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## Introduction

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### INDIVIDUALS AND SOCIETIES: RIGHTS AND DUTIES

In modern discussions of political theory, the favored terms seem to be “individual *and* society” or “society *and* individual.” Indeed, the very ordering of these terms by any modern political theorist quickly shows on which side of the great debate over the priority of one entity to the other he or she stands. The debate is usually framed in terms of this essential question: Are the demands of a society to be justified by criteria coming from *the* individual, or are the demands of individuals to be justified by criteria coming from *the* society?

At present, those who favor the first version of the question are usually called “liberals”; those who favor the second version are usually called “communitarians.” Each side initially addresses two real political fears, both of which are very much part of contemporary experience, even though by no means unique to it. Liberals address the fear of tyranny; communitarians address the fear of anarchy. Liberals fear that communitarian theory has no way of preventing all rights from being ultimately vested in society and its rulers. The threat of a Hitler or a Stalin seems not to have been sufficiently considered.<sup>1</sup> Communitarians fear that liberal theory has no way of recognizing any real community at all.<sup>2</sup> Liberals seem to regard the right to privacy as supreme, which is “the right to be let alone,” in the famous words of Louis D. Brandeis.<sup>3</sup> Thus each side accuses the other of either ignoring or underestimating the primary fear it addresses. Yet could it be that both liberals and communitarians are seeing only parts of a bigger picture? Perhaps we need to search for that bigger picture in order to address their legitimate concerns, while we simultaneously transcend their respective myopia.

Could we start from *the* individual? But where could we possibly find any individual who is actually separate from a society? If that individual speaks, as most do, then that itself, as philosophers from Aristotle to Habermas have

<sup>1</sup> See Lloyd L. Weinreb, *Natural Law and Justice* (Cambridge: Harvard University Press, 1987), 253f., especially his charge that the influential communitarianism of Alasdair MacIntyre cannot explicitly argue against Hitler except by internal German criteria, which most people would regard as morally insufficient. Along somewhat similar lines, contra relativism, see Leo Strauss, *Natural Right and History* (Chicago: University of Chicago Press, 1953), 4, 42f. Cf. Luc Ferry, *Political Philosophy*, vol. 1, trans. F. Philip (Chicago: University of Chicago Press, 1990), 21.

<sup>2</sup> See David Selbourne, *The Principle of Duty* (London: Sinclair-Stevenson, 1994), 5; also, John Finnis, *Natural Law and Natural Rights* (Oxford: Clarendon Press, 1980), 210.

<sup>3</sup> Samuel D. Warren and Louis D. Brandeis, “The Right to Privacy,” *Harvard Law Review* 4 (1890): 193. This reflects the influence of John Stuart Mill’s *On Liberty*, in *Utilitarianism, Liberty, and Representative Government* (London: Everyman Library, 1993), 196. Cf. Mary Ann Glendon, *Rights Talk* (New York: Free Press, 1991), 47ff.

continually pointed out, is the most immediate evidence that humans are inevitably social beings.<sup>4</sup> Thus as one of the early Rabbis despaired when he found himself in a community where he could no longer engage in discourse because his own voice was no longer recognized there: “either fellowship (*haveruta*) or death.”<sup>5</sup> And even those individuals who do not or cannot speak could not survive, however minimally, if they are not or have not been included in some way or other in a society of speakers.

Could we start from *society*? But where could we possibly find any society that is actually distinct from the individuals who comprise it? As history in its record of the rise and fall of various human cultures shows, when the formal institutions of society become too separate from the lives of the individual participants in the culture that sustains them, they crumble. Unlike physical power, where an active subject stands over a passive object, political power is not just transitive; it is also a *transaction*, where some active subjects empower other equally active subjects. Thus they make themselves into objects for the other, as philosophers from Plato to Hobbes have pointed out.<sup>6</sup> As such, political power is something between subjects and not something external to them and over and above them in principle, however much social institutions might come to look like impersonal external forces. As philosophers from Maimonides to Hegel have pointed out, one’s claims to the exercise of political power (as distinct from the exercise of physical power, however much it might accompany it) are intelligible only when the objects of that power are free persons, that is, those whom one can verbally command.<sup>7</sup>

Of course, it is necessary for discursive purposes to continue to use polar terms like individual and society. They are just too much a part of our ordinary political vocabulary to be dropped altogether. Yet it is not at all helpful, I think, to reduce all political discourse to the relation between these two abstract poles. There is just too much that lies in between that needs less-abstract terms. If so, then what terms are more appropriate for our theoretical purposes here and now?

