “moral duties” regarding animals and would welcome their having “legal rights” that were recognized in a society that considers itself civilized. But I would not allow that from the fact that we humans have moral duties regarding animals it follows that the latter have moral rights. An animal may well be a right-holder in the legal sense when humans bestow this condition on it, but no animal will ever be a moral subject. Morality is the prerogative of men and, of course, women —that is, of human beings —and I do not believe the partisans of moral rights would be willing to consider animals holders of such rights, as they would have to be, however, if those partisans wished to pursue the questionable thesis of the correlativity of duties and rights to its final consequences. But one never knows: in a heated discussion I once heard an American friend, who was a member of the Animal Liberation Front, speak of “animals’ human rights” (*derechos humanos de los animales*).

But, in concluding our excursus into ordinary language, I would only like to mention an expression that on the contrary seems to me extremely revealing of certain aspects of the moral phenomenology involved here, an expression that is furthermore an integral, and colloquial, turn of phrase. I refer, of course, to the expression “You’ve no right,” which we so often use independently of any legal context: the expression “You’ve no right (for example, to treat someone in a manner we judge reprehensible)” is usually accompanied by a feeling of moral indignation which in our example might be a translation of the conviction that “it is denigrating to treat anyone that way” or that “such treatment violates his dignity.” But I already warned a moment ago that we would do well to separate the treatment of human dignity from that of the supposed natural rights, and I feel the same about supposed moral rights, which counsels that we postpone that subject until the proper time comes.

Nevertheless, all we have said thus far regarding moral rights fails to do complete justice—I hasten to say—to the aforementioned position of Dworkin. For Dworkin speaks not only of *moral rights* but of *moral principles*, which is something quite distinct and of a much higher ethical caliber. In his work one notices a determined effort to bring law (and not only its philosophy, the philosophy of law) closer to ethics, an effort I can only fervently applaud.²³ And on each occasion one notices a criticism of positivism with which, minor differences aside, I confess I also fundamentally agree. In connection with his critique it has been observed, and not without reason, that the former targets a concept of legal positivism that is too narrow, as in the case of the so-called “positivism of the law” so magnificently summed up in K. Bergbohm’s frightening sentence: “The most infamous law must be deemed applicable provided it was promulgated in a formally correct manner.” But it is nevertheless true that Dworkin goes somewhat beyond that restricted concept of positivism, as his polemic with Professor Herbert Hart over the role of *key norm* of the so-called “rule of recognition” shows.²⁴ If I refer here to this often-mentioned question it is because I am convinced that its import is much greater than is usually thought. In his criticism of what he calls the “model of norms,” Dworkin criticizes the positivists for their inability to distinguish between “a law” (*ana ley*) and “the law” (*el derecho*), but the point of his reproach is to show the insufficiency of a conception of the law as a system of laws or norms the identity of whose parts would be due to the functioning of the aforesaid “key norm.” Taken as such a key norm, Hart’s *rule of recognition* would have the task of laying down which laws or norms would make up the law, just as Article 1 of our Civil Code determines what laws and norms

²³ R. Dworkin, *Taking Rights Seriously* (Cambridge, Mass., 1977); *A Matter of Principle* (Cambridge, Mass., 1985); *Law’s Empire* (Cambridge, Mass., 1986).

²⁴ See H. L. A. Hart, *The Concept of Law* (Oxford, 1961), 89ff., and R. Dworkin, *Taking Rights Seriously*, chaps. 2 and 3.

belong to that current legal or normative system.²⁵ Now then, this sort of criterion of identification might well seem inane when faced with what Dworkin calls “difficult cases,” where we come up against the problem of finding a norm that is applicable. In such cases of legal indeterminacy, it is Hart’s opinion that the case would have to be left to the discretion of the judge, whereas for Dworkin this would amount to conceding him the undesirable power of “creating law,” with the added difficulty that the judge would be empowered to legislate retroactively. In his opinion what the judge would have to do in such cases, and what he in fact does in such cases, is to go beyond the norms —that is, the *normative model* —and turn to principles (or, alternatively, to “political directives”), principles —this would be Dworkin’s choice —that contain the requisites of justice, equity, or other moral requirements. In the example Dworkin himself so often uses,²⁶ a judge rejects the perfectly legal bequest of an inheritance because of the fact that the testator was murdered by the inheritor and by appealing to the principle —legally unstated, but valid in the judge’s view —that “no one may (strictly speaking, ought to) benefit from their own crime.” Personally I wonder, however, if Dworkin’s recourse to principles does not allow the judges at least as much “discretionality” as Hart does in the absence of any exact norm. Not to mention the possibility that those judges take as principles the *political directives* relative to objects held to be socially beneficial (utilitarianism seems to me just as detestable a moral philosophy as it does to Dworkin, but one cannot discard the possibility that some utilitarian judge might discover a vein of moral principles in it) or that judges might simply disguise the strangest and most varied *ideological prejudices* as principles. For example, one could adduce in this regard an old bit of court reporting in a Madrid newspaper that —the differences between

²⁵ Dworkin, *Taking Rights Seriously*, chap. 3, § 6.

²⁶ I refer to the well-known case of *Riggs versus Palmer*, which Dworkin examines in *Taking Rights Seriously*, chap. 2, § 3,

our judicial system and the Anglo-Saxon one aside —will illustrate what I'm saying. If I remember correctly, a dead husband left a will — our examples run to wills — making his wife sole heir on the condition that she never remarry (in truth the kindest thing one can say about certain testators is that they are better dead); but one day the wife, who for a number of years had scrupulously adhered to this condition of the will, was discovered to be pregnant (which, naturally, provoked a suit on the part of the dead man's nearest relatives); the tribunal charged with deciding the case declared the will null and void, since it found that, if the last will of the testator had been to guarantee his wife's fidelity after his death, he would have disapproved a fortiori a situation like the present one that added licentious conduct to infidelity (since I cannot imagine that such an extraordinary decision could be literally based on any legal text, no matter how peculiar its content, I am inclined to attribute the tribunal's action to the repository of their "moral principles").²⁷ But of course this unfortunate anecdote doesn't reduce the importance of Dworkin's invocation of moral principles. For, as has been correctly pointed out,²⁸ that invocation is not so much directed at Hart's normative model and its rule of recognition as it is at the latter's condition as key norm. And, in this sense, against any other key norms of the same family, whether Hans Kelsen's *fundamental norm* or John Austin's *sovereign's command*, that is, against the supposed positivist self-sufficiency of the law, which can hardly contain its own grounding.

For our purposes the preceding conclusion is important. For a good positivist would never lose sleep over the question of an

²⁷Although I cannot document this reference now, I seem to remember reading this article in the Madrid daily *ABC* back in the fifties, when I was just entering a now-distant adolescence, during the heyday of the Franco regime, which undoubtedly explains many details of the case.

²⁸See Albert Calsamiglia, "Ensayo sobre Dworkin" (prologue to the Spanish translation of *Taking Rights Seriously* [*Los derechos en serio*] Barcelona, 1984, 7–29), and "¿Por qué es importante Dworkin?" *Doxa* 2 (1985): 159–66.

extralegal grounding of the law, even in the case of human rights. Once incorporated into the legal statutes —for example, in the form of *fundamental rights* or anything similar —why inquire further into their “grounding” or foundation? But, as I said, human rights offered us a Janus face and were moral demands before being recognized as such rights. As moral demands they constituted *presumed rights* —something quite different from supposed rights, where the adjective would serve to disqualify rather than just to qualify —or, if one prefers, they might be considered *assumed rights*, that is, demands assumed “as if” they were rights. But how justify our assumption or presumption of these rights without inquiring into their grounding? Whatever the positivist may say, questions about this grounding are far from idle and we must continue to ask them.

But, despite my insistence on ethics, I intend that our treatment of grounding or foundation be as realistic as possible. And, when I speak of realism, I also mean this in the sense of *legal realism*, which, as we know, need not be a dirty realism —unlike the latest United States novels. At least, Judge Oliver Wendell Holmes’s scandalous definition, according to which law is nothing but the set of “the predictions about what the judges will do in fact,” a definition that amounted to the birth notice of American legal realism, has never seemed scandalous to me, nor has the circumscription of legal validity to the judges’ conduct, which Alf Ross and the Scandinavian realists contributed to the theorizing about “law in force,” ever seemed scandalous to me either.²⁹ To put it in the briefest terms, it is a question of recognizing, in contrast to any doctrinaire view of jurisprudence, that judges may sometimes decide —although they will not always, or necessarily, do so— not by virtue of reasons that allow them to adduce an appropriate legal rule for their decision, but just the reverse, that is, by first deciding and then choosing —as with a “rationaliza-

²⁹ See Dworkin, *Taking Rights Seriously*, chap. 1, and Liborio Hierro, *El realismo jurídico escandinavo* (Valencia, 1981).

tion” —the aforementioned rule. In the classical model of prediction attributed to Hempel and Popper, the prediction of a phenomenon is merely an explanation of it before it happens. This calls for one or more general laws, as well as the specification of a series of relevant conditions, and, based on these premises, the prediction of the phenomenon, or its explanation in advance, would then be derived as the conclusion of a deductive or inductive-probabilistic argument. For example, the law that “all metals enlarge when heated,” together with a specification of the conditions of temperature being applied to a metal object and of the coefficient of enlargement of the metal in question, will enable us ultimately to predict that said object will become enlarged at a given moment (or explain why it became enlarged the instant following its having done so, since the explanation of a phenomenon, in its turn, is nothing other than its prediction *post eventum*, or its retrodiction). And the same thing that happens with this phenomenon could occur, *mutatis mutandis*, with another phenomenon like a judge’s decision, despite the fact that in this case we have an individual and, therefore, an intentional action, which would tend to put in question the Hempel-Popper model as well as the symmetry of “explanation-prediction” that their model supports.³⁰ Be that as it may, the only thing that legal realism urges us to do, and it is quite a worthy recommendation, is not to look exclusively for the premises of our explanations and/or predictions in legal texts but in the real social life of the judiciary, which is the reality most likely to provide us with the repertory of more or less general laws and more or less relevant conditions that we will need in order not to lose sight of the latter. (I would not even like to imagine, for example, the “relevant conditions” that would have to be specified in order to explain and/or predict the conduct of judges like the magistrates in the

³⁰ See on this subject my paper “La versatilidad de la explicación científica,” in *A ciencia incierta* (in preparation).

