"HUMAN RIGHTS": WOULD YOU RECOGNIZE ONE IF YOU SAW ONE? A PHILOSOPHICAL HEARING OF INTERNATIONAL RIGHTS TALK

MATTHEW A. RITTER*

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* B.A., Rice University (philosophy/religious studies); M.Div., Boston University School of Theology (biblical studies/theology); S.T.M., Yale Divinity School (philosophical theology); M.A., M.Phil., Ph.D., Yale University (philosophical theology); J.D., California Western School of Law.

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INTRODUCTION: RIGHTS TALK

> American rights talk is now but one dialect in a universal language of rights.[1]

"Rights talk" is talk about human rights. We speak of human rights in any number of ways, in a variety of circumstances, for any number of reasons. I have a right to own a cat (or do I?), a right to pray to the God of my choice (my choice?), a right to smoke (for how long?), a right to privacy (from whom?—leave me alone), a right to speak freely (about anything at all? really?), a right to ride my motorcycle without a helmet (but not in California?), a right to live (or die?), a right to work (for whom?), a right to know (what?) . . . . When the international community speaks of human rights, however, it is not insisting upon the right to own a cat. It proclaims rather the existence of fundamental and universal moral principles that demand recognition by all peoples and all nations.[2] This discussion will concern itself with such speech—now referred to in jurisprudential literature as "rights talk."

My contention is that it remains unclear what a human right is, and still less clear how to recognize one. I come to this discussion as someone trained extensively in philosophy and theology, and only recently in legal thinking. As might be expected, I was initially startled by the law's dependence upon standards of "reasonability," degrees of "proof," levels of "scrutiny," canons of "ethics," and categories of "rights"—not to mention "Bluebook rules." Metaphysical hobglobins apparently run rampant in the halls of justice. This discussion—my first foray into jurisprudence—will try to wrestle down the legal concept of a human right.

Talk of human rights has become in our culture the authoritative language of law. To a significant extent, we have come to understand what the law means in terms of human rights. Rights talk tells us not only what the law is, but what the law should be. In some strong sense, law has become for us a function of rights talk. The first section of this discussion details the *emergent convergence* of rights talk: the internationalization of respect for the human rights of the individual.

The second section examines the *submergent divergence* of the justification for this rights talk. Although the international community may well agree upon the recognition of human rights, there remains disturbing disagreement as to *why* or *how* they should be recognized.

In the contemporary jurisprudential debate over human rights, natural law has been newly proposed as providing the requisite justificatory foundation for rights talk. This naturalist proposal is addressed in the third section.

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1. MARY ANN GLENDON, RIGHTS TALK 7 (1991).

2. ROBERT F. DRINAN, CRY OF THE OPPRESSED: THE HISTORY AND HOPE OF THE HUMAN RIGHTS REVOLUTION 191 (1987).

The fourth section details an international critique of the jurisprudence of rights talk that to date has been allegedly dominated by the language, culture, and philosophy of the West. This section relies upon African legal thinkers in reference primarily to the Banjul Charter with its proclamation of communitarian rights over the rights of the individual.

Having set out the international conversation of rights talk, its undertone of dissention, and current jurisprudential responses to this dissention, this discussion will bring a critical inquiry to bear upon rights talk. Section five thus examines the governing philosophical presumptions of rights talk. In conclusion, a re-articulation of rights talk is proposed.

I. THE EMERGENT CONVERGENCE OF RIGHTS TALK

> In the midst of all the terrible inhumanity of the twentieth century, however, there is a hopeful story: the emergence in international law of the idea of human rights.[3]

Since the end of the Second World War, the language of human rights has increasingly been proclaimed to provide the very bedrock of law, both domestically and internationally. On the international level, the human rights "revolution" was initiated in San Francisco at the 1945 Charter Convention of the United Nations,[4] "to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women . . . ."[5] Since its Charter, the United Nations has enacted a multitude of declarations and covenants having to do with the proclamation of human rights.[6] It is a proclamation esteemed by many to provide the very core of what the United Nations is and stands for.[7] It has since developed into what is now commonly referred to as an "International Bill of Rights."[8]

In its modern currency, the international proclamation of human rights refers to those "'moral-political claims which, by contemporary consensus, every human being has or is deemed to have upon his [sic] society or government,' claims which are recognized 'as of right,' not by love, or grace,

3. Michael J. Perry, *Is the Idea of Human Rights Ineliminably Religious?*, 27 U. RICH. L. REV. 1023, 1024 (1993).

4. Lewis B. Sohn, *The New International Law: Protection of the Rights of Individuals Rather than States*, 32 AM. U. L. REV. 1, 1 (1982).

5. U.N. CHARTER pmbl.

6. *See* Sohn *supra* note 4, at 11-17. The U.N. Charter initially asserted the international recognition of human rights. These rights were enumerated in the Universal Declaration of Human Rights, and elaborated in the International Covenant on Civil and Political Rights as well as in the International Covenant on Economic, Social and Cultural Rights. The United Nations has since adopted some fifty additional declarations and conventions concerning human rights. *Id.* at 11. For the text of these documents, *see* UNITED NATIONS, HUMAN RIGHTS: A COMPILATION OF INTERNATIONAL INSTRUMENTS, U.N. Doc. ST/HR/1/Rev. 1 (1978).

7. DRINAN, *supra* note 2, at 3.

8. LOUIS HENKIN ET AL., INTERNATIONAL LAW ch. 8, §1, at 599 (3rd ed. 1993).

or charity."[9]

Prior to this contemporary proclamation of human rights, however, international law did not recognize the individual as such.[10] International law had to do with relations between States; its concern with individuals was confined to political regard for State representatives.[11] The general rule of international law was that injury to a foreign national citizen was construed as injury to the foreign state.[12] International law granted respect not for the human rights of the individual, but for the political rights of the State over its foreign nationals. What a state did to its own citizens was of no international legal concern, and a person having no nationality was not legally recognized at all.[13]

Due largely perhaps to the horror of inhumanity exercised during the Second World War, violation of the human rights of the individual was recognized by international law in the criminal prosecutions of war crimes at Nuremberg and Tokyo.[14] The internationalization of human rights followed in their wake.[15] International jurisprudence came to recognize the individual as such, regardless of domestic law. For the first time in history, internation-

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9. *Id.* at 597, citing Henkin, *Rights: American and Human*, 79 COLUM. L. REV. 405 (1979); HENKIN, THE RIGHTS OF MAN TODAY 1-3 (1978).

10. Sohn, *supra* note 4, at 9.

11. *See* HENKIN, *supra* note 8, at 596-597. Under traditional international law, how a state treated its own citizens was its own affair. Such internal matters were a function of state sovereignty. "International law developed one early exception when it recognized that how a country treats an alien is the proper concern of the government whose nationality he/she bore. The exception might be seen as essentially political, not humanitarian." *Id.* at 596, citing HENKIN, THE INTERNATIONALIZATION OF HUMAN RIGHTS, Proceedings of the General Education Seminar, Vol. 6, No. 1, 7-9 (1977).

12. *See Greece v. Great Britain*, P.C.I.J., Ser. A., No. 2, 1 (1924):

> It is an elementary principle of international law that a State is entitled to protect its subjects, when injured by acts contrary to international law committed by another State, from whom they have been unable to obtain satisfaction through the ordinary channels. By taking up the case of one of its subjects and by resorting to diplomatic action or international judicial proceedings on his behalf, a State is in reality asserting its own rights–its right to ensure, in the person of its subjects, respect for the rules of international law.
>
> The question, therefore, whether the present dispute originates in an injury to a private interest, which in point of fact is the case in many international disputes, is irrelevant from this standpoint. Once a State has taken up a case on behalf of one of its subjects before an international tribunal, in the eyes of the latter the State is sole claimant.

HENKIN, *supra* note 8, at 375.

13. Sohn, *supra* note 4, at 9. Henkin elaborates:

> It was widely accepted, therefore, that injustice to a stateless person was not a violation of international law since no state was offended . . . . The international standard, then, was not a universal human rights standard, and governments that invoked it did not suggest that it applied also to how governments treated their own citizens. That treatment was not the concern of international law or the business of other governments, and in fact governments rarely concerned themselves with domestic injustice elsewhere.

HENKIN, *supra* note 8, at 596.

14. *Id.* at 10-11.

15. HENKIN, *supra* note 8, at 597.

al law interposed itself between the State and its citizenry:

> *Whereas* recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world, . . . *The General Assembly Proclaims* this Universal Declaration of Human Rights as a common standard of achievement for all peoples and all nations, to the end that every individual and every organ of society . . . shall strive . . . to promote respect for these rights . . . to secure their universal and effective recognition and observance, both among the peoples of Member States themselves and among the peoples of territories under their jurisdiction.[16]

In its recognition of human rights, international law sought to dictate the proper relationship between the State and the individual in order to protect the individual from injury by the State.[17] In this effort, international law endorsed what has been observed as the single most influential idea of the United Nations: international respect of the human rights of the individual.[18]

Since its initial endorsement, international recognition of the human rights of the individual has been proclaimed as one of the great driving forces of modernity.[19] The idea is now observed as sufficiently widespread throughout the major legal systems of the world to constitute a general principle of international law.[20] By virtue of this ostensible international consensus, the idea has acquired its own normative force[21] as expressing "an authoritative vision of what is right."[22] In sum, the recognition of human rights is proclaimed to provide an internationally "emergent convergence" of respect for the individual.[23]

Proclamation of the fundamentality of human rights does not, of course, fall harshly upon the ears of Americans. Citizens of the United States are quite accustomed to rights talk. But such rights talk has not always provided the governing vocabulary for understanding the law. Prior to the Second World War, and certainly prior to the American Civil War, constitutional law was primarily concerned with the division of authority between state and federal government.[24] Individual human rights were understood to be derivatively protected by the structural features of government. Government

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16. *Universal Declaration of Human Rights*, U.N.G.A. Res. 217 A (III), U.N. Doc. A/810, at 71 (1948).

17. NAOMI ROHT-ARRIAZA, *Nontreaty Sources of the Obligation to Investigate and Prosecute, in* IMPUNITY AND HUMAN RIGHTS IN INTERNATIONAL LAW AND PRACTICE 47-50 (Naomi Roht-Arriaza ed. 1995).

18. Sohn, *supra* note 4, at 14.

19. DRINAN, *supra* note 2, at 3.

20. ROHT-ARRIAZA, *supra* note 17, at 48.

21. DRINAN, *supra* note 2, at 9.

22. NAOMI ROHT-ARRIAZA, *Conclusion: Combating Impunity, in* IMPUNITY AND HUMAN RIGHTS IN INTERNATIONAL LAW AND PRACTICE 295 (Naomi Roht-Arriaza ed. 1995).

23. MICHAEL J. PERRY, LOVE AND POWER 41 (1991).

24. LAWRENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 5-7 (2nd ed. 1988).

intrusion upon these rights was not a principal judicial concern until the latter half of the twentieth century.[25] Currently, the majority of Supreme Court decisions comprise claims of human rights violations.[26] This has led one commentator to perceive the contemporary American legal system as a "rights industry," engaged primarily in the manufacture, if not proliferation, of human rights.[27]

On both the domestic and international scene, then, rights talk has come to bespeak itself as an authoritative language of the law. Domestically, human rights is programmatically employed as a governing principle of legal criticism, interpretation, and reformulation. Internationally, the recognition of human rights has emerged as an apparent consensus despite all cultural and legal differences. "Across the world a new gospel is echoing in the hearts of men and women—the good news that their human rights are recognized and somehow guaranteed by the law of nations."[28] Human rights have ostensibly won the day as establishing the conceptual/legal framework within which civilization may flourish: the emergent convergence of rights talk.

Beneath this apparent international consensus on human rights, however, lurks a continuing debate: why should such rights be recognized? There is no consensus here. In fact, the debate is nothing short of acrimonious. Rights talk is spoken throughout the world; this is quite clear. But why it is spoken is far from clear.

II. THE SUBMERGENT DIVERGENCE OF RIGHTS TALK

> Nevertheless:
> Napalming babies is bad.
> Starving the poor is wicked.
> Buying and selling each other is depraved.
> Those who stood up to and died resisting Hitler, Stalin, Amin, and Pol Pot—and General Custer too—have earned salvation.
> Those who acquiesced deserve to be damned.
> There is in the world such a thing as evil.
> [All together now:] Sez who?
> God help us.[29]

Rights talk is talk about rights. Talk of rights has historically divided human rights into two distinct categories: descriptive and prescriptive rights. Descriptive rights are what a government confers upon its citizens, for any number of administrative reasons:[30] the right, for instance, to own a cat. A

25. GLENDON, *supra* note 1, at 4-5.
26. *Id.* at 4.
27. RICHARD E. MORGAN, DISABLING AMERICA, THE RIGHTS INDUSTRY IN OUR TIME 3 (1984).
28. DRINAN, *supra* note 2, at 1.
29. Arthur A. Leff, *Unspeakable Ethics, Unnatural Law*, 1979 Duke L.J. 1229, 1249 (1979).
30. PERRY, *supra* note 23, at 30.

prescriptive right, on the other hand, is what ought to be conferred:[31] the right, for instance, to worship one's cat should one choose. The distinction is between law that is made, and law that is found.[32] Freedom to possess a domestic animal within city limits is an administrate right conferred by the government for administrative reasons—a descriptive right; freedom of religion is held to be a fundamental right that ought to be conferred by the government—a prescriptive right. The jurisprudential debate about the justification for human rights concerns itself with prescriptive rights.[33] Such rights speak in the imperative voice. They have a moral character: they demand recognition. They are to be recognized by all nations of the world, and conferred upon all citizens. But *how* and *why* are such human rights recognized?

> A great many lawyers are wary of talking about moral rights, even though they find it easy to talk about what is right or wrong for government to do, because they suppose that rights, if they exist at all, are spooky sorts of things that men and women have in much the same way as they have non-spooky things like tonsils.[34]

Rights talk is talk of human rights that pre-exist any legislation of rights. Legislation does not create human rights; human rights create legislation. But the question remains: what is the governing principle of their recognition?