I submit that we would be better served by locating the political situation of humankind in the relation of the terms “person” and “community.”<sup>8</sup> Is not

<sup>4</sup> See Aristotle, *Politics*, trans. H. Rackham (Cambridge: Harvard University Press, 1932), 1253a10; Jürgen Habermas, *Moral Consciousness and Communicative Action*, trans. C. Lenhardt and S. W. Nicholsen (Cambridge: MIT Press, 1990), 23ff.

<sup>5</sup> B. Taannit 23a. See Zevahim 117a re Lev. 13:46.

<sup>6</sup> See Plato, *Republic*, trans. P. Shorey, 2 vols. (Cambridge: Harvard University Press, 1930), 338E; D. Novak, *Jewish Social Ethics* (New York: Oxford University Press, 1992), 38f. n. 1; Hobbes, *The Elements of Law*, vol. 1, chap. 15.

<sup>7</sup> See Maimonides, *Mishneh Torah: Teshuvah*, chaps. 5–6; G. W. F. Hegel, *Phenomenology of Spirit*, trans. A. V. Miller (Oxford: Oxford University Press, 1977), sec. 182, p. 112; and Alexandre Kojève, *Introduction to the Reading of Hegel*, trans. J. H. Nichols, Jr. (Ithaca: Cornell University Press, 1969), 5ff.

<sup>8</sup> See Nikolai Berdyaev, *Slavery and Freedom*, trans. R. M. French (New York: Scribner’s, 1944), 20ff.; Alfred Schutz, *The Phenomenology of the Social World*, trans. G. Walsh and F. Lehnert (Evanston, Ill.: Northwestern University Press, 1967), 163ff.

the character of a community actually determined by the majority of the persons who comprise it, whether or not they exercise that consent more or less directly? And is not human existence characterized by a person's participation in a series of communities, each related to the other?<sup>9</sup> Thus a person, even when acting singly, is always acting as a member of a community beginning with his or her own family. That is the case whether one is acting inside his or her own immediate community, or outside it by representing it in another community. Thus one is always a son, a daughter, a husband, a wife, a Jew, a Christian, and so forth, whether infracommunally or transcommunally.<sup>10</sup> Furthermore, a person is never only part of one community of which he or she can simply be regarded as a subset. Instead, a person participates in a plurality of communities, the relation of which should be pictured as a series of partially overlapping circles, not as a series of wholly concentric circles.<sup>11</sup> For this reason, a person is not locked into any one community, and can even effect social change in one community based on the standards of another.<sup>12</sup>

A society as distinct from a community might very well be seen as a community that is too large for everyone to personally know every other person in it.<sup>13</sup> Thus societies are abstract constructions stemming from communities. For the sake of more complex order, they require distinctly impersonal institutions to supplement the simpler order of interpersonal contact within smaller, more intimate communities.<sup>14</sup> But when institutionalized societies lose their link with true communities of persons, they crumble. That is why community is a more primal political term than society. Persons in community always need to remain closer to those who know them than to those who do not.

An individual as distinct from a person might very well be seen as a juridical construction. This construction stems from the need for adjudication between litigants, which is a matter requiring equality.<sup>15</sup> Hence we need to abstract from

<sup>9</sup> For the dialectical relationship of person and community, see Peter L. Berger, *The Sacred Canopy* (Garden City, N.Y.: Doubleday, 1969), 187, n. 2.

<sup>10</sup> See Michael J. Sandel, "Justice and the Good," in *Liberalism and Its Critics*, ed. M. J. Sandel (Oxford: Blackwell, 1984), 172.

<sup>11</sup> See Michael Walzer, *Spheres of Justice* (Oxford: Blackwell, 1983), 316ff.

<sup>12</sup> See Isaiah Berlin, "Two Concepts of Liberty," in *Four Essays on Liberty* (Oxford: Oxford University Press, 1969), 161, n. 1; also, Luc Ferry and Alain Renaut, *Political Philosophy*, trans. F. Philip (Chicago: University of Chicago Press, 1992), 3:128.