“Bardellino case.”)³¹ From this point of view, it would be no exaggeration to affirm that, in its description of the law, legal realism is merely guilty of realism and that the reasons judges use to back up their decisions are often —or, at least, occasionally — no more than *rationalizations*.³² At least, there is no point in denying that the above reasons might be, and occasionally will be, extrajudicial ones —political, for example, and also moral, as Dworkin would wish.

In other words, there could well be reasons of an ethical nature along with the others. But what has been said regarding the judges ought to be applied to the other legal figures— for example, to legislators, who in a political regime such as ours more or less represent the citizens. And, of course, we would have to include the citizens themselves in what has been said. For, whatever the degree of attention professionals of law give these reasons of an ethical nature, it is probably reasons of this sort that make most mortals believe that certain of their requirements —such as those touching on their dignity, liberty, and equality — will with good reason sustain the expectation that they be recognized in the legal statutes, nationally and internationally, as human rights.

Now we come to the problem of the *ethical foundation* of these rights. But before proceeding, we ought to ask ourselves if this is a problem that still deserves our attention, for there may be some who feel that perhaps this problem has been overcome. No less an authority than Norberto Bobbio maintained this thesis in his already classical text, “Presente e avvenire dei diritti dell’uomo” (1967), in which he assures us that the principal problem of our time regarding human rights is no longer their grounding but their protection, that is, they are a problem that has ceased to be philosophical and has become a juridical and, in a wider sense, a politi-

³¹ [A recent case in the course of which two presiding Madrid magistrates — there is no jury system in Spain — were discovered to have accepted bribes in exchange for releasing a famous Italian Mafia soldier from jail.]

³² Dworkin, *Taking Rights Seriously*.

cal one.³³ This led Bobbio solemnly to pronounce that “we do not consider the problem of grounding to be nonexistent but rather, in a certain sense, as solved, so that there is no further need to concern ourselves with its solution.” To which he added: “Indeed, now we can say that the problem of founding human rights was solved by the Universal Declaration of Human Rights that the General Assembly of the United Nations approved on December 10, 1948.”³⁴ Which is to say that this Declaration would be the best possible proof that a system of values is deemed to have a grounding and thus be recognized as, in short, “the proof of the general consensus as to its validity.” In Bobbio’s view there are three primary ways of founding such values. One way consists in deducing them from some invariable objective datum such as, for example, human nature (which is what jusnaturalism has always done and what in one way or another will have to continue to do in order to avoid debasing itself to the point where it admits to any interpretation we wish to make of it; but the truth is that human nature can be imagined in many different ways and an appeal to it can serve to justify extremely divergent and even contradictory value systems, so that the “right to dignity, liberty and equality” would be just as natural as the “right of the strongest”). A second way considers the values in question to be self-evident truths (but an appeal to evidence is no more promising than the appeal to human nature, since what at one moment in time is considered evident may not be at another moment: in the eighteenth century property was considered “sacred and inviolable,” a view which is certainly not held today, whereas the “evidence” today that “torture is intolerable” was no impediment to its being considered a normal legal procedure in the past, nor does it keep

³³ N. Bobbio, “Presente e avvenire dei diritti dell’uomo,” *La Comunità Internazionale* 23 (1968): 3–18. I have quoted from the Spanish translation of this text, delivered the previous year at the Royaumont Colloquia, by A. Ruiz Miguel, “Presente y porvenir de los derechos humanos,” *Anuario de Derechos Humanos* 1 (1982): 7–28.

³⁴ Bobbio, “Presente e avvenire,” 10.

it from being practiced today extralegally). A third way is the one held by Bobbio when he tries to justify values by demonstrating that the latter are supported by consensus and that therefore a value will have a stronger grounding the more widely it is shared (in the argument from consensus,³⁵ the proof of the “objectivity” of values—held to be impossible or, at least, extremely uncertain—has been replaced by that of “intersubjectivity,” a proof that only provides a “historical” and “nonabsolute” grounding, which nevertheless is the only one capable of being “factually” proven). So the declaration of 1948—together with all the legislation it engendered, whether at the international or at the various national levels—constitutes the strongest historical proof ever of a *consensus omnium gentium*, that is, of a real universal consensus as to a given value system: that is, the system of human rights.

But perhaps things are not as clear as Bobbio thinks, and in truth his proclamation can be objected to on several fronts. At least, and within the same *factual point of view* in which he sites his argument, one could object that the “universal consensus” on human rights is not as universal as it seems, besides the fact that—as Bobbio himself would admit—the process of recognition, and even of creation, of these rights is “a process that is under way” and nothing and no one guarantees the perpetuation of the corresponding consensus, especially when some of these rights—such as the so-called “economic and social rights”—become a bone of contention between conceptions of human rights as different as the liberals’ and socialists’ conceptions. It has also been argued from a *juridical point of view* whether or not the declaration of 1948 is a “juridically consistent document,” a condition which Kelsen would deny—however positively he might evaluate it from other perspectives—but which many lawyers concede, albeit to varying degrees and on the basis of quite different suppositions. But, naturally, the objections that interest us the most

³⁵ Ibid., 11ff.

are those made from a *philosophical point of view*. And so we will examine one such possible objection, which, in view of our interest, is of decisive importance.

During the decade of the sixties, when Bobbio wrote the text we have been discussing, his thought passed from a preferably “coactivist” conception of the law —the view of the legal statute as an apparatus whose functioning is ultimately guaranteed by the possible use of force —to a preferably “consensualist” view of the same.³⁶ And *consensualism*, in the history of ideas, is indissolubly linked to contractualism, that is, to the different versions — at least to the different classical versions —of the theory of the social contract. Bobbio and his disciples have dedicated subtle, penetrating historiographical studies to this theory, but their accounts often stress too much, in my view, the resemblance between the classical theories of the contract and contemporary or immediately prior theories of natural law.³⁷ In contrast, and for reasons we will soon see, I am especially concerned to emphasize the counterexample of Jean-Jacques Rousseau, the Rousseau of *On the Social Contract*. As I already remarked in connection with Kant, in Rousseau too there is unquestionably a clear trace of jusnaturalism — studied with authority and care by Robert Derathé — but the Rousseau theorist of the contract is in no way a jusnaturalist.³⁸ On the contrary, faithful in this to the remote origins of contractualism, Rousseau takes *conventionalism*, which is just the opposite of jusnaturalism, as his position. For, as everyone knows,

³⁶ See Alfonso Ruiz Miguel, *Filosofía y derecho en Norberto Bobbio* (Madrid, 1983), 297ff.

³⁷ See, for example, Norberto Bobbio and Michelangelo Bovero, *Società e stato nella filosofia politica moderna* (Milan, 1979); see also N. Bobbio and M. Bovero, *Origen y fundamentos del poder político*, selection and translation of texts by both authors by José Fernández Santillán (Mexico City, 1985).

³⁸ R. Derathe, *Jean-Jacques Rousseau et la science politique de son temps*, 2d ed. (Paris, 1970).

the tie between “conventionalism” and “contractualism” dates from many centuries ago.³⁹

However, in our case we have no need to go back to the distinction of the Greek Sophists between “nature” (*physis*) and “convention” (*nomos*), a distinction whose applicability in the domain of politics Aristotle rejected when he defined man as “by nature a political animal.” To Rousseau, without going any further back, it was quite obvious that the grounding of the social order represented by the contract was not to be sought in nature — “nature,” he wrote, “produces no law” —but instead was the product of a convention.⁴⁰ Quite another matter is Rousseau’s establishing at once a distinction between “legitimate” and “illegitimate” conventions —according to his thesis, no agreement could ever legitimize the voluntary submission of one man to another or of a whole people to a despot —but this involves the distinct question of *legitimacy*, to which we will return at the proper time.

Regarding our present interest, and if we interpret the United Nations declaration of 1948 in contractualist terms, the consensus of which Bobbio speaks is no more than what is called a “factual consensus” or merely contingent agreement, that is, what we called a “convention,” for such a consensus —to which Bobbio entrusted the definitive *de facto* solution of the problem of grounding human rights, but which he himself offered as no more than a simple historical fact —might express no more than a strategic compromise of the interested parties instead of being the result of a *rational discussion* between them (remember Maritain’s anecdote of which we spoke at the beginning: the delegates of the countries represented on the commission were “in agreement” as to the list

³⁹ See J. W. Gough, *The Social Contract: A Critical Study of Its Development*, 2d ed. (Oxford, 1957).

⁴⁰ J.-J. Rousseau, *Du contrat social*, Oeuvres complètes, Bibliothèque de la Pleiade, vol. 3 (Paris, 1964), 353ff.

of human rights to be approved, but on condition they not be asked Why? that is, For what “reason”?).

In which case, Bobbio’s trust might well be betrayed, and he would risk the charge —a charge that contemporary ethics of discourse, or “communicative ethics,” levels at any conventionalist position more or less inspired in the tradition of the social contract —that no factual collective agreement, not even a true *consensus omnium gentium*, can contain its own rational grounding, since the factuality of such agreements would never by itself be a guarantee of their rationality. As is well known, the cultivators of this communicative ethics tend to believe that a *factual consensus* of this sort can be considered “rational” only to the extent that the means of obtaining it approximate those that the members of an ideal assembly —presumably less subject to spurious considerations than the United Nations General Assembly —would have to follow to obtain, in uninhibited communication and by no other means than “discourse” or cooperative discussion, a similarly ideal and even *counterfactual consensus*, one whose rationality would be above suspicion. For —as is also well known —discourse or communicative ethics is extremely sensitive to the “theory of rationality,” and with good reason, since it attempts to offer itself as a *theory of practical reason*, which is what ethics amounts to for many of us.