For contemporary jurisprudence, human rights are possessed by individuals.[35] And they are held by any one individual to the extent that they are held by all individuals. Intrinsic to the notion of human rights is the idea that they are equally held by all human beings.[36] The central claim of rights talk, in other words, is the claim of equality.[37] Rights talk dictates that all individuals equally possess certain human rights. "By 'rights' [are meant] those rights which are alleged to belong to human beings as such and . . . to attach equally to all individuals . . . ."[38] This equality is typically understood in terms of a *dignity* equally inherent in each individual human being.[39] Yet this inherent dignity is typically understood in terms of the

31. *Id.*

32. Leff, *supra* note 29, at 1229.

33. Prescriptive rights have to do with "claims that such-and-such a (moral) right ought to be conferred on all (or virtually all) human beings." PERRY, *supra* note 23, at 30.

34. RONALD DWORKIN, Taking Rights Seriously 139 (Harvard Univ. Press 1978).

35. *Id.* at xi.

36. "Government must not only treat people with concern and respect, but with equal concern and respect." *Id.* at 272. Dworkin distinguishes the right to equal treatment from the right to treatment as an equal. The latter right is the more fundamental, embodying an essentially moral claim; the former is a derivative political/economic right having to do with the distribution of societal goods.

37. *Id.* at 273.

38. ALISTAIR MACINTYRE, AFTER VIRTUE 66 (1981).

39. Sohn, *supra* note 4, at 18.

possession of certain human rights.[40] Rights talk therefore dictates universal legislative respect for all individuals, and dictates as well that this universal respect be egalitarian.

Equality thus functions as the governing principle of rights talk. Human rights devolve from the idea of universal egalitarian regard for each individual human being. The individual, moreover, is understood in terms of the possession of human rights. That the universalization of rights talk emerged together with the internationalization of the individual is no mere historical coincidence. "[R]ights are political trumps held by individuals."[41] The jurisprudential debate over why human rights should be recognized therefore revolves more profoundly around the issue of equality. And justification for equality has not been settled. On the contrary, it remains critically at issue:

> As the International Declaration of Rights published by the United Nations in 1948 showed very clearly, it is doubtless not easy but it is possible to establish a common formulation of . . . the various rights possessed by man [sic] in his personal and social existence. Yet it would be quite futile to look for a common *rational justification* of . . . these rights.[42]

The ostensible futility of justifying human rights is a function of the lack of any justification for equality. Can justification be provided? The critical issue for rights talk—the question of why human rights should be recognized at all—is at bottom the question of why all humans should be regarded as equal.[43]

Historically, the justification for proclaiming a dignity equally inherent in every human being has been distinctly religious in nature. The theological claim of equality rests upon the proclaimed sanctity of all and every human life.[44] Sanctity is a function of divine sanction. The contemporary jurisprudential attempt to justify the recognition of human rights by virtue of the principle of equality, however, is an attempt preoccupied by a distinctly secular concern. It seeks assiduously to avoid any particular religious justification.[45] But without a sanctifying principle—in the Semitic tradition,

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40. *Id.*

41. DWORKIN, *supra* note 34, at xi.

42. JAQUES MARITAIN, Man and the State 76 (Univ. of Chicago Press 1951).

43. The crucial question, in other words, is why should we care for other human beings: "Why should we give a damn?" *See* PERRY, *supra* note 23, at 36.

44. *See* PERRY, *supra* note 23, at 75-82. Perry further notes:

> [T]he great religious traditions, Indic as well as Semitic, tend to converge with one another in affirming that an essential part of what it means to be fully human, an essential requirement of the meaningful life for everyone, is to accept some responsibility for the basic well-being of the Other (the outsider, the stranger, the alien).

Id. at 81.

45. ROLANDO GAETE, HUMAN RIGHTS AND THE LIMITS OF CRITICAL REASON 123 (1993).

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God—does the proclamation of a dignity equally inherent in every human being make any sense? "We almost all accept . . . that human life in all its forms is sacred . . . . For some of us, this is a matter of religious faith; for others, of secular but deep philosophical belief."[46] But is such a philosophical belief philosophically coherent? Does the idea of the sanctity of human life survive the demise of its sanctification? Absent its religious foundation, is the idea of equality coherent?

Egalitarian regard by all for all is certainly not evident in the world. The jurisprudence of rights talk claims it should be. Before analyzing rational justifications for this equality, it is necessary to understand why contemporary jurisprudence systematically eschews religious justification. The secular response to this question would avoid religious answers for two reasons.

First, different religions provide very different answers to the question (if at all). Because no criteria exist to adjudicate between these answers, a secular distress arises over the perceived religious pluralism. Each religion claims the categorical truth of its claims, as well the sole means for the recognition of their truth. Such truth claims are therefore religiously particular. Human rights, and the principle of equality upon which they are based, are construed as universal. Surely the universal cannot be based on the particular. Hence, universal regard for the dignity equally inherent in every individual human being can scarcely be justified by appeal to any particular religious perspective.

Second, the justification for human rights simply does not wish to be religious. Modern jurisprudence was initiated upon a programmatically non-religious basis.[47] Rights talk would base itself not upon the extrinsically revealed truth of the divine, but upon the intrinsically known truth of the human.

Contemporary jurisprudence consequently seeks rational justification for human rights. Two strategies have been used to provide such a rational justification for equality. They may be referred to respectively as the *definitional* strategy[48] and the *prudential* strategy.[49]

The definitional strategy dictates that having equal regard for others is what morality means. But why be moral? The definitional strategy can provide no answer beyond its categorical imperative. What is categorically imperative for one, however, is arbitrarily dogmatic to another. It amounts to a rational justification for neither.

The prudential strategy provides that one's self-interest is best advanced through advancing the interests of others. Having regard for others is thus motivated by regard for self. Regard for self is prudently achieved by exer-

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46. Ronald Dworkin, "*Life is Sacred: That's the Easy Part*," N.Y. TIMES, May 16, 1993, §6 (Magazine), at 36.

47. *Id.* at 106.

48. PERRY, *supra* note 3, at 1062-1063; *supra* note 23, at 36-37.

49. Perry, *supra* note 3, at 1068-1069; *supra* note 23, at 38.

cising regard for others. At best, the prudential strategy generates an ethic of contractual regard for others. "I promise to regard your interests if you promise to regard mine." Contractual ethics, however, can marshal no reasons against breach beyond that of expediency. Should it become inexpedient to sustain regard for another, the ethical obligation for this regard ceases to exist. At worst, the prudential strategy generates merely an ethic of non-aggression, which ethic need have regard only for those others whose aggression is cause for concern. "I need have egalitarian regard only for those from whom I fear less than egalitarian regard for myself. For those who cannot harm me, I need have no regard at all." In neither case does the prudential strategy provide justification for a universal recognition of human rights as demanded by a dignity equally inherent in all human beings. It provides no justification either for the universality of equal regard for others, or for sustaining this regard when it becomes inexpedient to do so.

Neither the definitional nor the prudential strategy of jurisprudential rationalism successfully justifies universal respect for a dignity equally inherent in every individual human being.[50] So the question remains: why should human rights be recognized? Which is to ask, more essentially: why should equal regard be granted to all human beings? The question is especially critical in view of the fact that such equal regard has never been the case. Despite the human rights revolution, the horrors of inhumanity perpetrated by humans against humans are as flagrant in this latter half of the twentieth century as ever. If the world is turning the corner on the recognition of human rights, it is leaving no skid marks. Why should we care?

No answer seems forthcoming. "In the post-World War II period, the . . . idea of prepolitical 'human' rights thus came to have wide appeal, although there was no consensus on any secular foundation for such rights,

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50. An ostensibly alternative strategy is one taken by Dworkin, who argues that such rationalist strategies fail because they fail to speak in the imperative voice. Rationalism therefore fails to provide any finally effective source for the moral strength of its convictions. Perry, *supra* note 3, at 1076. Rational convictions are by definition conclusional; they have no intrinsic authority beyond the cogency of their reasoning, which reasoning is itself subject to the cogency of its reasoning, etc. Dworkin seeks to provide an unquestioned basis for his justificatory strategy. He therefore holds that equality is a fundamental postulate of political morality. DWORKIN, *supra* note 34, at 272. As such, it requires no justification, but is rather self-justifying. The recognition of human rights therefore derives its justification from the primordial demand that "[g]overnment must not only treat people with concern and respect, but with equal concern and respect." *Id.* The demand for equal regard itself justifies human rights. Speaking in the imperative voice, the demand requires no justification beyond itself. It is axiomatic: a principle that is justifying, not justified. "The . . . argument for political rights [is] the derivation of particular rights from the abstract right to concern and respect taken to be fundamental and axiomatic." *Id.* at xv. Equality is therefore simply not subject to justification.

In essence, such a strategy for justifying human rights follows the course of argument provided by the definitional strategy. And it is subject to the same criticism. It appeals to the self-evidence of the principle of equality. Appeal to the self-evidency of a moral principle "is always a signal that something has gone badly wrong with an argument." MACINTYRE, *supra* note 38, at 67. Defining the principle of equality as axiomatic merely sidesteps the problem of its rational justification. Through semantic sleight of hand, the problem of justification is made to disappear by reflecting it in a self-justifying mirror. But again, what is self-evident for one is simply dogmatic for another.

or on their precise content."[51] The emergent convergence of rights talk rests upon a submergent divergence of its justification. Rights talk may well speak itself universally, but it has yet to speak with a voice of universal authority.

> Here we are confronted by the paradox that rational justifications are *indispensable* and at the same time *powerless* to create agreement among men [sic]. They are indispensable, because each of us believes instinctively in truth and only wishes to give his consent to what he has recognized as true and rationally valid. Yet rational justifications are powerless to create agreement among men, because they are basically different, even opposed to each other; and is this surprising?[52]

Although perhaps not surprising, it remains enormously disconcerting. Can rights talk viably continue to speak itself devoid of any universal rational justification, and lacking any particular religious commitment?

In the latter part of the nineteenth century, Friedrich Nietzsche remarked: "Naivete: as if morality could survive when the *God* who sanctions it is missing! The 'beyond' absolutely necessary if faith in morality is to be maintained."[53] Perhaps more clearly than any other thinker of the Western world to date, Nietzsche realized the futility of basing moral claims on anything other than the will to do so. Absent God, moral claims are a function of will, not reason. For Nietzsche, rationally to justify moral claims, in particular the idea of equality, is to avoid taking responsibility for them.[54] The principle of equality, the notion of a dignity equally inherent in each human being, is not an idea that corresponds to any kind of moral reality. There simply is no reality which morality is therefore obliged to recognize. In essence, there is no truth to which morality must rationally conform.

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51. GLENDON, *supra* note 1, at 38.

52. MARITAIN, *supra* note 42, at 77.

53. FREIDRICH NIETZSCHE, THE WILL TO POWER 147 (Walter Kaufman ed., Walter Kaufman & R.J. Hollingdale trans. 1967).

54. Nietzsche himself had little patience for the idea of equality. He perceived it as morally debilitating, the product of the mass egoism of the weak:

> [T]he concept of the "equal value of men before God" is extraordinarily harmful; one forbade actions and attitudes that were in themselves among the prerogatives of the strongly constituted–as if they were in themselves unworthy of men. One brought the entire tendency of the strong into disrepute when one erected the protective measures of the weakest (those who were weakest also when confronting themselves) as a norm of value . . . . If one reflects with some consistency, and moreover with a deepened insight into what a "great man" is, no doubt remains that the church sends all "great men" to hell–it fights *against* all "greatness of man."
>
> . . . .
>
> When lesser men begin to doubt whether higher men exist, then the danger is great! And one ends by discovering that there is *virtue* also among the lowly and subjugated, the poor in spirit, and that *before God* men are equal–which has so far been the *non plus ultra* of nonsense on earth.

Id. at 466-68.

> Presupposition of this hypothesis: that there is no truth, that there is no absolute nature of things nor a "thing-in-itself." This, too, is merely nihilism—even the most extreme nihilism. It places the value of things precisely in the lack of any reality corresponding to these values and in their being merely a symptom of strength on the part of the value-positers, a simplification for the sake of life.[55]

For Nietzsche, the truth of reality is precisely false: a fiction imposed upon existence for purposes other than truthful.

> This is the greatest error that has ever been committed, the essential fatality of error on earth: one believed one possessed a criterion of reality in the forms of reason—while in fact one possessed them in order to become master of reality, in order to misunderstand reality in a shrewd manner.[56]
>
> "Truth" is therefore not something there, that might be found or discovered—but something that must be created and that gives a name to a process, or rather to a will to overcome that has in itself no end—introducing truth, as a *processus in infinitum*, an active determining—not a becoming conscious of something that is in itself firm and determined. It is a word for the "will to power."[57]

Without God, morality cannot viably be based on any kind of moral truth provided by rationality. Morality is not a function of reason. To believe so is profoundly to misconstrue what morality is. But for Nietzsche, not only is the secular idea of universal equality incoherent, it is incoherent for a purpose. That purpose is for the idea of equality to will itself into reality, and to will itself universally. It has no justification for doing so beyond this purpose.

Absent divine authorization, then, morality is ostensibly authorized by nothing other than the human. The notion of a prescriptive right is therefore a misunderstanding, a hoax perpetrated by reason to rationalize the covert imposition of its moral will. Prescriptive rights are not prescripted; they are scripted: fictions made up to order existence in a particular way. And they are universal to the extent, and only to the extent, that they are willed to be such. Human rights are not discovered; they are created. The truth of rights talk is a truth that such talk speaks for itself. It has no justification; it needs no justification.

In apposition to the long-standing and still continuing inclination to justify rights talk, Nietzsche therefore articulates the competing alternative: to embrace its non-rationality. Absent divine sanction, moral principles are a function, and a function only, of human sanction. And human sanction is grounded upon nothing other than the power of its sanctioning.

55. *Id.* at 14.
56. *Id.* at 315.
57. *Id.* at 298.