<sup>13</sup> See Aristotle, *Politics*, 1326b15, where the best polity is one in which everyone is personally known to everyone else and decisions can be made based on this personal knowledge. However, Aristotle was also well aware of the fact that political independence (*autarkeia*) requires economic independence (1326b30), and that such independence is impossible when a polity is too small. Optimally, political independence and personal community (*koinōnia*) should go together. But Aristotle is surely suggesting that a less than optimal polity might very well have to sacrifice full communal intimacy for the sake of political survival. In other words, society might have to be constructed by primal communities—for a price, of course.

<sup>14</sup> See Novak, *Jewish Social Ethics*, 212ff.

<sup>15</sup> See B. Shevuot 30a re Lev. 19:15. Regarding courts to handle litigation as being the first political institution, see B. Sanhedrin 56b re Gen. 2:16.

the specific communal identities of different persons inasmuch as equality itself is an abstraction.<sup>16</sup> But when juridical persons lose their link to their own personal identities, becoming components of society in essence, they are unable to be functioning members of the very communities of which societies are abstractions.<sup>17</sup> That is why person is a more fundamental political term than individual. Communities take care of more basic personal needs than societies do.

The relation of the political terms “individual” and “society” is most often seen in the relation of the legal terms “rights” and “duties.” The relation of the political terms “person” and “community” is most often seen in the relation of the moral terms “claims” and “responses.” This latter set of terms is more primary existentially, and it is closer to the primary normative vocabulary of the Jewish tradition. Nevertheless, the former terms—individual, society, rights, and duties—are now too prevalent in our ordinary political vocabulary ever to be avoided without paying the price of obscurantism. So, my task in this book is to lead these former terms back to fuller historical origins in the latter terms: person, community, claims, and responses. By doing this, I hope to show that there are richer contexts for rights talk than is provided by current secularist liberalism and denied by many communitarians.

Usually, those who emphasize the priority of rights over duties are also those who emphasize the priority of the individual over society. Rights, for them, are those primal claims the individual person brings with him or her upon entering society. Duties are how society is supposed to subsequently respond to these claims by enforcing them.<sup>18</sup> The price for this correlation of individual rights with social duties is that the individuals who themselves have rights also agree to accept these social duties when the rights of other individuals are at stake. This correlation is made by standards upon which all have agreed or could have agreed upon in advance.<sup>19</sup>

The problem, of course, is that agreements are ultimately promises that require mutual trust.<sup>20</sup> But why should persons whose sole motivation is their

<sup>16</sup> See B. Baba Kama 83b–84a re Lev. 24:22; also, Aristotle, *Nicomachean Ethics*, trans. H. Rackham (Cambridge: Harvard University Press, 1926), 1132a20ff., 1133a30. Hence the roots of society as an impersonal abstraction from community are already found in the communal need for what Aristotle calls “rectifying justice” *τὸ διορθωτικόν*.

<sup>17</sup> See Novak, *Jewish Social Ethics*, 225f.

<sup>18</sup> Hence in this view, society has duties to individuals but no rights. See Jack Donnelly, *The Concept of Human Rights* (New York: St. Martin’s Press, 1985), 62.

<sup>19</sup> See John Locke, *Second Treatise of Government*, ed. G. Macpherson (Indianapolis, Ind.: Hackett, 1980), chap. 8; also, Alan Gewirth, *The Community of Rights* (Chicago: University of Chicago Press, 1996), 6.

<sup>20</sup> In *Contract as Promise* (Cambridge: Harvard University Press, 1981), Charles Fried writes: “So remarkable a tool is trust that in the end we pursue it for its own sake; we prefer doing things cooperatively when we might have relied on fear or interest or worked alone. —The device that

own individual power trust each other enough to limit their own power for the sake of some greater promised social end? That would even be true in a case where the “social contract” was an actual political event in history—*fois* not real individual desire a stronger pull on a person than a socially constructed standard, one accepted only under fear of the individual impotence resulting from the isolation that could come from public hostility toward antisocial individuals? Is not the lure of privacy so valued in modernity because it gives us greater opportunity to minimally avoid and maximally cheat on the necessary evil the social contract seems to entail?<sup>21</sup> As Stanley Hauerwas has put it in his critique of liberal rights notions, “Rights are necessary when it is assumed that citizens fundamentally relate to one another as strangers, if not downright enemies.”<sup>22</sup> And, surely, the weakness of the social contract is even more evident when it is seen to be only a theoretical construct of some individual philosopher or other, without the support of any communal tradition.