If we wish to put it this way, the “theory of consensus” that this sort of ethics of discourse or *communicative ethics* defends, tries in some sense to go “beyond the social contract,”⁴¹ as these extracts from the chef d’oeuvre of one of its representatives show:

The free acceptance undertaken by human beings only constitutes a *necessary*, but not a *sufficient*, condition of the moral validity of norms, Immoral norms can also be accepted by men as obligatory, out of error or on the assumption that only

⁴¹ I refer the reader to my paper “Más allá del contrato social (Venturas y desventuras de la ética comunicativa),” chap. 7 of *Desde la perplejidad* (Madrid, in press).

others (only the weakest!) will have to obey them: as, for example, the presumed duty to offer human sacrifice to the gods, or the legal norm that subordinates all social considerations to the free play of economic competition —or to the biological selection of the fittest. It is true that to be binding every *contract* presupposes the free acceptance of authentic, that is, moral, norms by both parties, but the moral validity of the presupposed norms cannot be grounded in the fact of their acceptance, that is, following the model of the setting up of a contract.⁴²

To which question he returns later:

The sense of moral argument might be adequately expressed with a principle that is by no means new: that is, that all man's *necessities* that can be accommodated to the necessities of others through discussion . . . must be the concern of the "ideal community of communication." With this I believe I have outlined the grounding principle of an *ethics of communication* which, at the same time, also constitutes the grounding . . . of an ethics of the democratic formation of the will, achieved by means of agreement or "convention." The basic norm outlined here does not derive its obligatory character from its *factual acceptance* by those who arrive at an agreement based on the "contractual model," but rather it obliges those who have achieved communicative competency through the process of socialization to reach an understanding with the object of arriving at a solidary formation of the will on every affair that affects the *interests* of others.⁴³

Regarding the two texts just quoted, both from a justly famous essay by Karl-Otto Apel, one can be as ironic as one likes about their aprioristic "community of communication" that sets up shop in the One-way Castle of philosophical transcendentalism, to

⁴² Karl-Otto Apel, *Transformation der Philosophie*, 2 vols. (Frankfurt am Main, 1973), 2: chap. 7, "Das Apriori der Kommunikationsgemeinschaft und die Grundlagen der Ethik," 415–16.

⁴³ Apel, *Transformation*, 425–26.

which there are certainly as many access roads as there have been transcendental philosophers throughout history, but not one return road, because none of these philosophers has ever returned. Or it might be compared, as I once did, to the “communion of saints,” beyond the reach of any mortals except those Tibetan monks to whom Kant attributed a certain familiarity with the *Versammlung aller Heiligen*.⁴⁴ Or, finally, one might allege the unlikelihood of discovering the grounding we seek for human rights in that sort of angelic community, where it is by no means clear that we are likely to find anything truly human. But Apel’s allegation against conventionalism *must be taken seriously*, which really means “taking ethics seriously,” inasmuch as it is no less deserving of seriousness than rights or the law. For, all irony aside, the moral of his texts is conclusive. If our conventions will serve equally to support just and unjust norms, they will also serve to ground human and inhuman rights, from which it follows that such conventions will not serve our purposes.⁴⁵ And, as for the accusation of idealism, it should not be forgotten that in those texts Apel also speaks of quite realistic and even material things, such as “interests” and “needs,” even though he reminds us that both require linguistic expression in order to be shared in communication.

But this last is something that even so prominent a theoretician of needs as Agnes Heller makes no bones about recognizing, in dialog, furthermore, with an equally prominent theoretician of the ethics of discourse, or communicative ethics, Jürgen Habermas, when she writes that even though the Habermasian theory cannot speak to people with any more authority than its rivals about what their “interests and needs” are, at least “it can tell one that—whatever their interests and needs—people must argue com-

⁴⁴ Kant, *Zum ewigen Frieden*, Werke, 8:359–60n.

⁴⁵ For a more detailed evaluation of Apel’s critique of conventionalism, see my contribution, “El aposteriori de la comunidad de comunicación y la ética sin fundamentos,” to *Estudios sobre la filosofía de Karl-Otto Apel* ed. Adela Cortina (in preparation).

municatively in favor of them,” that is, “must relate them to values by means of rational arguments.”⁴⁶

Nor is the advent of Habermas and his *ethics of discourse* at all fortuitous at this point.⁴⁷ His position, as everyone knows, is close to Apel’s, albeit with certain important differences of nuance (for example, a considerable reduction in degree of transcendentalism). And, like Dworkin, he is interested in bringing ethics closer to law (Habermas’s ethics is clearly influenced by Kant, but it also contains certain Hegelian features that are worth keeping in mind). As to the first, Habermas holds that the criterion for grounding a norm can only be a consensus obtained through rational discourse, a consensus, then, that is a *rational consensus*, the obtaining of which depends on a series of hypothetical conditions—the well-known, hypothesis of the “ideal speech situation”—such as that all those involved in the dialog enjoy a symmetrical distribution of the opportunities to intervene, and that the dialog proceed with no more coercion than that imposed by the quality of the arguments (conditions which obviously ought to be called “counterfactual,” that is, contrary to fact, rather than hypothetical, for in reality they never arise—with the probable exception of the discussion sessions that will follow the reading of this lecture). As to the second—that is, the *liaison*, I would not want to say at this point whether *hereuse* or *dangereuse*, between ethics and law—perhaps it would be better to let Habermas himself speak. We are told that “the counterposition between the areas regulated respectively by morality and politics would be relativized, and the validity of all norms would then depend on the *communicative formation of the will of those potentially interested*,” given that “(even if) this does not alter the need to

⁴⁶ A. Heller, “Habermas and Marxism,” in *Habermas: Critical Debates*, ed. J. B. Thompson and D. Held (Cambridge, Mass., 1982), 21–41, 32.

⁴⁷ For the most complete exposition of his ethics of discourse, see J. Habermas, “Diskursethik: Notizen zu einem Begründungsprogramm,” in *Moralbewusstsein and kommunikatives Handeln* (Frankfurt am Main, 1983), 53–124.

establish coercive norms, because no one can know — at least not at present — to what degree it is possible to reduce aggression and achieve a voluntary recognition of the ‘principle of discourse,’ . . . only in this latter case, which for the moment is no more than a construct, would morality become strictly universal, in which case it would also cease to be ‘mere morality’ in the sense of the usual distinction between law and morality.”⁴⁸ (There is no need to insist on the Hegelian overtones of these paragraphs, where — rather than bringing ethics closer to law — it would be more proper to speak of their mixture, with politics included, once the aforementioned *mere morality* had been overcome.)

Habermas has reiterated his viewpoint in a recent essay — “Wie ist Legitimität durch Legalität möglich?” (1987) — where, in the course of attempting to answer the question “how can legitimacy be achieved through legality?” the general sense of his position on the problems of grounding that we have been discussing is considerably clarified.⁴⁹

Habermas takes them up in the process of defending the thesis that the autonomization of law — effected in modern times with the help of rational law (the Kantian *Vernunftrecht*), which rendered possible the introduction of differences into the previously solid block of morality, law, and politics — cannot mean a complete divorce between law and morality, on the one hand, or politics, on the other, since law that has become positive cannot do without its inner relationship with either of the *two*. Habermas, then, considers Austin’s or Kelsen’s concept of juridical autonomy (to which we referred a short while ago) indefensible, and he then asks how the aforementioned autonomization of law was effected. The turning point comes with modern rational law, which — in connection with the theory of the social contract

⁴⁸ J. Habermas, *Legitimationsprobleme in Spätkapitalismus* (Frankfurt am Main, 1973), 87.

⁴⁹ Habermas, “Wie ist Legitimität durch Legalität möglich?” *Kritische Justiz* 20 (1987): 1–16.

(Kant's, but before him, Rousseau's) —reflected the articulation of a new posttraditional state of moral conscience, which in turn would eventually serve as a model of *procedural rationality* for law. As Habermas writes elsewhere:

In modern times we have learned to distinguish with greater clarity between theoretical and practical arguments. With regard to questions of a practical nature, which concern the justification of norms and actions, Rousseau introduces *the formal principle of Reason*, which takes the role formerly played by material principles such as Nature or God. . . . Now, since ultimate reasons are no longer theoretically plausible, the *formal conditions of justification* end by taking on a legitimizing force of their own, that is, the procedures and the premises of the rational agreement acquire the status of principles. . . . (That is), the formal conditions for the possible reaching of a rational consensus replace the ultimate reasons in their capacity as *legitimizing force*.”⁵⁰

Of course, there can be theories of contracts of very different stripe, and obviously Hobbes's is very different from Kant's. Whereas for Hobbes, for example, in the last analysis law becomes an instrument at the service of political domination, law for Kant — including positive law —retains its essentially moral character, which leads Habermas to assert that law (and the same could be said of politics) “is reduced by Kant to the condition of a deficient kind of morality [*Recht wird zu einem defizienten Modus der Moral herabgestuft*].”⁵¹ According to Habermas, the reason for this is the tendency of Kantian rational law to occupy the place vacated by the old natural law. In Kantian terms, as interpreted by Habermas at least, the positivation of law would amount to the realization in the empirical or phenomenal political world (*res publica phaenomenon*) of rational juridical principles —which

⁵⁰ J. Habermas, *Zur Rekonstruktion des historischen Materialismus* (Frankfurt am Main, 1976), 250.

⁵¹ Habermas, “Wie ist Legitimität,” 7.

supposedly would correspond to a moral or noumenal political world (*res publica noumenon*)—principles derived from, and dependent upon, imperatives (moral imperatives) of reason (practical reason). But according to this metaphysical doctrine of the two worlds or “two kingdoms (*Zwei-Reiche-Lehre*),” both law and politics would in fact lose their positivity, thereby threatening, still according to Habermas, to destroy the very viability of the distinction we spoke of before between legality (of a positive law within an also positive conception of politics) and morality.