> [T]here is discontent verging on despair whenever some theorist tries to develop a system in which "found" ethical or legal propositions are to be treated as binding, but for which there is no supernatural grounding. God's will is binding because it is His [sic] will that it be. Under what other circumstances can the unexamined will of anyone else withstand the cosmic "says who" and come out similarly dispositive? *There are no such circumstances.* We are never going to get anywhere (assuming for the moment that there is somewhere to get) in ethical or legal theory unless we finally face the fact that, in the Psalmist's words, there is no one like unto the Lord.[58]

Rational justification does not, and cannot supplant God. Not only is this philosophically the case; it is historically the case as well. Rational justification for the principle of equality cannot be provided. Is it surprising, then, that it has not been provided? "The result of that realization is what might be called an exhilarated vertigo, a simultaneous combination of an exultant 'We're free of God' and a despairing 'Oh God, we're free.'"[59] Lacking divine authorization, the final authority for the principle of equality can therefore rest upon nothing other than its human authorization.[60] Such human authorization, however, is provided not through rational justification, but through moral will. Absent divine authorization, and lacking rational justification, the principle of equality is consequently a function of its human authorization. But if rights talk is spoken, and spoken only, by humans, does it speak with any authority? Or is its authority based merely upon how loudly it is shouted, and by whom?

The emergent convergence of rights talk therefore rests upon a submergent divergence of its justification. Programmatically lacking religious foundation, and failing to provide rational justification, the contemporary jurisprudence of rights talk remains faced with the Nietzschean alternative. The truth of rights talk is a function, and a function only, of its human authorization as imposed upon existence through its moral will. The critical question is therefore "[w]ho among us . . . *ought* to be able to declare 'law' that *ought* to be obeyed?"[61] Who gets to speak the rights talk that declares itself as *the* language of the law? Hence the Nietzschean question: "Now suppose that belief in God has vanished: the question presents itself anew: 'who speaks?'"[62] In the contemporary jurisprudential debate over human rights, "who speaks rights talk?" is *the* critical question.

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58. Leff, *supra* note 29, at 1232.
59. *Id.* at 1233.
60. *Id.*
61. *Id.*
62. NIETZSCHE, *supra* note 53, at 157.

III. THE NATURAL LAW OF RIGHTS TALK

> The imperative to "love one another as I have loved you" can be understood, and should be understood, not as a piece of divine legislation, but as a truly, fully human response to the question of how to live.[63]

The whole world allegedly now speaks the talk of rights. Many authors therefore understand rights talk to voice the authority of law by virtue merely of its universal articulation. General principles of law are not uncommonly inferred from their adoption by the major legal systems.[64] And as noted above, the major legal systems all speak the language of rights: the emergent convergence of rights talk.

> [A] strong case can be made that the UN charter and the legal institutions that have developed as its enforcement arm are compatible and indeed supportive of all the major moral beliefs and practices of the religions of the world. This is especially true with respect to human rights. In every moral and legal system certain values are considered absolute and cannot be subverted for any cause, however appealing. In any civilized nation these values will be generally safeguarded. . . . As the proponents of human rights treaties hope, there may be a moral consensus among nations to make the universal acceptance of the sanctity of human rights a permanent and irreversible part of the law of nations.[65]

Albeit spoken in many different tongues, rights talk is nonetheless spoken universally. Its authority ostensibly derives from its universality.

The *emergent convergence* of rights talk would thus avoid its *submergent divergence* by virtue of universal consensus. The problem of pluralism, of the divergence of rational justification for rights talk, is consequently declared by some to be ephemeral. In order to appreciate this claim fully, it is necessary to understand the foundation upon which it stands in the current jurisprudential debate over rights talk. The claim stands upon the foundation of "natural law."[66]

The notion of natural law as it has developed in the Western world derives both historically and philosophically from the *Nicomechean Ethics* of Aristotle.[67] The notion was theologically filtered into Christian thought by Thomas Aquinas, Jewish thought by Maimonides, and Islamic thought by Ibn

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63. Perry, *supra* note 3, at 1044.

64. ROHT-ARRIAZA, *supra* note 17, at 47.

65. DRINAN, *supra* note 2, at 10-11.

66. "The United Nations' concept of human rights embraces this natural law concept of rights, rights to which all human beings have been entitled since time immemorial and to which they will continue to be entitled as long as humanity survives." Sohn, *supra* note 4, at 17.

67. MACINTYRE, *supra* note 38, at 50.

Roschd.[68] It reached into the American ethical consciousness primarily through the writings of Locke via the framers of the United States Constitution, and into the European ethical consciousness through Rousseau.[69] Throughout its various historical, philosophical, theological and ethical formulations, however, natural law has retained a governing structural presumption: a human nature that is the same for us all, in which inheres the essential means properly to realize itself in accordance with its nature.

> This means that there is, by the very virtue of human nature, an order or a disposition which human reason can discover and according to which the human will must act in order to attune itself to the essential and necessary ends of the human being. [Natural law] is nothing more than that.[70]

Natural law presumes a human essence in which all humans, by virtue of being human, participate. It further presumes that this human essence is intrinsically disposed toward actualizing itself. It presumes finally that natural law is the proper mode of this actualization. In other words, the being of human being is essentially incomplete. If a bit of philosophical jargon may be forgiven, the anthropology espoused by natural law amounts to an ontological teleology.[71] For human rights jurisprudence, the relevant issue is whether rights talk is an appropriate language for speaking the human *telos*. Does rights talk, in other words, effect the proper being of human being?

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68. *Id.* at 51. Despite its theological appropriation, the logical structure of Aristotle's notion of natural law remained essentially unchanged in its various religious guises. Within its Aristotelian structure, however, the concept of "sin" replaced Aristotle's concept of "error," and "grace" replaced "reason" as the primary enabling factor in the human realization of the "good." *Id.*

69. STEVEN LUKES, INDIVIDUALISM 73-78 (1973). As the notion of natural law entered into its seventeenth and eighteenth century formulations, however, its essential structure was altered quite dramatically. This contention provides the historical thesis of MacIntyre's *After Virtue*, and lays the foundation for his critical reflection on contemporary natural law theorists. These insights will be addressed in the fourth part of the current discussion.

70. MARITAIN, *supra* note 42, at 86. As articulated in terms of "reason" and "will," this is a classical Thomistic formulation of the structure of natural law. Other formulations, based upon variant anthropological ontologies, will appeal to different faculties of human being (variantly conceived as active or passive, or in some measure both). But the essential structure remains the same: an essential human nature, the end realization of which is effected through certain means. The logic of natural law is thus tri-partite: human nature, its end as such, and the means to realize this end. Depending upon how human nature is defined, its appropriate end is defined accordingly, and consequently as well the appropriate means of its realization.

71. This means that the essential *being* (*ontos*, hence ontology) of human being is inherently inclined to an *end* (*telos*, hence teleological) beyond itself. A human being is not only incomplete; it is to be completed in a certain way. The essence of human being is therefore construed as that which intrinsically seeks to fulfill itself in a manner that is appropriate to itself. For natural law, human ontology is thus teleological.

> [T]he first basic element to be recognized in natural law [is] the *ontological* element; I mean the *normality of functioning* which is grounded on the essence of that being: man [sic]. Natural law in general . . . is the ideal formula of development of a given being; it might be compared with an algebraical equation according to which a curve develops in space, yet with man the curve has freely to conform to the equation.

Id. at 87-88.

Natural law jurisprudence seeks to justify rights talk not by appealing to a rational explanation of its validity, but by appealing to its universal, yet inevitably pluralistic, articulation.

> Any plausible conception of human good—of human well-being, of human nature—must be pluralist. Human beings differ from one another across time, of course. But they also differ from one another across space. They differ from one another interculturally. They even differ from one another intraculturally. A conception of human good, however, can be universalist as well as pluralist: it can acknowledge sameness as well as difference, commonality as well as variety.[72]

By virtue of appealing to a universality within plurality, the naturalist would avoid not only the philosophical difficulty of the lack of any rational justification for rights talk, but would avoid as well its Nietzschean alternative. Precisely how the naturalist circumlocutes rights talk around the rationalist/ Nietzschean dilemma occupies the balance of this section.

The naturalist notion of universalism within pluralism takes its point of departure from the idea that "[n]atural law is not written law."[73] The naturalist thus distinguishes natural law from positive law. Positive law is written law: law that is legislated and adjudicated by the various societies of the world. Natural law, on the other hand, is what properly effects the essential *being* of human being. Inasmuch as the essential being of human being is understood to be universal, natural law is itself universal as the means whereby the essential end of human being may properly be realized. Because this realization is enacted in different places and different times, however, it takes varying forms. Positive law thus enacts natural law. But positive law enacts natural to varying degrees of adequacy.[74] For the naturalist, natural law therefore serves a dual purpose: it is the unwritten basis upon which positive law is written, and thereby provides as well the foundation upon which positive law may be criticized as either adequately or inadequately facilitating the proper realization of human being.[75] Natural law constitutes the universal foundation for its pluralistic articulation, the unwritten *ought* intrinsic to the written *is* of positive law.[76]

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72. PERRY, *supra* note 23, at 31.

73. MARITAIN, *supra* note 42, at 89.

74. *Id.* at 94.

75. "The ontological basis and the knowability of natural law give it universal validity and make it the criterion of all legislation." Johannes Grundel, *Natural Law*, *in* ENCYCLOPEDIA OF THEOLOGY 1018 (Karl Rahner ed. 1975).

76. An analogy that is particularly helpful for understanding this logical relationship between natural law and positive law is the notion of a musical "variation on a theme." The theme does not exist *per se*. It is realized only through its variations. Each variation is precisely and only that, a variation. The theme itself remains un-sung. But a good musician has a rather clear sense of the theme, for it is by virtue of the theme that any variation is recognized as a variation of it. The theme therefore provides the critical basis for recognizing its variations, and for recognizing whether any particular variation is a good or bad variation. The theme itself, however, remains unvaried. It has no varied existence. It exists heuristically only, but by which

For the naturalist, natural law therefore provides for the moral force of any particular legal system. "[I]t is by virtue of natural law that the law of Nations and positive law take on the force of law, and impose themselves upon the conscience."[77] Positive law speaks with the authority of law to the extent, and only to the extent, that it voices natural law. In the current jurisprudential debate over human rights, this underlying authority of natural law is understood to speak in terms of rights talk. For the naturalist, the universalization of rights talk provides clear and convincing evidence of natural law. This evidence is both extrinsic and intrinsic.

The extrinsic evidence of natural law provided by rights talk is simply that "the international bill of rights has bypassed the idea that all human rights derive from the morality or mystique of individual nation-states. Instead, it has proclaimed . . . rights as absolute, transcending any particular nation's moral or legal priorities."[78] For the naturalist, extrinsic evidence of natural law is provided by the internationally emergent convergence of rights talk.

The intrinsic evidence of natural law provided by rights talk has to do with the governing presumption of rights talk, namely the equality of all human beings. "Just as every law,—notably the natural law, on which they are grounded,—aims at the common good, so human rights have an intrinsic relation to the common good."[79] Natural law and rights talk share the fundamental presumption that all human beings are essentially equal. Intrinsic evidence of natural law is thus provided by rights talk through its voicing the essential sameness of the being of human being presupposed by natural law.

For the naturalist, however, the universalization of rights talk does not require rational justification.[80] As noted above, the attempt rationally to

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heuristic existence its variations are what they are, namely variations on a theme.

77. MARITAIN, *supra* note 42, at 99.

78. DRINAN, *supra* note 2, at 193.

79. MARITAIN, *supra* note 42, at 101.

80. Various proposals have been advanced by various natural law theorists for why moral claims in general, and rights claims in particular, are not subject, and more significantly, need not be subject to rational justification. In the current jurisprudential debate over such matters, the most sensitive and insightful treatment is provided by Michael Perry. Perry employs the Wittgensteinian notion of "language games" to articulate his position. *See* MICHAEL J. PERRY, MORALITY, POLITICS, AND LAW 12-19 (1988). There, Perry likens the justification of basic moral claims to that of providing justification for rationality: the attempt presupposes the value of rationality. One either accepts this value of rationality or one doesn't. Its value is not subject to justification. Moreover, and more significantly, the value of rationality cannot rationally be demonstrated as unjustified. The value of what Perry refers to as "human flourishing" occupies a similar logical position. Perry is fond of quoting Wittgenstein here: "If I have exhausted the justifications I have reached bedrock, and my spade is turned. Then I am inclined to say: 'This is simply what I do.'" LUDWIG WITTGENSTEIN, PHILOSOPHICAL INVESTIGATIONS §217 (G.E.M. Anscombe trans. 1953). For Perry, the fundamental conviction that human flourishing intrinsically involves equal regard for all human beings as such, is bedrock, and therefore not subject to justification. Its justification would presuppose the value of human flourishing, which value presumes equality. Moreover, and more importantly, the value of human flourishing cannot be demonstrated as not of value, without this very value being presupposed. *See* Perry, *supra*

justify rights talk is essentially an attempt to address the problem of pluralism. Specifically, it is an attempt to obviate any particular religious justification for rights talk. This rationalist attempt fails. But the naturalist seeks not only to circumvent rationalism, it seeks as well to avoid its Nietzschean alternative. The naturalist ostensibly navigates this path between rationalism on the one hand, and its Nietzschean alternative on the other, by expressly endorsing pluralism.

The naturalist endorsement of pluralism takes its point of departure from the observation that positive law lacks the normative resources for providing the requisite moral force to rights talk.[81] Rights talk is talk of prescriptive human rights that demand universal recognition.

> [A] positivistic philosophy . . . is powerless to establish the existence of rights which are naturally possessed by the human being, prior and superior to written legislation and to agreements between governments, rights which the civil society does not have to *grant* but to *recognize* and sanction as universally valid, and which no social necessity can authorize us even momentarily to abolish or disregard. Logically, the concept of such rights can seem only a superstition to these philosophies.[82]

Positive law cannot justify rights talk beyond its political expediency. But restricting the authority of rights talk to the political expediency of its positive articulation violates the very grammar of rights talk. Human rights are not a function of positive law; positive law is a function of human rights. The normativity to which rights talk gives voice is not, and simply cannot be spoken by positive law.[83] For the naturalist, the normative authority of rights talk is invariably religious.[84]

Rights talk is the *normative* articulation of human equality. The central claim of rights talk is therefore a *moral* claim of equality: an equality of dignity inherent in each human being in terms of which every human being

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note 3 at 1039; Michael J. Perry, *The Gospel According to Dworkin*, 11 CON. COMM. 163, 167 (1994). Commitment to human flourishing is simply what we do. Whether Perry's position is viable, either philosophically or empirically, will be discussed below.

81. PERRY, *supra* note 23, at 42.

82. MARITAIN, *supra* note 42, at 96.

83. At best, the normativity of rights talk is spoken through, or by way of positive law. This has to do with the nature of the dialectical relationship between natural law and positive law. *See* note 76.