Be that as it may, the dynamics of modern social life seems to flow through quite different channels from those foreseen, or dreamed of, in Kantian ethics. And the dogmatics of private law, as well as of public law, would contradict Kant’s juridical construct, according to which positive politics and positive law would have to be subordinate to the moral imperatives of rational law. Now, if on the one hand, the moral foundations of positive law could no longer be modeled on a Kantian subordination to rational law, on the other hand it is also clearly impossible to deal with, or avoid either, without first having found a substitute for rational law itself. Habermas quotes the dictum of the German jurist G. F. Puchta, who in the last century proclaimed that the creation of law could not be exclusively the work of political legislators, since in that case the state could not be founded on law, that is, not be a state of law, where “state of law” is offered precisely as a substitute for rational law.⁵² But, in addition to the question of strict legality, the idea of a state of law poses the problem of “legitimacy,” unless one wants to interpret in strictly positivistic terms a no less famous dictum, which another jurist, H. Heller, quoted during the Weimar Republic: “In a state of law the laws are the totality of the juridical norms promulgated by the Parlia-

⁵² *Ibid.*, 8ff.

ment.”⁵³ Therefore, the definition of legality neither resolves the problem of legitimacy nor allows us to dismiss it. And, according to Habermas, the *plus* required by the demands of legitimacy would have to be supplied by the introduction “in the interior of positive law itself (*im inneren des positiven Rechts selbst*),” and not by subordination to something exterior, “of the moral point of view of an impartial formation of the will (*der moralische Gesichtspunkt einer unparteilichen Willensbildung*),” so that “the morality nested in law would have . . . the transcendent capacity of a self-regulating procedure charged with controlling its own rationality [*die ins positive Recht eingebaute Moralität hat . . . die transzendierende Kraft eines sich selbst regulierenden Verfahrens, das seine eigene Vernunftigkeit kontrolliert*].”⁵⁴

Let us try to clear a path through Habermas’s dense prose in order to see what he means. The rationality Habermas speaks of is nothing but the “procedural rationality” that was already presaged in the eighteenth century, when Kant, basing himself on Rousseau, liked to repeat that the ultimate proof of the legality of any judicial norm lay in asking oneself “if it could have arisen as a result of the joint will of a whole people.”⁵⁵ Now then, what are we to understand, when this sort of criterion is proposed, by “the joint will of a whole people”? Obviously, for Kant, that will had much more to do with Rousseau’s “general will” than with the plain and unadorned “will of all,” which is the only will that plain and unadorned conventionalism takes into account.⁵⁶ And this would also appear to be the choice of the “rational will” to which Habermas refers — a will produced by “an impartial formation of the will,” that is, of the collective will — a will that,

⁵³ *Ibid.*, 9.

⁵⁴ *Ibid.*

⁵⁵ *Ibid.*, 10; see Kant, *Rechtslehre*, part 2, and *Über den Gemeinspruch: Das mag in der Theorie richtig sein, taugt aber nicht für die Praxis*, *Werke*, 8:273–313.

⁵⁶ See Howard Williams, *Kant’s Political Philosophy* (Oxford, 1983), 161ff.

like the general will, would not be content with a consensus that merely reflected the total of a series of individual interests but one that shed light on the general interest of the community, that is, the “generalizable interests” of its members, by means, as we saw, of a rational consensus. Naturally, the Habermasian version of consensualism — an heir of Rousseau’s general will — faces no fewer problems than conventionalism, some of which we will mention presently. But, for the moment, let us deal with Habermas’s insistence on procedural rationality.

According to Habermas, procedural rationality gains consideration “with the proof of its capacity for generalization of interests (*durch die Prüfung der Verallgemeinerungsfähigkeit von Interessen*).”⁵⁷ This would provide a critical standard for the analysis and evaluation of the political reality of a state of law, a state, in other words, “that derives its legitimacy from a rationality of the procedures for the promulgation of laws and the administration of justice designed to guarantee impartiality (*der seine Legitimität aus einer Unparteilichkeit verbürgenden Rationalität von Gesetzgebungs- und Rechtsprechungsverfahren zieht*).”⁵⁸ As a matter of fact, the procedural rationality that presides over Habermas’s ethics of discourse is naturally no stranger to law, to positive law. We must look, therefore, to the “rationality of law” for an answer to the question of how legitimacy is achieved through legality. Now, Habermas does not agree with Max Weber’s belief that the rationality inherent in the law as such provides — aside from all kinds of moral presuppositions and implications — the ground for the legitimizing force of legality: in Habermas’s opinion, the legitimizing force would correspond rather to the procedures charged with institutionalizing the foundational demands of the current legality, as well as to the argumentative resources available to achieve those demands.⁵⁹ The

⁵⁷ Habermas, “Wie ist Legitimität,” 11.

⁵⁸ *Ibid.*

⁵⁹ *Ibid.*, 12.

“source of legitimation,” therefore, should not be sought unilaterally in such places as political legislation or the administration of justice. For example, the grounding of norms —no less than their application —presupposes the idea of impartiality. And this “idea of impartiality,” which in turn is strictly dependent on the idea of the “moral point of view,”⁶⁰ constitutes, Habermas recalls, the very root of practical reason, forming part of communicative ethics and of any other ethical theories (Habermas mentions those of John Rawls and Lawrence Kohlberg) that consist of providing a *procedure* with which to meet practical problems from the moral point of views.⁶¹ In Habermas’s communicative ethics, it is already quite clear just what that procedure is: “Whoever takes part in the praxis of argumentation,” Habermas concludes, “must assume pragmatically that, as a matter of principle, all of the potentially interested parties can and may participate freely and equally in a cooperative search for truth, where the only coercion is in advancing a better argument [*Jeder Teilnehmer an einer Argumentationspraxis muss namlich pragmatisch voraussetzen, dass im Prinzip alle moglicherweise Betroffenen als Freie und Gleiche an einer kooperatiuen Wahrheitssuche teilnehmen konnten, bei der einzig der Zwang des besseren Argumentes zum Zuge kommen darf*].”⁶²

Personally I would object, in such a characterization, to the blatant cognitivism of the allusion to the “cooperative search for truth.” In practical discourse, as a matter of fact, “truths” are not

⁶⁰ [The words “moral point of view” were in English in the original.]

⁶¹ Habermas, “Wie ist Legitimität,” 12. According to Jose Luis L. Aranguren, “Sobre la etica de Kant,” in *Kant después de Kant (En el segundo centenario de la Critica de la Razon Practica)*, ed. J. Muguerza and R. Rodriguez Aramayo (Madrid, in press), “proceduralism” —that is, the reduction of practical reason to procedural reasoning —is a “neokantian” characteristic of those trends in contemporary ethics, and is the result, among other things, of an extreme assimilation of ethics by law (this assimilation is, in fact, more neokantian than Kantian, since it is scarcely in line with the spirit of Kant’s distinction between legality and morality). For my part, I have already pointed out that in Habermas’s case the same assimilation also includes a good bit of “neohegelism.”

⁶² Habermas, “Wie ist Legitimität,” 13.

sought (even “truths by consensus”) and the best refutation of a cognitivist position such as this is the one developed by Paul Lorenzen, who encapsulates it in the precept “You ought to seek only the truth,” where the “ought” removes us from the cognitivist perspective and places us in a normative and, finally, an ethical one.⁶³ But, in fact, there would be no problem —that is, no new problem— if, for the phrase “cooperative search for truth,” we simply substituted “search for a consensus.” With the characterization understood this way, we can also understand better why Habermas wants to consider “juridical proceduralism” as *continuous* with ethical proceduralism. “It is not a question,” he tells us, “of confusing law and ethics (*Freilich dürfen die Grenzen zwischen Recht und Moral nicht vermischt werden*).”⁶⁴ As institutionalized procedures, the juridical ones may aspire to a “completeness” that would not be attainable for ethical procedures, whose rationality is always an “incomplete rationality” that depends on the perspectives of the interested parties. Not to mention the greater degree of “publicity” of juridical procedures, compared with the “privacy” of an internalized and autonomous morality; or the instrumental condition of law when used to achieve this or that political goal, which locates law “between ethics and politics.” But, be that as it may, there is also, he warns us, an “ethics of political responsibility,” and law and ethics “not only complement each other but one can even speak of their mutual coupling,” such that “procedural law and proceduralized morality could control one another.”⁶⁵ But what is the ultimate meaning of this “control one another”?

As he himself says, Habermas does not confuse ethics and law, but he does mix them when he speaks not only of their “complementarity” (*Ergänzung*) but also of their “mutual cou-

⁶³ P. Lorenzen, *Normative Logic and Ethics* (Mannheim, 1969), 74.

⁶⁴ Habermas, “Wie ist Legitimität,” 13.

⁶⁵ *Ibid.*, 14–15.

pling” (*Verschränkung*). And I am not at all certain if we can expect much from this mixture to which I previously referred. For Habermas ends up not so much with “the *moralization of Law*” or “the *juridicalization of Ethics*” as with the *politicization* of both elements.

In what is thus far the canonical version of his ethics of discourse,⁶⁶ Habermas has been able to encapsulate it as the proposal of a communicative transformation of the Kantian “principle of universalization,” that is, one of the formulations of Kant’s categorical imperative. Where the former prescribed, “Act only according to that maxim by which you can at the same time will that it should become a universal law,” Habermas’s version prescribes instead, “Rather than ascribing as valid for all others any maxim that I can will to be a universal law, I must submit my maxim to all others for the purpose of communicatively testing its claim to universality,” where “communicatively” simply means “democratically.”⁶⁷ In the essay we have been commenting on, Habermas closes with this affirmation: “No autonomous law without real democracy [*Kein aatonomes Recht ohne verwirkliche Demokratie*].”⁶⁸ He might have said the same about ethics, for, in the end, we not only find law between ethics and politics, but also ethics between politics and law (for a graphic idea of their mutual relations, one has only to conceive of ethics, law, and politics as the three sides of a triangle). Habermas does not tell us what kind of “democracy” this would be, in keeping with his reservations elsewhere which led him to write, “it is a question of finding mechanisms that will serve to ground the supposition

⁶⁶ Ibid., 14–15 n. 45.

⁶⁷ Habermas, “Diskursethik,” 77. As Habermas acknowledges, the reformulation of the principle of universalization, within the ethics of discourse, was inspired by a version of his own thought by Thomas McCarthy, *The Critical Theory of Jürgen Habermas* (Cambridge, Mass., 1978; 2d ed., London, 1981), 326.

⁶⁸ Habermas, “Wie ist Legitimität,” 16. See, in connection with this point, the paper by Maria Herrera, “Ética, derecho y democracia en J. Habermas,” in the collective volume *Teorías de la democracia* (Mexico City, in press).

that the basic institutions of society and the fundamental political decisions would be willingly approved by all those affected by them if the latter were able to participate —freely and equally— in the processes of the communicative formation of the will, [but] democratization cannot mean an a priori preference for a specific type of organization.”⁶⁹ But whether we are dealing with a participatory or a representative democracy, or with a combination of the two, the collective decisions that are made there will have to recognize in some way or other the prevalence of some version of the “rule of the majority,” something that, with good reason, Professor Elías Díaz never tires of reminding us of in our country.⁷⁰

Still, as Díaz is the first to recognize, the rule of the majority is far from guaranteeing the justice of the decisions it enables. In truth, nothing excludes the possibility that the decision of a given majority may be unjust, and the fact that decisions that are not majority ones may also be unjust —and, very likely, or certainly, even more unjust— does not provide us with any ethical solace, especially if what we hope to do is use Habermas’s imperative (or the Habermasian version of the Kantian principle of universalization) to ground human rights. When it comes to putting it into practice, the sophisticated consensualism of Habermas, or of Apel, unfortunately does not seem much more useful than conventionalism, or, if one prefers, Bobbio’s consensualism.

Take, for example, those human rights having to do with the requirements of liberty and equality of which I spoke at the beginning of this lecture. Habermas seemed to take them for granted when he affirmed that in argumentative praxis we would have to consider the possibility, even the necessity, that all those potentially interested participate (precisely as free and equal and in no other way) in the cooperative search for consensus. In which case,

⁶⁹ Habermas, *Zur Rekonstruktion*, 252.

⁷⁰ E. Díaz, *Da la maldad estatal y la soberanía popular* (Madrid, 1984), 57ff.

freedom and equality would be something like transcendental, or quasi-transcendental, conditions of possibility for discourse itself. And, when we descended from this transcendental or quasi-transcendental plane to the miserable sublunary world of daily political realities, those conditions would not be sufficient to exclude the possibility that a majority decision might infringe on the freedom and/or equality of a number of people, such as those forming an oppressed and/or exploited minority (for our purposes it would be too much if it infringed on the freedom and/or equality of even one individual). Just as it could happen that this decision might infringe on the dignity of those people if, for instance, to their oppression and/or exploitation, humiliation and even the denial of their condition as human beings were added.

The preceding observations—I hasten to add in order to reassure Díaz—are by no means intended to disqualify democracy, which undoubtedly is made legitimate to an acceptable degree with Habermas's procedural rationality, in addition to a series of complementary elements (respect and protection of minorities, safeguards for the rights of the individual, guarantees as to the extension of the concept of democracy beyond the mechanical functioning of the rule of the majority, etc.), elements that would be important to Habermas and that are included in the notion of legitimacy that Díaz suggests we call "critical legitimacy."⁷¹

But the question that we are concerned to clarify here is whether this procedural rationality, with as many complementary elements as we wish to add, completely exhausts the domain of practical reason, which is to say the domain of ethics: the answer, I believe, would be in the negative, since thus far ("thus far," of course, simply means "until this moment in my lecture") practical

⁷¹See *ibid.*, 21ff., 127-48, as well as his postscript, "La justificación de la democracia," *Sistema* 66 (1985): 3-23. For Habermas's view, see also "Die Schrecken der Autonomie," on the disqualification of democracy by Carl Schmitt and his present curious revival, in *Eine Art Schadensabwicklung* (Frankfurt am Main, 1987), 101-14.

reason still has not managed to provide us with the desired foundation of human rights that we seek.

In order to explore a different strategy, I want to turn to a different formulation of Kant's categorical imperative, one whose ethical importance —for our purposes undoubtedly superior to that of the *principle of universalization* —has been pointed out by several contemporary philosophers, by Ernst Tugendhat for instance.⁷² Although my approach to this formulation is not the same as his, I too have had recourse more than once to the prescription “Act in such a way that you always treat humanity, whether in your own person or in that of any other, never simply as a means but always at the same time as an end.” And on one such occasion I called that imperative *the imperative of dissidence*,⁷³ with the understanding that —unlike the principle of universalization, which was meant to promote subscription to values such as dignity, liberty, and equality —what this imperative would really have to do was to ground the possibility of saying no to situations where indignity and a lack of liberty or equality prevailed.

To put it succinctly, we ought to ask ourselves if —after so much insistence on factual or counterfactual consensus with regard to human rights —it would not be more advantageous to attempt a “grounding” on the basis of *dissensus*, that is, a “negative” foundation for human rights, which I will term “the alternative of dissent.”

⁷² See E. Tugendhat, *Probleme der Ethik* (Stuttgart, 1984). See Tugendhat's “Retraktationen” (1983), included in this book (132–76) and written in reaction to the criticism Ursula Wolf (*Das Problem des moralischen Sollens*, Berlin, 1984) leveled at his earlier “Drei Vorlesungen über Probleme der Ethik” (1981), 57–131. For other views of this question, see P. Haezrahi, “The Concept of Man as End-in-Himself,” in *Kant: A Collection of Critical Essays*, ed. R. P. Wolff (London, 1968), 291–313; T. E. Hill, “Humanity as an End in Itself,” *Ethics* 91 (1980): 84–99; and, especially, Albrecht Wellmer, *Ethik und Dialog: Elemente des moralischen Urteils bei Kant und in der Diskursethik* (Frankfurt am Main, 1986).

⁷³ For instance, in my paper “La obediencia al Derecho y el imperativo de la disidencia (Una intrusión en un debate),” *Sistema* 70 (1986): 27–40.

In fact, the idea here of recourse to “dissensus” instead of consensus hardly seems wrongheaded if we notice that the historical phenomenology of the political struggle for the conquest of human rights, of whatever variety, has always had to do with the dissent of individuals or groups of individuals with respect to a prior consensus —usually written into the current legislation — that in one way or another denied them their intended condition of subjects of those rights. Although historical accounts of human rights often go back to the beginnings of time, if we located the start of this struggle in modern times, it would not be hard to find —behind each and every one of the documents that serves as a precedent for the Universal Declaration of Human Rights of 1948 (from the English Bill of Rights of 1689, or that of the Good People of Virginia of 1776, or the Déclaration des droits de l’homme et du citoyen of the French National Assembly of 1789, by way of our own Constitution of Cádiz of 1812, to the Mexican Constitution of 1917, or the Declaration of Rights of the Working People of the Soviet Union of 1919) —either the vindications that accompanied the rise of the bourgeoisie in the sixteenth, seventeenth, and eighteenth centuries, or the workers’ movements in the nineteenth and twentieth centuries, just as the anticolonialist struggles of our own era are to be found behind this declaration of 1948. Nor would it be hard to identify the contemporary social movements directly or indirectly responsible for the International Pact on Civil and Political Rights, and the International Pact on Economic, Social, and Cultural Rights, both dating from 1966, which are an outgrowth of the UN declaration and together with it, in the context of the United Nations’ efforts to coordinate legislation, make up what is known as the Human Rights Act.⁷⁴ Today, indeed, we will have to look to the so-called “new social movements” —pacifist, ecologist, feminist, and so on —for any future

⁷⁴ See *Derecho positivo de los Derechos Humanos*, ed. Gregorio Peces-Barba (Madrid, 1987), and *Historia de los Derechos Humanos*, ed. E. Fernández, G. Peces-Barba, A. E. Pérez Luño, and L. Prieto (in preparation).

advances in the struggle for those rights, which, as we hope and presume, will one day be added to the appropriate legislation, however indifferent to them the present legislation now is.

In this perspective, the social and political history of mankind —with its perpetual, one could almost say Sisyphean, construction and destruction of prior consensuses broken by dissent and later restored on different bases, only to be struck down by other dissents in an infinite succession —is rather like the description of the history of science that we owe to Thomas Kuhn, with its characteristic alternating periods of “normal science” under the hegemony of a given scientific paradigm, and its periods of “scientific revolution.” As Michael Walzer remarked somewhat acidly, the application of Kuhn’s schemata to the history of human mores “is more melodrama than realistic history.”⁷⁵ But perhaps human history is somewhat melodramatic, if not something worse —as Shakespeare well knew —since it is normally, or revolutionarily (in the Kuhnian as well as the usual sense), written in blood. And if there is any doubt that the history of mores involves discovery and invention just as the history of science and technology does, the invention of human rights ought to serve to dispel this misapprehension, inasmuch as human rights constitute “one of the greatest inventions of our civilization,” in exactly the same sense that scientific discoveries or technological inventions do, according to Carlos Santiago Nino.⁷⁶ But as to my remark that the historical phenomenology of the struggle for these rights has involved at least as much dissent as it has consensus—if not more—the truth is that I am unable to develop this line further. I am neither a historian nor a sociologist of conflict, nor do I have any other professional qualifications in this respect, and I do not wish to burden the thesis I will be defending with the inevitable accusa-

⁷⁵ M. Walzer, *Interpretation and Social Criticism* (Cambridge, Mass., 1987), 26.

⁷⁶ C. S. Nino, “Introducción,” *Ética y derechos humanos* (Buenos Aires, 1984), 13–17.

tion that I am guilty of some version of the “genetic fallacy,” of a historicist or sociologicistic variety, because I attempted to derive philosophical conclusions from the historical development of events or from this or that circumstance of social reality.

On the other hand, one would indeed have to keep in mind that, when viewed in a strictly philosophical perspective, the imperative I called one of dissidence — from which Kant drew his idea of “a kingdom of ends” (*ein Reich der Zwecke*), tending to be promoted by the establishing of “perpetual peace” on the face of the earth — demands to be connected not only with Kantian ethics but also with Kant’s much less sublime political thought and, especially, with his disturbing idea of mankind’s “unsociable sociability” (*ungesellige Geselligkeit*), which barely disguises a considerably conflictual vision of history and society.⁷⁷

Nevertheless, in the remainder of this lecture I will concentrate on the ethical aspects of this question and pass over its political-philosophical ones with the sole observation that the imperative of dissidence might allow us to ponder the importance, together with the *critical legitimacy* of which we spoke before, of the *critique of legitimacy*, that is, of any legitimacy that tries to ignore the condition of ends in themselves which that imperative assigns to human beings.⁷⁸

Now, moving on to the final point, this second imperative of the *Foundation of the Metaphysics of Morals* rested, according to Kant, on the conviction, which he solemnly affirmed in this work, that “man exists as an end in himself” and, as he added in the *Critique of Practical Reason*, that “he can never be used by anyone (not even God) only as a means, without at the same time being

⁷⁷ Kant, *Grundlegung der Metaphysik der Sitten*, Werke, 4:433ff.; *Zum ewigen Frieden; Idee zu einer allgemeinen Geschichte in weltbürgerliche Absicht*, Werke, 8:20ff. On this point see my paper “Habermas en el reino de *10s fines*: Variaciones sobre un tema kantiano,” in *Esplendor y miseria de la ética kantiana*, ed. Esperanza Guisin (Barcelona, 1988), 97–139.