84. As noted above, some natural law theorists have sought to provide a secular justification for rights talk. And as noted above, this enterprise is philosophically incoherent. Perhaps the most recent notable attempt to justify rights talk on a purely secular basis (i.e., provide purely rational justification for the presumption of human equality) is that of Ronald Dworkin: "We almost all accept . . . that human life in all its forms is sacred . . . . For some of us, this is a matter of religious faith; for others, of secular but deep philosophical belief." Dworkin, *supra* note 46, at 36. Philosophical belief (a questionable, perhaps oxymoronic phrase in and of itself) in the sanctity of human life is patently absurd. Sanctity intrinsically and necessarily involves sanctification. But lacking a sanctifying principle (namely, God), sanctification is reduced to political expediency. Political expediency is intrinsically contractual in nature; its terms can viably be dispensed with when these terms become inexpedient. Although sanctity can be violated, it cannot be dispensed with. Political sanctification is not sanctification.

is to be accorded equal respect.[85] Human rights are rights that every individual possesses by virtue of being human. But what is this normative "virtue" of being human? In terms of what are human beings equal? Surely not by virtue of having tonsils.[86] The universal human possession of tonsils packs no normative punch. For the naturalist, the normative virtue of human being—that by virtue of which human rights equally inhere in all human beings—is the sanctity of human life.[87] "The conviction that every human being is sacred is thus an essential, even foundational, constituent of the idea of human rights."[88] Humans are normatively equal not by virtue of any particular characteristic. No particular human characteristic can generate the requisite normativity of equal regard that is necessarily intrinsic to the grammar of rights talk.[89] A human being is to be accorded equal respect by virtue, and by virtue only, of its sanctity. The equality of all human beings is a function of the sacrality of human being.

The sacrality of human being, however, is a distinctly religious claim. As shown above, it is neither subject to rational justification, nor does it survive the demise of its religious authority. For the non-religionist, the endorsement of the sacrality of human being can amount to no more than a "free floating aesthetic preference."[90] Aesthetic preferences fail to exercise

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85. "If the affirmation of the intrinsic value and dignity of man [sic] is nonsense, the affirmation of the natural rights of man is nonsense also." MARITAIN, *supra* note 42, at 97.

86. Numerous, and equally untenable human characteristics have historically been held forth to constitute the human essence upon which equality is based: from rationality, laughter, moral sensibility, free will, etc. to being white-skinned, well-born, advocating proper beliefs, or sporting a penis.

87. Perry defines the idea of human rights in the following way:

> [T]he idea of human rights is the idea that because every human being, simply as a human being, is sacred (has 'inherent dignity,' is 'an end in himself,' or the like), there are certain things that ought not to be done to any human being and certain other things that ought to be done for every human being.

Michael J. Perry, *The Gospel According to Dworkin*, 11 CON. COMM. 163, 163 (1994). Note the normative character of what is shared as the basis of human equality: the human essence demands a certain kind of respect. The sacrality of human being is not merely *descriptive*; it is *prescriptive* as well. Properly to *describe* human being is at the same time properly to *prescribe* how a human being should be treated. For the naturalist, the *ought* is thus a function of the *is*.

88. *Id.* at 163.

89. This is because no particular characteristic of human being is of intrinsic worth. There is no particular human characteristic that intrinsically demands respect, such that its disrespect obviates the essential humanity of a human being. In essence, this is the Humean inability to generate an *ought* from an *is*. There is no *oughtness* intrinsic to the *isness* of any particular human attribute, whether it be the possession of tonsils, the capacity for reason, the exercise of free will, the ability to speak, etc. Any of these attributes may be absent from a human being, without that human being ceasing to be human. None of these human attributes provide the requisite normative basis for the demand that a human being be accorded respect as such, much less a respect equal to that accorded all human beings. To look for something in particular about human beings on which to hang one's moral hat is to look in the wrong place.

90. Perry, *supra* note 87, at 176.

the requisite normative authority of rights talk.[91] But in claiming the sacrality of human being as a distinctly religious assertion, the naturalist is confronted with a problem. On the one hand, this sacrality is esteemed as universally inherent in all human beings, regardless of religious perspective. On the other hand, this assertion is a function of religious perspective.[92] The dilemma is one that has plagued Western thought since Plato: the problem of pluralism.

For the naturalist, however, the problem of pluralism is precisely its benefit. The historically disturbing problem of pluralism is that differing perspectives, especially differing religious perspectives, generate ostensibly irresolvable disagreement. Such disagreement generally offends the Western mind. Disagreement, however, inevitably generates dialogue between the differing perspectives.[93] Pluralism provokes dialogue. And dialogue allows for the possibility of community.

> Community, not agreement, is the fundamental test or measure of the success of ecumenical political dialogue. The invariable point—the hoped-for yield—of ecumenical political dialogue is *political* community of a certain sort . . . . Its central purpose is the political community of which it is a principle constituent.[94]

Dialogue between differing perspectives—ecumenical dialogue—is not only formative of community between these differing perspectives, but becomes constitutive of the community. "[E]cumenical political dialogue not only requires a context of community . . . it also holds out the promise of, it makes possible the flourishing of, such community."[95] A community of discourse provides the only hope for the mutual understanding, tolerance, and respect

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91. Commenting on the aesthetic justification for morality:

> [I]f the fondness for human rights that some of us have is, at bottom, nothing more than an acquired taste, there is little of consequence to say to those who have not acquired the taste–and who may even have acquired a taste for violating (what we call) human rights–other than, perhaps, 'Try it, you'll like it (maybe).' [W]hy shouldn't we try to disabuse ourselves of our fondness for human rights, if it is only an acquired taste, once it becomes clear that indulging that fondness can be, politically, economically, and militarily a rather costly proposition?

Perry, *supra* note 3, at 1079-80.

92. For Perry, the uniquely Christian conviction of the sacrality of human life devolves from the instruction given by Jesus to his disciples on the eve of his execution: "I give you a new commandment: love one another; you must love one another just as I have loved you." PERRY, *supra* note 23, at 39 (citing John 13:34). From this commandment, and various other Biblical sources, Christian theology has come to espouse the religious conviction that all humans are sacred by virtue of being children of God, and therefore exhibit equal intrinsic worth, upon which worth is founded the normativity of rights talk. *Id.* at 40.

93. In fact, dialogue is presupposed by the very determination of difference. In order to differentiate, difference must be encountered, distinguished, and placed over against one's own identity. Identity is itself established through this dialogical encounter with difference. Identity obtains by virtue of difference; difference obtains by virtue of identity. Identity *and* difference obtain by virtue of their encounter; this encounter is dialogic.

94. *Id.* at 124, 125.

95. *Id.* at 124.

requisite for political community. Within the context, and promise of, such a conversational community, pluralism therefore plays a necessary and constituent part.

Although it may effect divergence, and has historically done so, plurality provides for the emergence of community. For the naturalist, community emerges through the explicit articulation of its implicit plurality. It is only by virtue of talking to one another that we know our real differences, and may therefore truly communicate with each other.

> Perhaps the time has come when we should endeavor to dissolve the structure of war that underlies our pluralistic society, and erect the more civilized structure of the dialogue. It would be no less sharply pluralistic, but rather more so, since the real pluralisms would be clarified out of their present confusion. And amid the pluralism a unity would be discernable—the unity of orderly conversation.[96]

The conversational community generated by pluralism therefore serves not only to mediate consensus, but dissensus as well.[97] To the extent, however, that such dialogical mediation of both agreement and disagreement is effective of emergent community, it must be carried forth within "the unity of orderly conversation." It must be carried forth, that is, within a presumptive conversational structure of tolerance.

Tolerance thus functions as the operative foundation of communal pluralism. It presupposes difference of perspective, and allows for the dialogic mediation thereof.[98] The social value of tolerance is consequently not, however, the generation of a minimum common denominator of agreement.[99] Tolerance sustains pluralism within the dialogic community of

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96. *Id.* (quoting JOHN COURTNEY MURRAY, WE HOLD THESE TRUTHS 24 (1960)).

97. "It is difficult to imagine a community of any size, religious or political, of which that is not true. Dissensus, as well as consensus, is a typical feature of communities." PERRY, *supra* note 23, at 95.

98. Michael J. Perry, *Religious Morality and Political Choice: Further Thoughts–And Second Thoughts–On "Love and Power."* 30 SAN DIEGO L. REV. 703, 719 (1993). Although it is commonly supposed that tolerance presupposes an absence of perspective, a distinct absence of conviction, tolerance actually presupposes precisely the contrary. One can only be tolerant of a conviction different than one's own if one has a conviction of one's own. Lack of conviction may well generate an absence of intolerance, but the absence of intolerance is not the same as tolerance. Tolerance speaks from a position of conviction. At best, lack of intolerance speaks from a position of uncertainty; at worst, from a systemic weakness of will.

99. The minimalist argument is quaintly set forth in the following anecdote:

> [T]he common denominator argument [is] fraudulent. Suppose Dad and Daughter are discussing what to have for dinner. Daughter proposes: 'Let's just have dessert.' Dad suggests that it would be better to have a full meal, with salad, meat, fruit, cooked vegetables, and *then* dessert. Daughter responds: 'Obviously, Dad, we disagree about a lot of things. But there is one thing we agree on; we both want dessert. Clearly, the fair and democratic solution is to accept what we agree on. So let's just have dessert.' . . .The argument that secular public discourse provides a common denominator that all citizens share is comparably clever–and equally unpersuasive.

Steven D. Smith, *Separation and the 'Secular': Reconstructing the Disestablishment Decision,* 67 TEX. L. REV. 955, 1010 (1989).

its discourse. Tolerance therefore provides the structural framework within which the "unity of orderly conversation" may arise, and whereby a community of discourse may consequently be achieved. "That we are a *pluralistic* political community, comprising many different and sometimes competing religious/moral communities, ought not to obscure the 'integrating' potential of ecumenical political dialogue."[100] The integrating principle is tolerance. Tolerance integrates community: it provides for the emergence of community in terms of its plurality.

The conceptual structure of natural law as expressed by the jurisprudence of rights talk may now finally be clarified. The governing presumption of rights talk is the normative equality of all human beings. Normative human equality is a function of distinctly religious convictions concerning the sacrality of human life. In accordance with natural law, this sanctity of all persons both describes and prescribes the essential being of human being. Inasmuch as it prescribes the essential being of human being, it demands that the sanctity of each human life be respected by all. The plurality of religious convictions that serve to provide the normative foundation of this demand itself exhibits this same emergent convergence. Plurality calls forth a community of discourse whereby both consensus and dissensus may be mediated dialogically. The principle of this mediation is tolerance. By means of tolerance, an emergent convergence of community may be integrated within, and in terms of, religious divergence. For the naturalist, rights talk voices this emergent convergence within divergence.

> [T]he experience of all human beings as sacred is widely shared among different sects and religions, albeit expressed or mediated differently in different traditions; and that common, ecumenical ground helps to explain the emergence of the idea of human rights as a point of convergence among peoples from different religious traditions.[101]

The universality of rights talk thus emerges in terms of the pluralistic divergence of its religiously normative articulation. The conversation of rights talk itself articulates the structural dynamic of natural law whereby human rights may be universally respected among the emergent community of discourse that speaks it.

The naturalist therefore circumlocutes rights talk around the rationalist/Nietzschean dilemma precisely by virtue of the natural law of rights talk itself. For the naturalist, rights talk is spoken within the community of discourse historically emergent among the plurality of religious perspectives providing its normative foundation.

> There is a dynamism which impels the unwritten law to flower forth in human law, and to render the latter ever more perfect and just in the very

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100. PERRY, *supra* note 23, at 97.
101. Perry, *supra* note 3, at 1048.

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> field of its contingent determinations. It is in accordance with this dynamism that the rights of the human person take political and social form in the community.[102]

Rights talk is now spoken universally by the international community. The naturalist observes, however, that it is spoken universally by virtue, and by virtue only, of its plurality. The natural law of rights talk would thus obviate the submergent divergence of rights talk by embracing the emergent convergence of its religious justifications—an emergent convergence dictated by the logic of natural law as itself expressed by international rights talk.

IV. THE INTERNATIONAL VOICE OF RIGHTS TALK

> To the ancient question, am I my brother's keeper, the answer is an emphatic yes, and so is your brother your keeper![103]

Although rights talk has indeed become generally recognized as the governing ideal of human rights throughout the world, such talk may well reflect a distinct cultural bias.[104] In recent years, international legal thinkers have questioned the presumptive universality of rights talk,[105] arguing that "the substance of 'human rights' depends on the cultural setting of a particular society."[106] And rights talk, it is argued, is distinctly Western, dependent for its validity and meaning upon its Western cultural heritage.[107] This criticism has led to the further contention that Western rights talk is perhaps inappropriate in non-Western contexts. In essence, international jurisprudence has leveled upon Western rights talk the critical question of whether human rights are themselves a "universal invariant."[108]

This section will examine the conceptual tension between Western rights talk and the international jurisprudence that has raised a critical voice against the universalist claims of the West. For this critical voice, the discussion will depend primarily upon African jurisprudence, since it was the Banjul Charter that crystallized this conceptual tension, and around which this jurisprudential

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102. MARITAIN, *supra* note 42, at 100.

103. Ziyad Motala, *Human Rights in Africa: A Cultural, Ideological, and Legal Examination*, 12 HASTINGS INT'L & COMP. L.REV. 373, 388 (1989) (citing Nahum, *African Contributions to Human Rights* (unpublished paper presented at the seminar on Law and Human Rights in Development, Gaberone, Botswana, May 24-28, 1982).

104. Rhoda Howard, *Evaluating Human Rights in Africa: Some Problems of Implicit Comparisons*, 6 HUM. RTS. Q. 160, 161 (1984).

105. Such a presumption categorically declares that "international human rights standards can be legitimately applied to non-Western societies." JACK DONNELLY, UNIVERSAL HUMAN RIGHTS IN THEORY AND PRACTICE 3 (1989).