⁷⁸ Here see my paper “¿Legitimidad crítica o crítica de la legitimidad?” in *Elogio del disenso* (in preparation),

an end.”⁷⁹ As I suggested before, our imperative has in some sense a *negative character*, since —behind its apparent grammatical affirmation—it does not actually tell us “just what” we ought to do but instead what we “ought not to do,” that is, not treat ourselves, or anyone, solely as an instrument. Kant is definite on this point when he affirms that the end that man is, is not one of those specific ends that we can decide to achieve with our actions and that are generally means to achieve other ends, as, for example, well-being or happiness. Man is *not* an end to be effected. As far as man as an end is concerned, Kant warns, “end is not to be thought of here as an end to be effected, but as an independent end and therefore in a purely negative way, that is, as something that should never be acted against.”⁸⁰ “Ends to be effected,” as specific ends, are, according to Kant, “only relative ends.” And for this reason they cannot give rise to “practical laws” or moral laws, but at most serve as a basis for “hypothetical imperatives,” such as those dictated by prudent consideration when we say, “if we want to remain healthy, we shall have to follow this or that medical advice.” But, according to him, the only specifically moral end or “independent end” we have —that is, human being invested with “absolute value” —requires no less than a “categorical imperative” such as ours.⁸¹ In this sense, and while the relative ends amount to no more than “subjective ends” such as any of us might attempt to realize, men as ends, that is, “persons,” Kant calls “objective ends,” as in a famous passage from the *Foundation of the Metaphysics of Morals* that I cannot help but quote:

Those beings whose existence does not depend on our will, but on nature, have, in the case of irrational beings, a merely relative value, as ends, and for that reason are called *things*;

⁷⁹ Kant, *Grundlegung*, 428; Kant, *Kritik der praktischen Vernunft*, Werke, 5:132.

⁸⁰ Kant, *Grundlegung*, 437.

⁸¹ *Ibid.*, 439ff.

by contrast, rational beings are called *persons* because their nature already distinguishes them as ends in themselves, that is, as something that cannot be used merely as a means and which, thereby, checks any caprice (and is an object of respect). The latter are not, therefore, mere subjective ends, whose existence, as an effect of our action, has a value *for us*, but are *objective ends*, that is, things whose existence is in itself an end.”⁸²

This is why, Kant adds in another equally famous passage from the same work, man has “dignity” instead of a “price”: “What constitutes the condition that makes something an end in itself, has not merely a relative value or *price*, but instead an intrinsic value, that is, *dignity*.”⁸³ These are indeed moving words, but why should everyone accept Kant’s proclaiming that man exists as an end in himself?

That this is not self-evident is proven, to give a single counter-example, by the difficulty of arguing in favor of Kant’s assertion—or even understanding it—that those would have who hold that rationality can only be *instrumental reason*, that is, a reason capable of concerning itself only with making the “means” adequate to the “ends” pursued by human action, and incapable of concerning itself with “ultimate ends” that do not serve as means for achieving other ends. This, of course, renders such reason incapable of assuring *that man be an end in himself*, a point that must never have bothered Heinrich Himmler, inasmuch as in his bulletins to the SS he emphatically insisted—according to Hannah Arendt—on “the futility of posing questions about ends in themselves.”⁸⁴ Theoreticians of instrumental rationality, on the other hand, would consequently deny that one can speak of a *practical*

⁸² *Ibid.*, 428.

⁸³ *Ibid.*, 434-35.

⁸⁴ Quoted by H. Arendt in *The Origins of Totalitarianism* (New York, 1968). I have quoted from the Spanish translation by G. Solana (*Los orígenes del totalitarismo*), 3 vols., Madrid, 1982, 3:440, n. 33.

reason, but —if we refuse to accept, as we are free to do, that the “rationality” of human “praxis” can be reduced to “instrumental rationality”—we would at least be authorized to examine the possibility of arguing in favor of the Kantian assertion that man is an end in himself.

In my opinion, the author who has most convincingly advanced the possibility of this sort of argument is Tugendhat, when he considers it an “empirical fact” —the recognition of which is aided by the study of the process of socialization —that regarding our lives and those of others we enjoy relations of mutual esteem (and its opposite), which make us feel that each of us is “one among many” and subject in this way to a common morality (unless, that is, we suffer a *Lack of moral sense*,⁸⁵ a state that Tugendhat is inclined to consider “pathological”)⁸⁶ Upon such a fact one could go on to build a “morality of mutual respect,” a morality Tugendhat feels, in my opinion correctly, to be the “basic nucleus” of all other morality. This does not mean that every morality must needs be restricted to this nucleus, since even Kant’s own ethics —especially in connection with his idea of the “supreme good” —could be derived from sources other than “respect.”⁸⁷ But it certainly would be significant if the *morality of mutual respect* —according to which the members of a moral community would treat one another as ends —were discovered as a matter of fact at the base of every morality, which would render it truly universal.⁸⁸ And, of course, Tugendhat’s position represents an advance over all those —this writer included —who have ever felt like conceding that the Kantian affirmation that man is an end in himself is no more than a “humanitarian

⁸⁵ [The words “*lack of moral sense*” were in English in the original; J.M.’s italics.]

⁸⁶ Tugendhat, *Probleme der Ethik*, 150ff., esp. 154-55, 156ff.

⁸⁷ See Jose Gómez Caffarena, “Respeto y Utopia: ¿Dos fuentes de la moral kantiana?” *Pensamiento* 34 (1978): 259-76.

⁸⁸ Tugendhat, *Probleme der Ethik*, 163-64.

superstition,” albeit a fundamental one if we are to go on speaking of ethics.⁸⁹

Still, has Tugendhat really managed to convince us? However convincing his thesis, and it does have considerable force, he himself would say it was doubtful that it could convince anyone who lacked moral sensibility, since with such a person, he confesses, “discussion would be impossible.”⁹⁰ But if, as indeed is the case, it is a question of discussing or arguing, this is precisely the case where discussion ought to be most relevant.

In my view, Tugendhat’s reasoning unfolds in such a way that the imperative of dissidence would have to presuppose the principle of universalization, since this lies at the root of his conception of the morality of mutual respect, valid at the same time for *one* and *all*. But perhaps this presupposition is not indispensable, since the imperative of dissidence could in principle hold *only* for one person, that is, *for the dissenter* who upheld the morality of mutual respect, understood as a resolution never to tolerate being treated, nor consequently ever treat anyone, merely as a means, that is, as a mere instrument (where the resolve “never to tolerate being treated merely as a means” would in some way claim a prius over the consequent resolve “not ever to treat anyone merely as a means,” that is, it would be prior to the reciprocity and not only the principle of universalization). Naturally, from what I have said it is clear that *ethical individualism* is not the same as an impossible ethical solipsism and is obligated to entertain the question of what happens to the other individuals.

But before returning to this point, and to clarify what I mean to understand by “individual,” I will indulge in a brief detour through John Rawls’s “Justice as Fairness: Political Not Meta-

⁸⁹ Muguerza, “Habermas en el reino, *de los fines*,” 126–28.

⁹⁰ Tugendhat, *Probleme der Ethik*, 155: “Wenn *das Individuum*, . . . die Moral, und das heisst die moralische Sanktion überhaupt, in dem Sinn in Zweifel stellt, dass es für diese Sanktion kein Sensorium hat, *lässt sich nicht argumentieren*” (italics mine).

physical” (1985), where —in explaining the ultimate sense of his “theory of justice” —Rawls specifies, in passing, the ultimate, or near ultimate, sense of his own individualism.⁹¹ With a great deal more clarity than in the essay by Habermas that I quoted from earlier, Rawls begins by pointing out that his procedural construction refers only to our present democratic societies and in this light we are to interpret the condition of the contractual partners (that is, “free and equal subjects”) in his mental experiment concerning the *original position*. (With or without the “veil of ignorance,” they are the citizens whom we daily meet and who take part in our day-to-day political life, in addition, of course, to personifying the “liberal political doctrine.”)⁹² And this is why Rawls’s conception of the individual or the person needs no more than the *overlapping consensus*⁹³ which, in a society that is pluralistic as to religious beliefs and ideology in general, allows the citizens to agree on certain “basic principles of justice.” Moreover he is saved from having to contemplate —as Rawls himself explicitly admits —any “stronger” conceptions of the “subject,” such as the Kantian one.⁹⁴

As Rawls himself acknowledges, “when [in his theory of justice] we simulate being in the original position, our reasoning no more commits us to a metaphysical doctrine about the nature of the self than our playing a game like *Monopoly* commits us to think that we are landlords engaged in a desperate rivalry, winner take all.”⁹⁵

We may be, then, the same in real life as in the original Rawlsian position, just as Saul of Tarsus remained in some sense

⁹¹J. Rawls, “Justice as Fairness: Political Not Metaphysical,” *Philosophy and Public Affairs* 14 (1985): 223–51.

⁹² Rawls, “Justice as Fairness,” 231ff.

⁹³ [The words “*overlapping consensus*” were in English in the original; J.M.’s italics.]

⁹⁴ *Ibid.*, 245ff.

⁹⁵ *Ibid.*, 239.

“the same” when he became the apostle Paul on the road to Damascus. But it is more likely that in real life one feels less equal and less free than in Rawls’s mental experiment. And, be that as it may, it still seems reasonable to say that, after all, a little daily “metaphysics” keeps the doctor away.