106. Motala, *supra* note 103, at 373.

107. *Id.*

108. Raimundo Panikkar, *Is the Notion of Human Rights a Western Concept?* 120 DIOGENES 75, 76 (1982).

debate continues to center.[109]

A methodological conundrum, however, inhabits not only this discussion, but the whole of the jurisprudential debate which this discussion examines. The Western perspective is presumed as primary; the African as responsive, and therefore secondary. The West is the *developed* world; Africa is the *developing* world. The latter is understood in terms of the former. The West is *the* defining perspective; the non-West is the *other* perspective. The West is consequently the standard in terms of which the non-West is understood as *non*. The Western perspective therefore arrogates to itself the defining terms of any debate with a non-Western perspective. This is particularly true of the jurisprudential debate over rights talk. It may well be that rights talk is a distinctly Western manner of speaking. It may well be that concern over its universality is a peculiarly Western pre-occupation. It may well be that jurisprudence is itself a distinctly Western discipline. But the debate has nevertheless been cast in terms of the jurisprudential universality of rights talk. Such methodological narcissism should give pause to any discussant in this debate.

International rights talk speaks the language of the human rights of the individual. Hence, "the central subject of human rights as embodied in the basic international texts is still quite definitely the irreducible human person."[110] The Western concept of individuality therefore governs the grammar of the International Bill of Rights. Consequently, international human rights are something possessed by individuals—by *everyone*. And precisely by virtue of being possessed by the individual, human rights are construed as possessed universally by all individuals.[111] International rights talk thus speaks universally.

The critical insight of African jurisprudence is that the universalism of Western rights talk may be particular to the West. "The sacralization of the individual and the supremacy of the jurisprudence of individual rights in organized political and social society is not a natural, 'transhistorical,' or universal phenomenon, applicable to all societies, without regard to time and place."[112] The notion that human rights are something held universally by all individuals is a function rather of a distinctive cultural context: namely, the modern capitalistic democracy of the industrial West.[113]

As will be demonstrated below, Western rights talk has essentially to do with the protection/promotion of abstract autonomous individuality. Accord-

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109. Theo van Boven, *The Relations between People's Rights and Human Rights in the African Charter*, 7 HUM. RTS. L.J. 183, 184 (1986). *See* The African Charter on Human and Peoples' Rights, June 27, 1981, OAU Doc. CAB/LEG/67/3/Rev.5 (1981), reprinted in 21 I.L.M. 59 (1982) [hereinafter Banjul Charter].

110. Jean-Bernard Marie, *Relations Between Peoples' Rights and Human Rights*: Semantic and Methodological Distinctions, 7 HUM. RTS. LAW. J. 195, 198 (1986).

111. DONNELLY, *supra* note 105, at 1.

112. Makau wa Mutua, *The Banjul Charter and the African Cultural Fingerprint: An Evaluation of the Language of Duties*, 35 VA. J.INT'L L. 340, 341 (1995).

113. DONNELLY, *supra* note 105, at 50.

ingly, Western rights talk structures a society of competing individuals in perennial fear of societal intrusion. Such individual competition is preserved, and societal intrusion prevented, through democratic control of the government. Western rights talk is consequently endemic to a democratic polity. And conversely, democracy is endemic to such rights talk.[114]

Moreover, a society of competing individuals is a society structured by generally formal social relations. The model of such a society is certainly not that of communal intimacy. A functional anonymity typifies social interaction between individuals.[115] The paradigm human is the abstract individual, socially unencumbered except by choice. The right to privacy governs the sociality of such individuals. This comports with the social economics of modern industrial society.[116]

Furthermore, a society structured in terms of rights talk conduces to a particular manner of adjudicating social conflict between competing individuals. Adjudication is appropriately made by a neutral judiciary on the basis of objective principles of law.[117] Rights talk comports with a jurisprudence characterized by such abstract judicial principles,[118] because abstract judicial principles exhibit the requisite universality of rights talk.[119] Accordingly, the primary goal of adjudication is circumstantially to vindicate universal human rights.[120] The rights talk that engenders an abstract jurisprudence engenders as well the universality of the rights upon which such jurisprudence is based. This presupposes, of course, general societal access

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114. *See* Panikkar, *supra* note 108, at 82. The modern democratic State, in other words, is the political expression of Western rights talk. Rights talk is a function of democracy, and vice versa. "Human Rights are tied to democracy. Individuals need to be protected when the structure which is above them [the State] is not qualitatively superior to them, i.e. when it does not belong to a higher order." *Id.* at 91. In the language of Western rights talk, the government serves the primary purpose of protecting/promoting individual autonomy. The governed governs the government. "This implies a quantitative reductionism; the person is reduced to the individual and the individual to the basis of society." *Id.*

115. *See* DONNELLY, *supra* note 105, at 59-60.

116. *Id.* at 59.

117. J.B. OJWANG, *Laying a Basis for Rights*, *in* AFRICAN LAW AND LEGAL THEORY 355 (Gordon R. Woodman & A.O. Obilade eds., 1995).

118. *Id.*

119. In order neutrally to adjudicate claims between competing individuals, appeal must be made to principles that are independent of particular circumstances. Rights must therefore be understood as universally applicable.

> "Rights," in Anglo-American law, have generally been viewed as if they were judicial principles and ideals autonomous enough . . . to be vindicated in a more-or-less uniform manner, even with minimal reference to the dynamic societal factors. *It is apparently considered that the rights in question are all-available, and constant*; the remaining task being merely to give them effect.

Id. at 357. Such an abstract jurisprudence becomes most tortured when it must adjudicate between individuals respectively claiming competing rights. Inasmuch as this calls for circumstantial justification of why one right should prevail over another, the judiciary is typically left with two, equally unsatisfactory options: prioritizing otherwise universal rights, or performing a generally arbitrary balancing test between them.

120. This produces a general judicial pre-occupation with *due process* and the *rule of law*. *See* DONNELLY, *supra* note 105, at 82.

to legal institutions for asserting individual rights claims.[121]

Western rights talk is thus uniquely suited to the political, economic, and legal culture of the West. In some strong sense, Western rights talk voices its own cultural dynamics. The universality of Western rights talk serves in essence to articulate the particularity of Western culture.[122] The critical question which African jurisprudence brings to bear upon Western rights talk is whether the universality of its individualism is particular *only* to the West. Can Western rights talk viably be spoken, for instance, in Africa? Properly to address this question requires a brief depiction of the African culture in both its pre-colonial and post-colonial form.

Pre-colonial Africa is characterized as communitarian.[123] The governing goal of the social, political, and economic structures in pre-colonial Africa was to assure social solidarity and the continued existence of a particular community.[124] This was perhaps due to the oftentimes extraordinary difficulty of life itself.[125] Pre-colonial African law was designed primarily to ensure communal unity and cohesion.[126]

Pre-colonial African law was consequently not designed to promote/protect individual autonomy over/against the unity and cohesion of the community. Hence, the "African conception of man [sic] is not that of an isolated and abstract individual, but an integral member of a group animated by a spirit of solidarity."[127] Communal solidarity is fundamental; individual self-assertion derivative. Individuation is a function of the particular role that the individual fulfills within the social, political, and economic structures that provide for communal unity and cohesion.[128] Individual identity is thus a function of communal identity. The individual does not exist prior to the community, but in terms of the community. Consequently, communitarian culture does not recognize the formally anonymous, abstract individual. Its essence may be summed up in the phrase: "I am because we are, and because we are therefore I am."[129]

In such a communitarian culture, the interests of the community not only take precedence over the interests of the individual, but the interests of the individual are a function of the interests of the community. The two interests

121. OJWANG, *supra* note 117, at 357.

122. "The prevailing human rights discourse . . . is abstracted from social history and thereby arrives at conclusions which make human rights both eternal in historical time and universal in social space." ISSA G. SHIVJI, THE CONCEPT OF HUMAN RIGHTS IN AFRICA 43 (1989).

123. OJWANG, *supra* note 117, at 369.

124. Mutua, *supra* note 112, at 361.

125. OJWANG, *supra* note 117, at 369.

126. *Id.*

127. Mutua, *supra* note 112, at 359 (citing B. Obinna Okere, *The Protection of Human Rights in Africa and the African Charter on Human Rights and Peoples' Rights: A Comparative Analysis with the European and American Systems*, 6 HUM. RTS. Q. 141, 148 (1984)).

128. *Id.* at 361.

129. *Id.* at 360 (quoting JOHN MBITI, AFRICAN RELIGIONS AND PHILOSOPHY 141 (1970)).

are not disparate: communal interests are not construed to stand opposed those of the individual. Rather, the interests of the individual member of a community are defined primarily in terms of social obligations to that community.[130] The individual and the community simply do not stand in a structural relationship of antagonism.[131]

Legal disputes between individual members of a community, moreover, are resolved not on a formally adversarial basis, but on a communitarian basis.[132] The governing concern of the judicial system in a communitarian culture is "to bring good sense and social accommodation, rather than to attain some abstract justice founded on recorded principles or doctrine of law."[133] Adjudication of legal disputes is therefore concerned with the resolution of communal conflict—not with the vindication of one individual over another.[134] The institutions that dispense such social justice, moreover, are largely informal, drawing upon oral tradition and adjudicating communal conflict in an entirely circumstantial fashion—"abstract legal doctrine being distinctly lacking."[135]

Clearly, the communitarian culture of pre-colonial Africa is structurally incompatible with Western rights talk: "at the advent of colonialism, the African concept of rights was only mildly based on the *self*, the interests of the *community* as an organic entity being all-important. . . ."[136] But during the colonial period, Western culture was layered over the African continent. Subsequently, Western rights talk articulated itself into African jurisprudence. The primary concern here is to examine the viability of this articulation. How does contemporary Africa speak its rights talk?

By and large, African jurisprudence bespeaks itself within the context of social crisis. "Since colonialization . . . Africa has lunged from one crisis to another."[137] Over the last several decades, African States have been beset with abysmal poverty; widespread lack of food, shelter and clothing; systemic deficiency of health and education; rapacious use of resources (both natural and human); uncontrolled population growth; general corruption of the basic administrative structures (local, regional, and national); and the unceasing devastation of ethnic rebellion, genocide, and war.[138]

Into this social crisis, the communitarian jurisprudence of pre-colonial

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130. Such obligations attach primarily through kinship, and are identified by the communal system of "naming": one's familial identity (e.g., aunt or uncle) attaches a variety of specific social obligations upon the one so identified. *Id.* at 362. Unlike the West, kinship identity relates to actual obligations, and are not necessarily biologically based. *Id.* at 362 n.79.

131. *Id.* at 363.

132. OJWANG, *supra* note 117, at 369.

133. *Id.*

134. *Id.*

135. *Id.*

136. *Id.*

137. Mutua, *supra* note 112, at 378.

138. OJWANG, *supra* note 117, at 371.

Africa received the Western jurisprudence of rights talk. And this received jurisprudence has acquired both conceptual and institutional priority.[139] This has created in post-colonial Africa a cultural crisis that to date has rendered her systemically unable to address the social crises she now faces.

On the one hand, allegiance to community and kinship remains culturally primary; on the other hand, the conceptual and institutional dynamics of the West are imposed officially.[140] But these official dynamics have been unable to re-route communal allegiance to the modern African State.[141] Consequently, there is no sustained national identity.[142] This conduces, in turn, not only to national political corruption, but to the lack of popular rebellion against such corruption as well: neither the citizenry nor the government possess any nationalistic bond to the State.[143] The social-political-economic devastation of Africa therefore remains largely unchecked.

The institutional imposition of modern statehood, moreover, has managed increasingly to subvert the communal base of African society.[144] "The cake of custom has been crumbling and continues to crumble rapidly."[145] And the institutional imposition of the modern African State that has served in large measure to crumble this cake—typically in the name of "development"— has been unable to regather these crumbs against the forces of social devastation in Africa.[146] In the midst of its social crisis, Africa therefore suffers from a "crisis of cultural identity."[147] The latter crisis prevents successful address of the former; and the former only exacerbates the latter.

Africa addressed itself jurisprudentially to this social/ cultural crisis with the formation of the Banjul Charter.[148] In essence, it seeks explicitly to

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139. *Id.* at 368, 370.

140. Mutua, *supra* note 112, at 366.

141. *See id.* at 366-368.

> The motivation and purpose behind the concept of duty in pre-colonial societies was to strengthen community ties and social cohesiveness, creating a shared fate and common destiny. This is the consciousness that the impersonal modern state has been unable to foster. It has failed to shift loyalties from the lineage and the community to the modern state, with its mixture of different nations.

Id. at 368.

142. *Id.* at 366.

143. *Id.* at 343.

144. As "development" increases, the individual becomes increasingly separated from the local, supportive community, and must "go it alone" against newly imposed socio-economic and political forces. DONNELLY, *supra* note 105, at 59, 60.

145. OJWANG, *supra* note 117, at 370.

146. Because of the widespread social crises in Africa, the institutional setting for adjudicating social conflict is largely lacking. "For the majority, the rights of the official legal system are unavailable." *Id.* at 371.

147. Mutua, *supra* note 112, at 378. Mutua states that although there are numerous reasons for this cultural identity-crisis, the most critical has been the imposition of Western forms and values of government and culture upon pre-colonial African society. "The failure of the [consequent] post-colonial state is so pervasive that it has become the rule, not the exception." *Id.*

148. *Id.* at 380.

coordinate the Western notion of individual human rights with an African notion of community rights.[149] Although community rights had figured into previous human rights documents (especially with regard to a peoples' right of self-determination), such rights were generally construed as derivative from the human rights of the individual.[150] Western rights talk maintains the individual as the primary bearer of human rights; community forms the social context of such individual rights, but is not construed as itself the bearer of such rights.[151] In contrast, the Banjul Charter takes the position that individual rights and community rights exist on an equal par—that indeed, they are "complementary concepts."[152] The jurisprudential contention of the Banjul Charter is that a community may itself be the bearer of human rights.[153]

This contention has launched an enormous, often acrimonious, jurisprudential debate over the existence of communal human rights, by whom (or what) they are borne, and their relationship to the human rights of the individual. The debate has revolved around the issues of whether one form of rights preconditions the other, and whether they conflict with or complement each other.[154]

The communal rights advocates argue that African culture is primarily communitarian, and that the problems she faces are essentially communal in nature. As noted above, Africa suffers from a cultural identity crisis in the face of overwhelming social devastation. Western rights talk of the individual—a talk spoken with the stable voice of democracy from the comfort of the industrial West—is entirely unsuited to address such a problem. "The development of the state in Africa is so radically different from its [Western] equivalent that the traditional liberal conception of the relationship between the state and the individual is of limited utility in

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149. Van Boven, *supra* note 109, at 184.

150. Richard N. Kiwanuka, *The Meaning of "People" in the African Charter on Human and Peoples' Rights*, 82 AM. J. INT'L. LAW 80, 81 (1988).

151. Van Boven, *supra* note 109, at 184. Sohn exemplifies this perspective:

> [I]nternational law not only recognizes inalienable rights of individuals, but also recognizes certain collective rights that are exercised jointly by individuals grouped into larger communities, including peoples and nations. These rights are still human rights; the effective exercise of collective rights is a precondition to the exercise of other rights, political or economic or both. If a community is not free, most of its members are also deprived of many important rights.

Sohn, *supra* note 4, at 48. Collective rights are thus the group sum of individual rights; the former are derivative from the latter.

152. Van Boven, *supra* note 109, at 189.

153. Recent jurisprudential debate over human rights has managed to distinguish rights into three categories: civil-political (human rights traditionally held by individuals); economic-social-cultural rights (rights held by peoples, nations or even States); and solidarity rights (e.g., right to peace, the environment, to communicate, to benefit from cultural heritage, etc.). *See* Marie, *supra* note 110, at 197 n.4. It is not the concern here, however, to enter into an examination of rights-categorization, but rather to analysis the conceptual basis for the distinction between individual and communal rights.

154. *See* SHIVJI, *supra* note 122, at 26-29.

imagining a viable regime of human rights."[155] The African problem is essentially communal: social and economic, as well as political.[156] What good is a vote without bread? Regard for the individual must therefore be subordinate to communal development.[157] This comports with the communitarian nature of traditional African culture. "The Western comparison . . . is abstracted from both history and economics. It presents as a matter of Western moral commitment and political will what is in fact a matter of enormous economic advantage and centuries of class, ethnic, racial—and now sexual—conflict."[158] Absent the communal human right to development, individual human rights are functionally meaningless.[159] Under this perspective, individual human rights and communal human rights essentially complement each other.

Individual rights advocates typically argue in response that jurisprudential subordination of individual human rights to the human rights of the community serves merely to provide a legitimating pretext for human rights violations.[160] Although this may be true in some sense, the "facts do not indicate that the zeal to promote certain economic and political programs is the root cause of human rights abuses."[161] The subordination of individual human rights to communal human rights does not properly serve to justify

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155. Mutua, *supra* note 112, at 342.

156. It is therefore *not* essentially a problem of infringement upon civil and political liberties geared toward the protection/promotion of abstract autonomous individuality. An African leader has summed up the situation as follows:

> What freedom has our subsistence farmer? He scratches a bare living from the soil provided the rains do not fail; his children work at his side without schooling, medical care, or even good feeding. Certainly he has freedom to vote and to speak as he wishes. But these freedoms are much less real to him than his freedom to be exploited. Only as his poverty is reduced will his existing political freedom become properly meaningful and his right to human dignity become a fact of human dignity.

SHIVJI, *supra* note 122, at 26 (citing Julius K. Nyerere, "Stability and Change in Africa," *in Africa Contemporary Record* 2 (1969-70), c30-31).

157. "[The right to development] is a necessary precondition for the satisfaction of the social and economic rights of individuals." DONNELLY, *supra* note 105, at 147 (quoting Georges Abi-Saab, *The legal Formulation of a Right to Development, in* RENE-JEAN DUPUY, ACADEMIE DE DROIT INTERNATIONAL DE LA HAYE, COLLOQUE 1979: LE DROIT AU DEVELOPPEMENT AU PLAN INTERNATIONAL 172 (1980)).

158. Howard, *supra* note 104, at 166.

159. Such a communal right to development places a correlative duty, of course, upon the international community in general, and upon the Western community in particular, actively to promote such development. This duty devolves not only from international responsibility for the general human condition–as voiced in the International Bill of Rights–, but also from the fact that it was the West, through its colonial and continuing post-colonial exploitation of Africa, that is largely responsible for the current economic devastation of Africa. *See* SHIVJI, *supra* note 122, at 29-33. This position is especially critical of the Western refusal of aid on the basis of African human rights violations as simply another, more subtle form of Western political imperialism–an imperialism which initially provided the conditions which have led to such violations. *Id.* at 53.

160. Howard, *supra* note 104, at 175. *See generally* PAUL SIEGHART, THE INTERNATIONAL LAW OF HUMAN RIGHTS 368 (1983), and THOMAS BUERGENTHAL, INTERNATIONAL HUMAN RIGHTS 178 (1988). "To recognize a *human* right of *states* to peace, development, and the like will merely undercut the ability of the victims of oppression to advance effective human rights claims against their governments." DONNELLY, *supra* note 105, at 146.

161. Mutua, *supra* note 112, at 374.

violation of the former. Subordination does not legitimate violation.[162]

The more searching response of individual human rights advocates is that African culture is no longer communitarian, and that as Africa continues to develop a democratic, industrialized society, she is obliged jurisprudentially to endorse the rights talk that is suitable to such a culture.[163] Individual human rights are thus construed as a "logical and necessary evolution" in the development of culture.[164] "The rise of a [modern State] gradually destroyed the social basis of traditional communities and created separate and distinct individuals (in place of persons who are ascriptively defined by their position in a status hierarchy) who would become the bearers of human rights."[165] Individual human rights must therefore be given priority over any rights of the community—even if insistence upon them might radically alter the social dynamics of that community.[166]

This argument further contends that the notion of communitarian human rights is a conceptual confusion: the "right" of the community is nothing more that the duties of its members to the community.[167] A communal right is thus an abstraction from individual duties. And duties are not rights. "Communal human rights" is therefore a conceptual confusion. As an abstraction from individual duties to the community, communal rights are ultimately antithetical to human rights "because they deny the autonomy of the individual, the irreducible moral equality of all individuals, and the possibility of conflict between the community's interest and the legitimate interests of any individual."[168] Because communal rights serve to obviate the value of the abstract autonomous individual, they are essentially incompatible with human rights.[169]

Moreover, proponents of individual rights over communitarian rights

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162. Jurisprudence, in other words, need not bow to the danger of pretext. The fact that the jurisprudential subordination of individual human rights to communal human rights may be used pretextually to legitimate the violation of individual human rights does not in and of itself obviate the viability of the subordination.

163. DONNELLY, *supra* note 105, at 59.

164. *Id.* at 60. This argument presumes that within a communitarian culture, human rights are not required inasmuch as the social structure of the community provides for the well-being of its members in terms of the social role that members are obliged to fulfill. An insistence upon individual human rights might well subvert the internal unity and cohesion of such a community. *Id.* at 59. "In such a society, the individual lacks many if not most of the rights that are so highly valued in the liberal democratic state." *Id.* But as development arises, the individuals become separated from their defining social roles. "Economic, social, and cultural changes in and disruptions of traditional communities have often removed the support and protection that would 'justify' or 'compensate for' the absence of individual human rights." *Id.* The individual must now "go it alone" against largely anonymous social forces. Hence, the need for individual human rights. *Id.* at 60.

165. *Id.* at 64.

166. "[I]f the group can persist only through the systematic denial of the human rights of its members, it has no claim to our respect." *Id.* at 152.

167. *Id.* at 145.

168. *Id.* at 75.

169. *Id.* at 83.

argue that communitarian rights are by nature non-universal. In communitarian cultures, one acquires any rights one has only by virtue of being a member of the society—not by virtue of being human.[170] Human rights, however, are necessarily universal to all human beings by virtue of being *human* rights. "To have a human right, one need be nothing other than a human being, nor do anything other than be born human. To be human is to have human rights."[171] Not only do communal rights obviate the abstract autonomous individuality upon which human rights reside, they subvert the universality of human rights as well. Communal rights are consequently not human rights.[172] Under this perspective, individual human rights and communal human rights essentially conflict.

To the critical question, then, of whether Western rights talk is particular *only* to the West, this position responds negatively. Western rights talk can, indeed must, be spoken by African jurisprudence. Inasmuch as Africa embraces Western culture, its pre-colonial communitarian jurisprudence must be supplanted by the Western jurisprudential rights talk of the abstract autonomous individual with its claim of universal human rights.

Or, does this response simply exhibit another instance of Western imperialism?[173]

> To claim universal validity for Human Rights . . . implies the belief that most of the peoples of the world today are engaged in much the same way as the Western nations in a process of transition from [feudal/tribal institutions] to a "rationally" and "contractually" organized "modernity" as known to the Western industrialized world. This is a questionable assumption.[174]

Does Western rights talk voice such an intellectual imperialism?

The critical insight to be drawn from the African jurisprudence of rights talk is that the bearer of rights is not primarily the individual *per se*, but the individual defined as a member of a particular community. In short, the "abstract autonomous individual" does not exist for African jurisprudence. Humans exist communally. The identity of a human being is a function of its having existentially integrated a variety of social relationships. Moreover, such community is always and ever socially particular. Who one is and ought to be is a function of who one is and ought to be within a particular community.[175] "The individual as such is an abstraction, and an abstrac-

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170. *Id.* at 83.

171. *Id.* at 144.

172. At best, communal rights should be construed as the rights of individuals acting as members of a community. *Id.* at 147.

173. "'Human rights ideology' is an ideology of domination and part of the imperialist world outlook." SHIVJI, *supra* note 122, at 3.

174. Panikkar, *supra* note 108, at 88.

175. "[M]orality is always to some degree tied to the socially local and particular and . . . the aspirations of the morality of modernity to a universality freed from all particularity is an illusion . . . ." MACINTYRE, *supra* note 38, at 119.

tion as such cannot be an ultimate subject of rights."[176] Rights are intrinsically proprietary to communal relationships, not to pre-communal abstract individuals. Pre-communal abstract individuals do not exist.

African jurisprudence would thus contend that Western rights talk is itself based upon a conceptually confused, if not incoherent, understanding of the nature of human being as an abstract autonomous individual.[177] African rights talk of the community addresses itself to this confusion. Far from being either confused or incoherent itself, African rights talk of the community is a speech that needs to be heard by Western jurisprudence. Categorically to dismiss it is to turn a deaf ear not only to the conceptual viability of communal rights talk, but a blind eye to the conceptual deficiency of our own individual rights talk. It is time to listen with our eyes open.

V. THE COMMUNITY OF RIGHTS TALK

> Human rights do not exist as heavenly and pure principles but as a specific discourse with ambivalent rules of formation. It is this discourse that must be subjected to interrogation.[178]

The conceptual scheme in terms of which our ethical language in general, and rights talk in particular, may historically be understood, is Aristotelian.[179] As discussed above, that conceptual scheme is tri-partite. The first element is essential human nature: universal, and equally inherent in all human beings as such. The second element is social: the communal realization of human essence. The third element has to do with the means by which social existence properly realizes human essence.

> Within that teleological scheme there is a fundamental contrast between man [sic]-as-he-happens-to-be and man-as-he-could-be-if-he-realized-his-essential-nature. Ethics is the science which is to enable men to understand how they make the transition from the former state to the latter.[180]

The being of human being, in other words, is essentially incomplete. Ethics provides the means whereby human nature may realize its proper end. The canons of ethics dictate that we become who we are. As noted above, this

176. Panikkar, *supra* note 108, at 98.

177. As argued above, Western ethical language was not originally governed by the grammar of abstract autonomous individuality, but by the grammar of natural law. And the ethics of Aristotelian natural law was in some strong sense communitarian. The identity of an individual was a function of social role, although in a distinctly teleological manner–hence the Greek notion of *virtue* whereby citizens could individually fulfill (to a greater or lesser degree of excellence) their particular social identity. How this Greek notion of the relation between the individual and community differs from the African would make for an intriguing discussion, but is unfortunately beyond the scope of the present work.

178. GAETE, *supra* note 45, at 4.

179. MACINTYRE, *supra* note 38, at 50.

180. *Id.*

tri-partite conceptual scheme provided as well the metaphysical structure of natural law.

During the past three centuries of European intellectual history, however, the notion of the essential nature of human being underwent profound change.[181] This change was effected across philosophical, religious, political, and economic lines.[182] It served to collapse the tri-partite structure of ethical discourse into its first element.[183] How this happened has had profound impact on the grammar of rights talk.

The emergence of the modern notion of human being was occasioned by the denial of its intrinsic teleology.[184] This had largely to do with the understanding that humans are not socially constituted. In classical thought, the essence of human being was completed by virtue of its communal realization: one's humanity was realized through fulfilling proper social roles.

> [A]ccording to that tradition to be a man [sic] is to fill a set of roles each of which has its own point and purpose: member of a family, citizen, soldier, philosopher, servant of God. It is only when man is thought of as an individual prior to and apart from all roles that 'man' ceases to be a functional concept.[185]

For largely theological reasons,[186] modern thought sought to disassociate the intrinsic worth of human being from its communal realization. This functioned, in essence, to invent the *individual*.[187] The controlling concept for construing the essential being of human being became the concept of individuality.

The notion that humanity is composed of individual human beings is not profoundly illuminating. The idea that individuality constitutes the essential being of humanity, however, is rather startling (or would be if not now so taken for granted). And it has startling consequences for how the human being is constituted vis-a-vis its social, economic, political, and religious

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181. *See* MACINTYRE, *supra* note 38. MacIntyre provides an extensive historical-critical examination of the development of the notion of human being in Western European thought from the seventeenth through the twentieth century, as it applies to ethical philosophy. Although it lies well beyond the scope of the present discussion to trace this development, it is necessary to grasp its governing presumptions for a proper understanding of the current use of rights talk.

182. *See* LUKES, *supra* note 69.

183. MACINTYRE, *supra* note 38, at 52.

184. *Id.* Depriving human being of its teleological character prompts, of course, the philosophical dichotomy between "is" and "ought" made famous by Hume. Kant seemed to be the first to realize, however, that the lack of teleological capital functions to bankrupt moral philosophy.

185. *Id.* at 56.

186. LUKES, *supra* note 69, at 45-47. The Reformation was programmatically concerned to render salvation a function of the soul's naked stance before God, and distinctly not a function of its social role, status or accomplishments. This religious pre-occupation with the individual as such (as eschatologically prior to its moral behavior) received full secular endorsement with the Renaissance proclamation of the supreme and absolute worth of the individual.

187. MACINTYRE, *supra* note 38, at 59.

relationships. In essence, these relationships become *external* to the individuated human self.