Of course, I have no intention here of reviving the Kantian doctrine of the *two kingdoms*, the empirical or phenomenal and the moral or noumenal ones. But one could still maintain that the “moral subject” and the “empirical subject” are not completely coextensive. Of course, with this we are not saying that the moral subject and the empirical subject are actually distinct, but rather that the first one is the integral subject, but a subject that is far from being reducible to just its empirical manifestations. For example, even the most hardened criminal could never be reduced to his observable conduct, since the latter does not allow us to scrutinize his most secret motivations and intentions, and this fact is a powerful reason never to cease treating him as a moral subject, which is like saying, as “an end in himself.” Another example: as empirical subjects we humans are different as to talent, strength, beauty, and so on, but none of that keeps us from considering ourselves “equals” as moral subjects. Just as, to give a final example, the fact that we, as empirical subjects, may have to suffer a whole set of natural or sociohistorical conditions does not allow us to say that we are thus kept from being “free,” unless at the same time we renounce our status as moral subjects. Our self-consciousness and our self-determination as an indissoluble unit are derived from that moral subjectivity which seems to be the seat of “human dignity,” that is, what makes us “subjects” and not “objects.”⁹⁶

⁹⁶ The thesis of the indissolubility of “self-consciousness” and “self-determination” has been brilliantly defended by Tugendhat in his study *Selbstbewusstsein und Selbstbestimmung* (Frankfurt am Main, 1979). As Tugendhat points out, Andreas Wildt —in *Autonomie und Anerkennung* (Stuttgart, 1982) — was the first to give his considerations an explicitly moral-theoretical meaning, an interpretation Ursula Wolf also stresses (*Das Probleme des moralischen Sollens*), and in his turn, he has developed this point in his *Probleme der Ethik*, 137ff., discussing the thesis of

Perhaps today it is difficult to accept the idea that the *moral subject* and the *empirical subject* do not entirely coincide, but the impossibility of reducing the subject to its manifest properties was at least part of what the Greeks meant when they termed the subject *hypokeimenon*.⁹⁷ The moral subject exemplifies par excellence the subject understood in this way, and this is also the reason for the distance separating the moral subject from the so-called “subject of rights” (*sujeto de derechos*), which is, among others, a variety of the empirical subject. For the rest, not all subjects of rights are moral subjects, since a moral subject is always an individual, while the subjects of rights might well be “impersonal subjects,” such as collective bodies or institutions, from a business all the way to the state itself. And even when, by analogy with moral subjects, we allow one of these impersonal subjects such as a social class or a nation the capacity for “self-consciousness” and for “self-determination,” we must not forget that in any case both depend on the self-consciousness and self-determination of the corresponding individuals. Now then, moral subjects can, and in fact do, aspire to recognition as subjects of rights. And of those aspirations one of the most fundamental is the aspiration to recognition as “subjects of human rights.” In a certain sense, this would be the first human right and even the quintessence of any other human right; in other words, *the right to be a subject of rights*.

But to the question of who or what would concede them this right, prior to any possible recognition of rights, I would answer that nothing and no one has to concede it to a moral subject in full command of his faculties but that it must be the subject him-

“morality” as a necessary condition for the “(practical) identity of the self.” For such an interpretation of Kant’s idea of man as “an end in himself,” see my “Habermas en el reino, de los fines,” 123ff.

⁹⁷ In a somewhat similar vein, Tugendhat speaks of a person’s “being oneself” (*Selbstsein*), which he identifies with one’s “existence” (*Existenz*), as a “quasi-property” (*Quasi-Eigenschaft*), which according to him has to do — rather than with a substantial property that is different from the accidental ones — with the Kantian notion of “end in itself.”

self who appropriates it by affirming his condition as human being. “I am a man,” said the signs carried by the followers of Martin Luther King. And how could one deny the human condition to someone who asserts that he has it, even if for the present it is not recognized in law.

The denial of this condition, that is, the reduction of a *subject* to an *object*, was what Marx, the critic of the ideology of human rights, called “alienation,” and the struggle for human rights — be it said in his honor — is, ironically, nothing but the struggle against the multiple forms of *alienation* that man has known and suffered.

To this end, the subject must begin by being consciously a subject, that is, by unalienating itself. Or, in the words of the later Foucault, by freeing itself of the “subjection” that keeps one from being a subject or imposes on one an unwanted subjectivity.⁹⁸ No subject can aspire to be recognized as a subject of rights unless he or she is first of all a subject plain and simple — which means, among other things, being a moral subject. For this reason Rousseau correctly saw that the prior theory of the social contract was contradictory, in allowing for the possibility of a *pactum subjectionis*, since no subject could rightfully renounce being a subject through any kind of legal agreement.⁹⁹ But, in addition, there are many other “states” of subjection, very different from those characterized by Jellinek with that technical expression.¹⁰⁰ And in the grip of all of them, subjects, just as they find occasions to struggle against alienation, will also find occasions to exercise dissent.

⁹⁸ Michel Foucault, “Why Study Power: The Question of the Subject,” in his afterword, “The Subject and Power,” to Hubert L. Dreyfus and Paul Rabinow, *Michel Foucault: Beyond Structuralism and Hermeneutics* (Chicago, 1982), 208-26.

⁹⁹ Rousseau, *Du contrat social*, 359, 432-33.

¹⁰⁰ Georg Jellinek, *System der subjektiven öffentlichen Rechte*, 2d ed. (1919; repr., Aalen, 1964); for his four-part classification of the *status* of Public Law — *status subiectionis* or *passivus status libertatis* or *negativus*, *status civitatis* or *positivus*, *status activae civitatis* or *activus* — see 81ff.

And what is even more important, they will discover occasions to exercise this dissent, not only by and for themselves, but by and for other moral subjects, inasmuch as the imperative of dissidence—which did not need to presuppose the principle of universalization—is capable, in contrast, of incorporating it into itself. Sartre’s version of this last principle read, “when I choose, I choose for all mankind,” since individual acts already carry within them a potential universality (*l’act individuel engage toute l’humanité*).¹⁰¹ But equally when I dissent I can dissent for all mankind, even for *those who cannot dissent*, either because they are biologically or psychologically unable to do so (as with children or mental patients, for example), or because they are unable to do so for sociopolitical reasons (that is, because they suffer a state of subjection that at the moment cannot be removed).¹⁰² And, of course, when I dissent I can, by the same token, *dissent with others* (but without such dissension causing us to lose sight of the fact that, although often exercised by “groups of individuals,” it is still exercised by “groups of individuals”).¹⁰³ The dissenter is always an individual subject and—no matter how much solidarity there is in his decision to dissent—his dissidence is ultimately solitary, that is to say, the result of a decision taken in the solitude of an individual conscience.

If we now correlate the categories of moral and empirical subjects with those of ends and means, considered before, we could

¹⁰¹ Jean-Paul Sartre, *L’existencialisme est un humanisme* (Paris, 1946), 17ff.

¹⁰² Despite the “negativeness” of dissent, we must not forget that it too may be threatened by the shadow of “paternalism” and no one ought “to be forced to dissent” anymore than they should be forced to consent (for an examination of paternalism, see *Paternalism*, ed. Rolf Sartorius (Minneapolis, 1983) and Ernesto Garzon Valdés, “¿Es éticamente justificable el paternalismo?” in *Actas del II Encuentro Hispano-Mexicano de Filosofía (Filosofía Moral y Política)*, ed. J. A. Gimbernat and J. M. González García (Madrid, in press).

¹⁰³ In any case, ethical individualism, not to be confused with the so-called “methodological individualism,” vindicates only the *autonomy* of the moral subject and not its *autarchy* (for the difference, see Domingo Blanco, “Autonomía y autarquía,” in *Kant después de Kant*, and also my paper “¿Qué es el individualismo ético?” in *Elogio del disenso*).

say that — unlike a means, which in a certain sense is of measurable magnitude (for example, in terms of “instrumental efficiency”) — an end in itself, that is, a moral subject, admits no such “comparative measurability.” Like Aristotle’s substance — with which, nevertheless, it must not be confused, since for the moral subject perpetually *in fieri* one would have to say that “the subject is not substance” — *subjectivity does not admit of degrees* and one could perfectly well say that all subjects have the same import as to their moral demands of dignity, liberty, and equality and, in general, as to their aspirations to be subjects of rights. In this way, any human right could be accessible to any subject, with the proviso that in being accessible to one subject it would be no less so for all the others. For, as far as those rights are concerned, there is a sort of *principle of U-tubes* that, so to say, levels the legal *status* of the subjects — at least potentially. The popular saying “No one is any more a person than anyone else” has sometimes been presented as the fruit of an objectionable attitude of resentment that rejects all excellence, but the meaning of that saying could perhaps be made clearer by saying, “No one is any less a person than anyone else,” if human beings are taken as ends in themselves.

By way of concluding, it might be well to recall that for Bentham speculation about the foundation of human rights was nothing but a string of *anarchical fallacies*.¹⁰⁴ As far as my speculations are concerned, I would like to think that they cannot be refuted as “fallacious,” but I realize they are somewhat “anarchic,” at least in the etymological sense of this second adjective. For, in truth, to entrust the grounding of those rights to the individual is in a way to bet on behalf of *an-archy*, at least to the degree that

¹⁰⁴ In Bentham’s favor, it must be said that he was more careful in his disqualification of such speculations as “fallacies” than, in our own day, was Alasdair MacIntyre, *After Virtue* (Notre Dame, 1984), when he maintains that human rights “do not exist and to believe in them is like believing in witches and unicorns,” a statement that will disturb only those who insist on defending these rights from a position akin to ethical cognitivism.

ethical individualism lies at the opposite pole from any ethical *fundamentalism*.¹⁰⁵

In consequence, I do not believe any jusnaturalist will be prepared to assume a position such as this, which I would like to see go by the name of “ethical individualism.” But, just in case anyone should try to lay it on that sort of Procrustean bed, I will simply offer one argument or, better still, counterargument. I have been asked on occasion if, for example, what I call the “imperative of dissidence” would not, in the end, be similar to the traditional *right of resistance*.¹⁰⁶ My answer is a categorical no. As has been pointed out more than once, and in a magisterial way by Professor Felipe González Vicén,¹⁰⁷ the so-called “right of resistance” is a fairy tale created by jusnaturalism. To be precise, it was invented by the latter as the sole recourse, the sole natural right, capable of opposing the natural right to oppress that jusnaturalism itself awarded to those in power. As such, González Vicén has quite correctly termed it “a juridical monster” and has called attention to Kant’s perspicacity in rejecting it as though it were a *contradictio in adiecto*.¹⁰⁸ But one should add that for

¹⁰⁵ On the late Foucaultian “subject,” Reiner Schiirmann, “Se constituer soi-meme comme sujet anarchique,” *Etudes philosophiques*, October–December 1986, 451–71, speaks of an “an-archic” subject in a sense of “anarchy” similar to the one we have used, since the former would have to be the builder of the different “forms of subjectivity” (or “subject situations”) that in each case constitute it.