> The self is now thought of as lacking any necessary social identity, because the kind of social identity that it once enjoyed is no longer available; the self is now thought of as criterionless, because the kind of *telos* in terms of which it once judged and acted is no longer thought to be credible.[188]

The individual self is complete within itself, ontologically prior to, and therefore disparate from, its communal involvements. The individual self is thus an abstract self. Communal involvements are subsequent to the essential being of human being.[189] How the abstract individual communally realizes itself becomes a function not of how it *ought* to do so (in proper accordance with its nature), but how it *chooses* to do so. The defining characteristic of the abstract individual is its autonomy.[190] How the abstract individual chooses to be is constrained only by its discretion.[191] Absent the internal teleology that would dictate how the essential being of human being is properly to be realized communally, the abstract individual is autonomously free to realize itself in any way it chooses.

The essential being of human being is thus constituted as the pre-communal autonomy of the abstract individual. How this essential being is communally realized is a function of preserving its defining character of autonomy. The abstract individual becomes itself precisely by virtue of being itself, namely autonomous. The central and controlling issue for the abstract autonomous individual thus becomes: how to protect and promote one's autonomy. For modernity, autonomy is preserved through two fundamental

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188. *Id.* at 32.

189. *See* LUKES, *supra* note 69, at 73-79. On the one hand, individuals are construed as abstractly given, with given drives, interests, needs, desires, etc. On the other hand, society is construed as the set of possible social relationships which are suited, more or less adequately, to individuals' requirements. Societal rules, laws, institutions, etc. are accordingly construed as the social-political means of achieving this fit between the individual and society. "The crucial point about this conception is that the relevant features of individuals determining the ends which social arrangements are held (actually or ideally) to fulfil . . . are assumed as given, independently of a social context." *Id.* at 73.

190. MACINTYRE, *supra* note 38, at 58.

191. *See* LUKES, *supra* note 69, at 52-59. The autonomy of the individual is not understood, however, as arbitrary. It simply means that the behavior of an individual is ultimately that of the individual–not a function of social constraint beyond the control of the individual. "In particular, an individual is autonomous (at the social level) to the degree to which he subjects the pressures and norms with which he is confronted to conscious and critical evaluation, and forms intentions and reaches practical decisions as the result of independent and rational reflection." *Id.* at 52. How this autonomy is effected has been variantly conceived by different philosophers. For Kant, autonomy was effected primarily through the intellect by means of reason; for Hume, it was effected emotively (or, habitually) through desire; for Kierkigaard, it was effected through the will by radical choice. But whether intellectually, emotively, or volitionally, the principles by which decisions are made are subject to the discretion of the individual. Which is to say that the principles lack any normative authority in and of themselves. Such principles are authoritative to the extent that we choose to regard them as authoritative. *See* MACINTYRE, *supra* note 38, at 35-48.

complementary rights: the right to privacy,[192] and the right to self-development.[193] The right to privacy dictates that the autonomy of the abstract individual is to be respected by the various communal involvements of the individual. Privacy generates a host of *protective rights*.[194] The right to self-development dictates that the abstract individual be allowed autonomously to pursue whatever mode of self-realization the individual should choose. Self-development generates a host of *promotive rights*.[195] The complementary rights of privacy/self-development programmatically inform all communal involvements of the abstract autonomous individual: political,[196]

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192. *See* LUKES, *supra* note 69, at 59-67.

> In general the idea of privacy refers to a sphere that is not of proper concern to others. It implies a negative relation between the individual and some wider 'public', including the state–a relation of non-interference with, or non-intrusion into, some range of his [sic] thoughts and/or action. This condition may be achieved either by his withdrawal or by the 'public's' forbearance.

Id. at 66. The modern pre-occupation with privacy stands in rather stark contrast to classical thought on the matter:

> [T]he privative trait of privacy, indicated in the word itself, was all-important; it meant literally a state of being deprived of something . . . . A man who lived only a private life, who like the slave was not permitted to enter the public realm, or like the barbarian, had chosen not to establish such a realm, was not fully human.

Id. at 59 (quoting HANNAH ARENDT, THE HUMAN CONDITION 35 (1959)). For modernity, however, privacy does not denote a privation. In fact, "[s]imilar to property in its heyday, privacy was vaunted as a superright, a trump." GLENDON, *supra* note 1, at 60. The singularly American insistence upon the right to privacy is probably most directly attributable to the writings of Mill. LUKES, *supra* note 69, at 59-66. Although it did not enter the American vernacular until the late nineteenth century, it has since become the right in terms of which all other *protective* rights are understood. It is the right to be let alone. GLENDON, *supra* note 1, at 48-61. The historical relationship between the right to privacy and the institution of private property is well documented. Although the former is typically argued as the historical function of the latter, the right to privacy has a far greater compass than do property rights–unless, of course, one takes a more expansive view of property as that which is proper to one's self.

193. The right to self-development has primarily to do with the preservation of individuality as such. It is generally traceable to Romantic notions of uniqueness. LUKES, *supra* note 69, at 67.

> The notion of self-development thus specifies an ideal for the lives of individuals–an ideal whose content varies with different ideas of the *self* on a continuum from pure egoism to strong communitarianism. It is either anti-social, with the individual set apart from and hostile to society (as among some of the early Romantics), or extra-social, when the individual pursues his [sic] own path, free of social pressures (as with Mill) or highly social, where the individual's self-development is achieved through community with others (as with Marx, or Kropotkin). In general, it has the status of an ultimate value, an end-in-itself.

Id. at 71.

194. E.g., rights against various forms of government intrusion, social obligations, religious commitments, etc. Leave me alone.

195. E.g., rights to life, liberty, pursuit of happiness; freedom of speech, association, work, procreation, education, welfare, etc. Let me be me.

196. The form of political government programmatically appropriate to the idea of the abstract autonomous individual is a government whose authority is based upon the consent of its individual citizens: a democratized social contract whereby the government protects/promotes the interests of its individual citizens. LUKES, *supra* note 69, 79-87. This view, of course, has a long lineage traceable to Hobbes, Locke and Rousseau.

Bitter: "Human Rights": Would You Recognize One if You Saw One? A Philoso

economic,[197] religious,[198] and even philosophical.[199]

The essential being of human being, then, is that of the abstract autonomous individual, intrinsically unencumbered by social involvements, socially protected by the right to privacy and socially promoted by the right to self-development. The essential being of human being, in other words, is essentially complete. It pre-exists its communal realization, which pre-existent identity is to be preserved intact, as both protected and promoted, within its subsequent communal involvements. Its *telos* is the same as its *primus*: abstract autonomous individuality. How this essential being is properly to be effected is as well a function of its defining character: abstract autonomous individuality. What the essential being of human being is, what constitutes its proper communal realization, and how this constitution is properly realized, is all a function of the same thing: abstract autonomous individuality. The tri-partite structure of ethical language is thus collapsed into its first element.[200] And the ethical language that speaks this collapse is rights talk.

> The principle that the government must treat all human beings with equal dignity derives from the conception of human beings as autonomous beings. And rights must be taken seriously, not metaphysically or morally, but as required by the right to respect of [sic] one's autonomy. A respectful sovereign is a silent sovereign, a sovereign who respects everybody's freedom and has no strong opinions on the question of the good life.[201]

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197. "Economic individualism implies a consequent presumption against economic regulation, whether by Church or State." *Id.* at 88. This view received much of its controlling ideology from Adam Smith.

198. *See* LUKES, *supra* note 69, at 94-99. This form of religiosity achieved its quintessential expression in Kierkigaard. In essence, it provides that the relationship between the individual and God is precisely and only that: a relationship between the individual and God. Religiosity is fundamentally private and personal. Consequently, religiosity is profoundly unmediated–by Church, by community, by ritual, and in its more radical forms, by religion itself.

199. Ostensibly beginning with Descartes, and receiving progressively sophisticated treatment through a lineage highlighted by Hume, Kant and Husserl, the structural criteriology of knowledge is held to reside within the individual. Epistemology thus becomes the defining discipline of philosophy. Although this entire philosophical tradition has dissembled over the past half century or so, it remains in currency outside the exotic circles of contemporary philosophical thought.

200. "*Ethical individualism* is a view of the nature of morality as essentially individual." *Id.* at 99. Nietzsche represents the quintessential expression of this form of ethical language. As noted above, ethical individualism has a great deal to do with the demise of religion as providing the authoritative voice of morality.

> It contrasts . . . with all objectivist or naturalistic ethical views, according to which the content of moral values and principles and the criteria governing moral judgements are not open to choice but are given–whether through revelation or reason or intuition or a proper understanding of the requirements of society or the direction of history or the principles of human nature.

Id. at 106. In essence, ethical individualism asserts that how one is to live is a function entirely of how one chooses to live. What informs this choice, of course, may be any number of things, from economic self-interest to pious concerns for one's salvation. The point, however, is that the authority for the choice is vested entirely in the individual, even if choosing among competing authoritative criteria (e.g., religious beliefs).

201. GAETE, *supra* note 45, at 125.

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Rights talk has primarily and programmatically to do with the protection and promotion of abstract autonomous individuality. As such, its moral authority is collapsed into the self-assertion of the individual.[202] Absent a proper *end* beyond that of realizing its abstract autonomy, and consequently lacking as well any proper *means* for realizing that end beyond preserving its abstract autonomy, the moral authority of rights talk is precisely and only that of the abstract autonomy of the individual. The classical structure of ethical language thus collapses into the rights talk of the individual, the moral authority of which resounds no further than to the individual speaking it. "[T]he price paid for liberation from what appeared to be the external authority of traditional morality was the loss of any authoritative content from the would-be moral utterances of the newly autonomous agent."[203] Hence the programmatically disconcerting lack of any universal justification for rights talk discussed above.[204]

But rights talk generates not only a problem of moral justification. It generates as well an equally disconcerting social problem. Rights talk is inevitably and invariably divisive. This divisiveness exists in two forms.

On the one hand, rights talk structures a bifurcation between the individual and the society in which the individual would exercise its self-protection/promotion.[205] Rights are designed to preserve the individual against intrusion upon its autonomy. "The formal legal framework of modern democratic societies is the guardian of the abstract individual."[206] What rights talk guards against is intrusion upon individual autonomy by various

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202. The tri-partite structure of classical ethical language is collapsed, yet we retain its linguistic conventions. But lacking the teleologically appropriate end of human being, as well as the ethically authoritative means for realizing this end, its moral authority is collapsed into its first element, namely the abstract autonomous individual. The moral authority of ethical language is according collapsed into the moral authority of the individual speaking it.

> Up to the present in everyday discourse the habit of speaking of moral judgements as true or false persists; but the question of what it is in virtue of which a particular moral judgement is true or false has come to lack any clear answer. . . .In [the classical] context moral judgements were at once hypothetical and categorical in form. They were hypothetical in so far as they expressed a judgement as to what conduct would be teleologically appropriate for a human being . . . . They were categorical in so far as they reported the contexts of the universal law commanded by God [or reason, or intuition, or conscience, etc.] . . . . But take away from them that in virtue of which they were hypothetical *and* that in virtue of which they were categorical and what are they? Moral judgements lose any clear status and the sentences which express them in a parallel way lose any undebatable meaning.

MACINTYRE, *supra* note 38, at 57.

203. *Id.* at 65.

204. And as also discussed above, it is precisely to this problem that the natural law of rights talk addresses itself. The problem devolves from the nature of who speaks rights talk, namely the abstract autonomous individual.

205. *Id.* at 33.

206. LUKES, *supra* note 69, at 152.

and sundry forms of society, whether political, ethical or religious.[207] Rights talk speaks the autonomy of the abstract individual. And insofar as rights talk thus speaks, it protests against societal intrusion. Hence a structural division between the individual and the society in which the individual would exist as such.

On the other hand, rights talk structures as well a divisiveness between members of a society. The fundamental complementarity between rights to privacy and rights to self-development diverges when they are respectively claimed by competing individuals. The self-promotion of one inevitably and invariably infringes upon the self-protection of another. Communal dialogue is replaced by the protest of competing claims, social accommodation by righteous indignation, mutual amelioration by strident self-assertion.

> [R]ights talk . . . promotes unrealistic expectations, heightens social conflict, and inhibits dialogue that might lead toward consensus, accommodation, or at least a discovery of common ground . . . . Our rights talk is like a book of words and phrases without a grammar and syntax. Various rights are proclaimed or proposed. The catalogue of individual liberties expands, without much consideration of the ends to which they are oriented, their relationship to one another, to corresponding responsibilities, or to the general welfare. Lacking a grammar of cooperative living, we are like a traveler who can say a few words to get a meal and a room in a foreign city, but cannot converse with its inhabitants.[208]

Rights talk generates a sociality resembling more a cacophony of discord than a community of discourse. Such discord, moreover, is not merely happenstance. It is structurally intrinsic to the moral discourse of rights talk. "The fact is that the . . . ideal of self-sufficiency cannot be successfully democratized. A large collection of self-determining, self-sufficient individuals cannot even be a society."[209] The abstract autonomous individual that programmatically speaks rights talk is intrinsically non-social. Its governing social interest is self-interest. "Buried deep in our rights dialect is an unexpressed

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207. This divisiveness between the individual and society is most readily obvious, of course, in the political arena between the individual and the government.

> But in fact what is crucial is that on which the contending parties agree, namely that there are only two alternative modes of social life open to us, one in which the free and arbitrary choices of individuals are sovereign and one in which the bureaucracy is sovereign, precisely so that it may limit the free and arbitrary choices of individuals. Given this deep cultural agreement, it is unsurprising that the politics of modern societies oscillate between a freedom which is nothing but a lack of regulation of individual behaviour and forms of collectivist control designed only to limit the anarchy of self-interest.

MACINTYRE, *supra* note 38, at 33. Rights talk structurally generates this bifurcation between individualism and social utility: "between an individualism which makes its claims in terms of rights and forms of bureaucratic organization which make their claims in terms of utility." *Id.* at 68. Since these competing claims are structurally incommensurate, "[i]t is easy also to understand why *protest* becomes a distinctive moral feature of the modern age and why *indignation* is a predominant modern emotion." *Id.*

208. GLENDON, *supra* note 1, at 14.

209. *Id.* at 74.

premise that we roam at large in a land of strangers . . . ."[210]

The community of discourse generated by rights talk is inevitably and invariably a community of discord. To the extent that rights talk generates such social discord, rights talk is self-stultifying.

> [R]ights dialect puts a damper on the processes of public justification, communication, and deliberation upon which the continuing vitality of a democratic regime depends. It contributes to the erosion of the habits, practices, and attitudes of respect for others that are the ultimate and surest guarantors of human rights.[211]

Rights talk speaks the abstract autonomous individual. By virtue of having collapsed the classical tri-partite structure of ethical language into the grammar of individuality, rights talk not only restricts the moral authority of its claims to its voicing by the individual, but it also structures social division. Rights talk elicits a community of discord that functionally elevates assertion of self over respect for others. By speaking the abstract autonomous individual, rights talk effectively speaks its own communal demise. Rights talk therefore serves to compromise its own talk of rights.

In addressing itself, then, to the Nietzschean question of who has the authority to speak rights talk as the language of law, a philosophically critical inquiry observes that it is primarily and programmatically the individual who speaks rights talk. Rights talk has to do with the protection and promotion of abstract autonomous individuality. As such, rights talk is ultimately self-stultifying: the authority of its moral claims is effectively collapsed into the self-assertion of the individual. Such self-assertion structurally generates communal discord—a discord that is all too evident throughout our culture, both between the individual and society, and between individuals within society. Rights talk structures a society of competing individuals in perennial fear of societal intrusion.

CONCLUSION: A RE-SPEAKING OF RIGHTS TALK?

> Is my own understanding only blindness to my own lack of understanding?[212]

During the course of the last half century, the legal world has witnessed the emergent convergence of rights talk: a universalization of rights language historically co-incident with the internationalization of the individual. The human rights of the individual are now proclaimed by every major legal system in the world. "Human rights are the foundation of the liberal

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210. *Id.* at 77.

211. *Id.* at 171.

212. LUDWIG WITTGENSTEIN, ON CERTAINTY ¶418 (G.E.M. Anscombe & G.H. von Wright eds., Denis Paul & G.E.M. Anscombe trans., Harper & Row 1969).

[modern] State."[213] But this emergent convergence of rights talk has produced a submergent divergence of justification for them. In its secular effort to avoid ascribing religious bases to human rights, rational justification of rights talk obviates the moral force requisitely intrinsic to the grammar of rights talk. Absent divine authorization, the Nietzschean alternative poses the critical question: "Now suppose that belief in God has vanished: the question presents itself anew: 'who speaks?'"[214] Who possesses the human authority to speak the rights talk to which we must hearken?

The natural law of rights talk responds by observing that the whole world speaks rights talk. The world speaks its rights talk, however, in a multiplicity of tongues. The naturalist would avoid the failure of rationalism by actively endorsing this plurality of religious justification for rights talk. For the naturalist, not only is the requisite moral force of rights talk therefore preserved, but it allows as well for the generation of an international community of moral discourse. The emergent convergence of rights talk is thus itself expressive of natural law. The internationally multi-vocative articulation of rights talk is consequently vested with the universal moral authority of natural law. The universal authority of rights talk is therefore a function of the international community of moral discourse as conversationally expressive of the historicity of natural law.

Although the natural law of rights talk would thus generate an international community of moral discourse based upon tolerance and mutual understanding, its philosophical and cultural presumptions are cause for concern on two levels.

On the one hand, there is cause for empirical concern whether the emergent convergence of rights talk actually converges beyond a level of triviality. Has the internationally emergent convergence of rights talk effected anything beyond a merely linguistic consistency of discourse among the plurality of nations and peoples? Clearly, "the contemporary thrust toward the internationalization and 'universalization' of human rights, give to rights discourse everywhere a superficial appearance of unity."[215] But has any substantial agreement been effected throughout the world on recognizing human rights? Even the most staunch advocate of the internationalization of human rights is forced to admit that:

> In 1986 more than half of the military governments in the world made frequent use of torture, brutality, disappearances, and political killings to intimidate their citizens.
>
> In 1986, the International Year of Peace, global military expenditures reached $900 billion. Extravagant military expenditures are a major reason why in 1986 at least one billion people were inadequately housed, every third adult could not read or write, and one person in five lived in gnawing poverty. The hemorrhage of resources consumed for arms meant that a

213. GAETE, *supra* note 45, at 152.

214. NIETZSCHE, *supra* note 53, at 157.

215. GLENDON, *supra* note 1, at 11.

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Hiroshima-like catastrophe occurs every three days—120,000 children die unnecessarily. The direct casualties of war are equally appalling.[216]

Despite the internationally emergent convergence of rights talk, "looking around the world, it appears that if all men are brothers, the ruling model is Cain and Abel."[217] On an empirical level, the emergent convergence of rights talk is suspect at best.

On the other hand, there is cause for conceptual concern over rights talk. The natural law of rights talk would generate an international community of discourse dictating universal respect for the human rights of the individual. It would justify this universal respect by appeal to the religious plurality that multivocally demands such respect. But how is this unity within plurality established? Even the most staunch advocate of the natural law of rights talk observes:

> Indeed, I do not mean to deny even that the professed ideals of religious traditions—at least on some quite plausible construals of those ideals—fail to support, and may even oppose, some of what we now think of as human rights . . . . There has been an obvious tendency on the part of even the world's "great" religious traditions toward tribalism, racism, and sexism.[218]

In essence, the natural law of rights talk employs the principle of tolerance to generate the emergent convergence of religiosity whereby an international community of moral discourse may arise: unity within conversational plurality. What remains outside this emergent convergence is deemed irreligious.[219] But this principle of tolerance is not itself religiously universal. Indeed, the principle is properly characterized as a secular concern.[220] Because a secular principle of tolerance is employed by the natural law of rights talk to generate the emergent convergence of religious justification for its rights talk, the religious authority of its justification is

216. DRINAN, *supra* note 2, at 195.

217. Leff, *supra* note 29, at 1249. Belief in the international recognition of human rights is not readily confirmed by the current situations in former Yugoslavia, Rwanda, Nigeria, China, Sri Lanka, Pakistan, Chechnia, etc.

218. Perry, *supra* note 3, at 1048.

219. *See* Perry, *supra* note 3, at 1049.

220. Which is to say that the principle of religious tolerance is not itself a religious principle. Hence the difficulty in establishing such tolerance amongst the world's religions:

> [T]he goal of eliminating all intolerance and discrimination based on religion or belief was perhaps the most difficult and intractable of all the aspirations of the United Nations. It was not until November 25, 1981, that the United Nations General Assembly was able to agree on the Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief. And then the final document was not a covenant or a treaty to be ratified by all nations but only an article for informal agreement and common aspiration.

DRINAN, *supra* note 2, at 187.

theologically suspect.[221] For the natural law of rights talk, "[h]uman rights are the new site of the sacred."[222] In essence, the notion of human rights has replaced God as the governing principle for adjudicating the adequacy of the religious justification for human rights.[223] "Jurisprudential discourse is characterized by this obsessive search for a unitary, yet non-divine, Ground and Centre. It is a quest for the Holy Grail, for the unity and enlightenment of Truth . . . . It is a theology without God."[224] For the natural law of rights talk, a secular principle has effectively assumed the role of the sacred. But there can be no religious justification for this assumption absent its presumption. The natural law of rights talk thus conceptually folds in upon itself.

On both an empirical and conceptual level, then, the natural law of rights talk is suspect. And both the empirical and conceptual difficulties of the natural law of rights talk devolve from the same source. The governing problem of the natural law of rights talk is that it seeks to base the emergent convergence of an international community of moral discourse on a rights talk that primarily and programmatically speaks the individual. In essence, the natural law of rights talk envisions an international community of universal individuals. Not only does no such international community exist (hence, the

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221. For the natural law of rights talk, religion functions essentially to provide a postulate for the rationality of rights talk–a postulate that happily requires no further justification. But the logical strategy of natural law is still rationalist (secular). It simply employs religion to avoid the rationalist inability to justify rationally its own presumptive postulates. This strategy would work if all religions actually agreed on such matters as the universal recognition of the human rights of the individual. They don't. The natural law of rights talk thus reduces specific religious justifications for rights talk to universalist secular strategies, and in doing so effectively adjudicates religiosity by virtue of secularity. Those religious beliefs that don't measure up to the secular standard are deemed irreligious. The natural law of rights talk, however, argues that agreement among religions is emergent. This fails to address the problem. A secular standard is still being employed to adjudicate this allegedly emergent religiosity.

222. GAETE, *supra* note 45, at 2.

223. "The distinction between the essence of human rights and their imperfect expression in discourse is one of the features that characterize the literature on human rights." *Id.* at 14. Absent universally divine/divinely universal authorization for rights talk, the natural law of rights talk reflects a theological nostalgia for an ultimate integrating principle. It finds it in a notion of human rights that allegedly underlies its religiously pluralistic articulation. This is historically ironic, of course, since the "reasoned truth" of human rights was initially proposed in reaction to "revealed truth." "Against monarchical power and the Church's 'superstitions', the Enlightenment opposed the rule of truth and governments based on the Truth of Man. This is the single Truth 'behind' the Universal Declaration, Treaties and Bill of Rights . . . ." *Id.* at 106. The natural law of rights talk has therefore managed to elevate a secular principle to the status of the divine, the given, the metaphysical. Hence, "the order of human rights tends to feed the nostalgia for a higher principle that would synthesize conflicting interests and competing rights, subordinating them to a single principle in a quasi-metaphysical manner." *Id.* at 170. The synthetic principle used, of course, is equally secular: the principle of religious tolerance. In sum, the natural law of rights talk elevates a secular principle of human rights to the level of the sacred, and would preserve its newly established sacrality in the secular jar of religious tolerance.

224. *Id.* at 123.

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empirical difficulty),[225] neither does such an individual (hence, the conceptual difficulty).[226]

Contemporary international scholarship echoes this jurisprudential suspicion of rights talk by observing that the alleged international community of moral discourse is dictated by a distinctively Western rights talk of the individual. Western rights talk bases itself upon the proclamation of an essential humanity universally inherent in all human beings—an essential humanity constitutive of the sameness of all humans, and providing the programmatic basis for the claim of equality between them. But this essential humanity devolved from rather peculiar historical concerns, and engenders an equally peculiar picture of the human being: the abstract autonomous individual: rational, independent, self-sufficient, unencumbered and unconnected to others except by choice.[227] This notion of the abstract autonomous individual has found its supreme expression in the fundamental rights to privacy and self-development: the right to be left alone.[228] Western rights talk thus has primarily and programmatically to do with the protection and promotion of abstract autonomous individuality. The moral authority of rights talk is consequently a function of the self-assertion of the individual. Such self-assertive authority not only truncates any universal justification for rights talk, but is communally divisive as well.

The critical insight to be drawn from reflection on international rights talk is that the bearer of rights is not an individual *per se*, but an individual defined by particular communal interests and relationships. Abstract autonomous individual do not exist. Humans exist communally. The identity of a human being is a function of its having existentially integrated a variety of social relationships. Moreover, such community is always and ever socially particular. Who one is and ought to be is a function of who one is and ought to be within a particular and local community.[229] The notion of

225. The notion of an "international community" is misleading. Community has to do with particular individuals engaged in a multiplicity of particular social relationships. *See* MACINTYRE, *supra* note 38, at 119. The fact that a number of representatives from a number of States engage in diplomatic dialogue concerning the international law of human rights has absolutely nothing to do with generating an "international community." The emergent convergence of an international community of discourse does not and cannot serve to effect an international community. Hence the empirical disparity between international rights talk and the international recognition of human rights.

226. The natural law of rights talk envisions the individual as a particular instance of universal perspective vis-a-vis the principle of tolerance. The natural law of rights talk thus serves to privatize religion in order to generate universal tolerance. This ignores the fact that the personal-communal interests of religiosity categorically resist subjection to the universal interests of secularity. *See* DRINAN, *supra* note 2, at 189. Hence the conceptual disparity between the authority of religious claims and the secular strategy which they are made to serve by the natural law of rights talk.

227. GLENDON, *supra* note 1, at 48.

228. *Id.* at 60.

229. "[M]orality is always to some degree tied to the socially local and particular and . . . the aspirations of the morality of modernity to a universality freed from all particularity is an illusion . . . ." MACINTYRE, *supra* note 38, at 119.

a community of abstract autonomous individuals is incoherent.[230] Rights are proprietary not to abstract (pre-communal) individuals, but to communal relationships.

In speaking the abstract autonomous individual toward the emergent convergence of an international community of moral discourse, contemporary rights talk therefore speaks both ineffectively and incoherently. Rights talk is suspect both empirically and conceptually. But rights talk may be re-spoken. Re-speaking a coherent rights talk will necessarily involve a re-articulation of who speaks rights talk, and why it is spoken. Human rights simply do not exist as the property of abstract autonomous individuality. Human rights exist, and exist only, in terms of particular human relationships. Unless and until rights talk speaks in such terms, it will continue to speak both ineffectively and incoherently.

Human rights may properly be recognized, moreover, not as individually universal, but as communally particular.[231] The governing intent of rights talk would consequently comprise the preservation not of individual autonomy, but of communal integrity. Such rights talk would address itself not to the abstract equality of all individuals, but to the viability of specific forms of community. And the justification for such rights talk would therefore consist not in vague (secularly appropriated) postulations of individual human sanctity, but in the actual evocation of community. In short, rights talk must speak not to the individual, but to the community in terms of which individuals exist. To the extent that rights talk so speaks, may human rights properly be recognized.

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230. The rights talk that would effect such an international community of abstract autonomous individuals is equally incoherent, as are the "rights" of which this talk speaks. In short, they do not exist:

> It would of course be a little odd that there should be such rights attaching to human beings simply *qua* human beings in light of the fact . . . that there is no expression in any ancient or medieval language correctly translated by our expression 'a right' until near the close of the middle ages. . . . And this at least raises certain questions. But we do not need to be distracted into answering them, for the truth is plain: there are no such rights, and belief in them is one with belief in witches and in unicorns.
>
> . . . .
>
> [E]very attempt to give good reasons for believing that there *are* such rights has failed. . . .
>
> Natural or human rights then are fictions . . . but fictions with highly specific properties.

Id. at 66-67.

231. "To address relationships is to resist abstraction and to demand context." MARTHA MINOW, MAKING ALL THE DIFFERENCE 216 (1990).