¹⁰⁶ See Eusebio Fernández, *La obediencia al Derecho* (Madrid: Ed. Civitas, 1987), 109–15, as well as my paper “Sobre el exceso de obediencia y otros excesos,” in *Actas de las X Jornadas de Filosofía Jurídica y Social*.

¹⁰⁷ See F. González Vicén, “Kant y el derecho de resistencia,” in *Kant después de Kant*, where his approach to the problem of the right of resistance —with which he also dealt in chapter 5 of his early *Teoría de la revolución* (Valladolid, 1932)— echoes the views from his monograph *La filosofía del estado en Kant* (La Laguna, 1952), included as part of his *De Kant a Marx* (Valencia, 1984). In my opinion, González Vicén’s interpretation competes to its advantage with other interpretations of Kant’s attitude to this supposed right. See, to give only three examples of different approaches, Robert Spaemann, “Kants Kritik des Widerstandsrechts,” and Dieter Heinrich, “Kant über die Revolution,” both in Batscha, *Materialien zu Kants Rechtsphilosophie*, 347–58, 359–65, as well as Hans Reiss, “Kant and the Right of Rebellion,” *Journal of the History of Ideas* 17 (1956).

¹⁰⁸ González Vicén, *La filosofía del estado en Kant*, 92ff.

Kant the rejection of the right to resistance was perfectly compatible with the positive, even enthusiastic, value he placed on the political revolutions of his day, from the American Revolution to the French Revolution or the Irish Rebellion. From my point of view, which I would not dare attribute either to Kant or to González Vicén, what the dissenter ought to do when faced with a legally unjust situation, with “unjust law,” is not to invoke some right to resist but simply to resist.

The renaissance of jusnaturalism following the Second World War was due largely to the *argumentum ad hominem* —or to the *reductio ad Hitlerum*, as it has also been called —used by partisans of the former against juspositivism, an argument according to which the monstrous outrage against human rights of the Nazi regime was the fault of legal positivism.¹⁰⁹

But as Ernesto Garzón Valdés has recently reminded us, jusnaturalism —take the by no means unusual case of Hans Helmuth Dietze’s *Naturrecht der Gegenwart* —was not far behind juspositivism in serving as a legitimizing ideological cover for Nazism.¹¹⁰ And, of what use, in the face of so much abject submission to the established order, would it have been to invoke any right of resistance? In contrast to such empty invocations, an authentic resister like the Protestant theologian Dietrich Bonhoeffer —imprisoned and finally hanged for participating in the conspiracy leading to the attempt on Hitler’s life on July 20, 1944 —simply invoked, as we read in his *Ethics*, “the voice of conscience,” that

¹⁰⁹ See in this regard the book by E. Garzón Valdés, *Derecho y “naturaleza de las cosas” (Análisis de una nueva versión del derecho natural en el pensamiento jurídico alemán contemporáneo)*, 2 vols. (Cordoba [Argentina], 1970–71).

¹¹⁰ See the previous work and his response to the poll by *Doxa* 1 (1985), “Problemas abiertos en la Filosofía del Derecho,” 95–97, where he writes: “Because of my Kelsenian formation, I was not a little disturbed by the severe accusations that were leveled at legal positivism (in the post-War era), . . . which was virtually held responsible for the establishment of National Socialism. . . . The discovery of H. H. Dietze’s book (Bonn, 1936) . . . put an end to that turn of events, since it was clear proof of the ideological importance of jusnaturalism in the justification of the regime in power in Germany from 1933 to 1945.”

is, “a voice that, originating at a depth well beyond one’s own will and one’s own reason, calls human existence to a unity with itself.”¹¹¹

Unfortunately for me —although, given the proportions this lecture is assuming, I am not sure I may include the reader here — I have time to mention only a few points that might be developed as corollary paths leading off from what we have seen thus far. The first is connected with the curious fact that the distinction — conceptual, not real, but more or less metaphysical (in the sense, at least, of a “moral metaphysics”) —between moral and empirical subjects demands rather than excludes an empirical investigation (to be undertaken, for example, by the social sciences) into how dissidence in fact arises and how it might serve to reduce the distance between the two subjects and, especially, the moral subject and the subject of rights. The sociologist Barrington Moore has suggested a direction this investigation might take, in a book—written at the same time as Rawls’s *Theory of Justice*, which the author declined to read in manuscript so as to avoid “contaminating” the writing of his own text —titled, significantly, *Injustice: The Social Basis of Obedience and Revolt*.¹¹² What is decisive in explaining the origin and the effects of dissidence (quite a different matter from its justification, which would be the job of ethics) is not, according to Moore, the Rawlsian “sense of justice,”

¹¹¹ D. Bonhoeffer, *Ethik* (Munich, 1949), 257. To be fair to Bonhoeffer, one should point out that, as a good theologian, he further takes into account “the great transformation [that] takes place at the moment when the unity of human conscience no longer consists in its autonomy, but rather, thanks to the miracle of faith, is discovered beyond the Self and its law, in Jesus Christ” (see Tiemo Rainer Peters, *Die Prasenz des Politischen in der Theologie Dietrich Bonhoeffers* [Munich, 1976], 61ff.). But, he adds, for just that reason (Bonhoeffer, *Ethik*, 258–59): “When National Socialism says that the Führer is my conscience, it is an attempt to ground the unity of the Self beyond itself. This has as consequence a loss of autonomy in favor of an absolute heteronomy, which in turn is only possible if the other man in whom I seek the unity of my life serves as my redeemer. This would be the closest secular parallel as well as the most blatant contradiction with Christian truth.”

¹¹² B. Moore, Jr., *Injustice* (New York, 1978).

but a “sense of injustice,” which undoubtedly corresponds to another constellation in the phenomenology of moral life. The second point has to do with the problem of “civil disobedience,” which ought perhaps to be treated as a section or chapter of dissidence in general. As Jorge Malem maintains in his excellent study, *Concept and Justification of Civil Disobedience*, it has been normal from Hugo Adam Bedau forward (as in the case, for example, of Peter Singer’s *Democracy and Disobedience*) to consider civil disobedience as a group of conscious, public, nonviolent, and illegal acts carried out with the intention of frustrating the laws, programs, or decisions of a government, while accepting (at least within the context of a representative democratic society) the current constitutional order.¹¹³ The drawback of this kind of characterization of civil disobedience is that it leaves somewhat in the dark the relation between this and other forms of disobedience —from “ethical disobedience of the law” to “revolutionary disobedience” —not forgetting that what we call “democracy” in our present democratic societies has not always existed nor can it be said to exist today in countries like South Africa where civil disobedience is practiced. And, what is even more serious, we cannot even be certain that this democracy will survive in a “totally administered world,” to use Horkheimer’s terrifying expression, toward which we are most probably headed and in which disobedience will be —in any of its now known, or future, guises — more necessary than ever. But, as I said, we cannot treat these themes, which belong in their own right to an ethics of resistance that has still to be written for our times.

I cannot help but pause, however briefly, over a third and final corollary, with which I would like to close. The main moral, if one may speak of a moral, that might perhaps be derived from

¹¹³ In addition to the text by J. Malem (Barcelona: in press), see those of H. A. Bedau, *Civil Disobedience: Theory and Practice* (New York, 1969) and P. Singer (Oxford, 1973), as well as the study by J. A. Estévez Araujo, “El sentido de la desobediencia civil,” in *Filosofía Política*, ed. J. M. González García and F. Quesada, a special issue of *Arbor* 503-4 (1987): 129-38.

these hasty reflections on the imperative of dissidence —the imperative, please remember, that prescribes that we say *no* to the unjust law (or at least authorizes us to do so), no matter how much consensus lies behind it —would have to be that we are all the protagonists of the life of the law or at least *should* be. To parody a very famous thesis, one might say that the jusphilosophers have thus far only theorized about human rights (which, by the way, is the only thing they could do and should keep on doing). But it is the task of *every human being* as human being (and not only of jurists, whether jusphilosophers or not) to fight for the juridical realization of those demands of dignity, liberty, and equality that make each human being a human being. Just as it is the task of everyone to fight to preserve and protect those demands that are already satisfied as rights, keeping them from being emptied of meaning, and avoiding their degeneration to mere rhetoric once they have been incorporated into the corresponding legal texts.

What remains to be said is only that this struggle to effect what Bloch once called “justice from beneath” forms an extremely important part of the dissent from the not infrequent inhumanity of the law, which is no less unfortunate and dangerous in its consequences than the absence of any law. (The above-mentioned “justice from beneath” would be a justice, to borrow from Dworkin’s mythology, that ought to be left to the pygmies that we mortals are —the children, like Antaeus, of Mother Earth — and not to an exceptional judge like Hercules, endowed, as his name suggests, with uncommon faculties.)¹¹⁴

But perhaps it would be best in this regard to let Bloch have the last word: “Justice, whether retributive or distributive, answers

¹¹⁴Dworkin, *Taking Rights Seriously*, chap. 4, §§ 5–6 (I confess that my antipathy for Hercules the judge, always able to come up with the “right answer,” is due in no small measure to his kinship with that old friend the Rational Chooser (*Preferidor Racional*), with whom I was obliged to deal in my book *La razón sin esperanza*, 2d ed. [Madrid: Ed. Taurus, 1986], 69–100, 227ff.).

to the formula of the *suum cuique*, that is, it presupposes the head of the family, the father of his country, who dispenses to all *from above* their share of punishment or of social well-being, earnings and position. . . . The scale that, even in the Zodiac sign of Libra, rises all the way up so as to perform from there, is quite in accord with this ideal of justice seated on thrones. . . . [But] *real justice*, inasmuch as it is justice *from below*, usually rebels against such justice, against the essential injustice that reserves exclusively for itself the role of justice.”¹¹⁵

¹¹⁵ Bloch, *Naturrecht und menschliche Würde*, 228–29.