It would seem that the social contract itself is insufficient to protect us from the anarchy most of us correctly fear. The durability of civil society, which is presented as the result of the social contract, would seem to require one of two things. Either antecedent to it there must already be in place communal traditions that themselves are not the results of individual contractual agreement, and that are accepted as communal claims and not merely as necessary instruments for the fulfillment of individual desires;<sup>23</sup> or subsequent to it, institutions must be constructed whose operators are so empowered to have more and more independent authority over the individuals under it, employing fear rather than trust.<sup>24</sup> In either case, though, the whole argument for the social contract, made by lone individuals, being the sufficient foundation to explain and justify civil society, collapses. And if it is not foundational, what heuristic, let alone constructive, value could it pos-

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gives trust its sharpest, most palpable form is promise” (8). However, if trust is essentially a communal phenomenon, it cannot be rooted in a contract between individuals seeking their own private ends. Trust itself must precede any such contract; it is not a result of it. In the Jewish tradition, contracts between individuals are thus subordinate to the law that governs the covenant, the covenant being rooted in trust: first, between God and Israel; second, between the human members of the covenant (*bnei berit*) themselves. See B. Shevuot 39a re Deut. 29:9–14; M. Baba Metsia 7.11.

<sup>21</sup> See Plato, *Republic*, trans. P. Shorey, 2 vols. (Cambridge: Harvard University Press, 1930), 359Aff.; also, Ferry and Renault, *Political Philosophy* 3:2.

<sup>22</sup> *Suffering Presence* (Notre Dame, Ind.: University of Notre Dame Press, 1986), 128. See also Martin P. Golding, “The Significance of Rights Language,” *Philosophical Topics* 18 (1990): 63f.

<sup>23</sup> See Alasdair MacIntyre, *After Virtue* (Notre Dame, Ind.: University of Notre Dame Press, 1981), 65; Jeffrey Stout, *Morality after Authority* (Notre Dame, Ind.: University of Notre Dame Press, 1981), 234ff.; Vincent Descombes, “The Socialization of Human Action,” in *The Public Realm*, ed. R. Schürmann (Albany: State University of New York Press, 1989), 247f.

<sup>24</sup> See Max Weber, “Bureaucracy and Political Leadership,” in *Economy and Society* (New York: Bedminster Press, 1968), 3:1401ff.

sibly have? In truth, the social contract presupposes a measure of individual autonomy that communal traditions never recognized or that bureaucratic structures soon suppress. Thus social contract theory and its attendant notion of natural rights simultaneously involves an underestimation and an overestimation of the human condition. It underestimates the natural necessity and priority of discursive community, and it overestimates the importance of individual authority in the natural social order, let alone the covenantal order.

Conversely, those who usually emphasize the priority of duties over rights are also those who emphasize the priority of society over individuals. Duties, for them, are the primal claims society makes on those it enables to be born and nurtured in its midst.<sup>25</sup> Rights are those entitlements society grants to various constituencies within it to justify its benevolent role for their particular interests. The smallest such constituency is the individual person. In this view, however, the highest claim is that of society itself for itself, which is primarily achieved by the exercise of the duty conceived by and for the majority. Only subsequent to this basic duty is the exercise of rights granted by the majority to various minorities within its domain as their entitlements.

The problem, of course, is that the human dignity, which seems to be guaranteed by the concept of rights, also seems to be quite precarious in a system where rights are mere entitlements granted by the society as a matter of largesse instead of something taken as prior to the raw political power of any majority.<sup>26</sup> The experience of recent tyranny alone has taught us to be quite wary of guarantees of respect for the dignity of individual human persons from political power that seems to be more and more self-justifying. What the majority can grant with nothing but self-justification can just as easily be withdrawn by these very same arbitrary criteria. Moreover, with the vast increase in political power brought about by the collective development of technology, it would seem that the benevolent concern of the majority for various minorities, like the family or the individual person, which can be located in older communal traditions, is insufficient in an age when the balance of power between them has been so strongly tipped in favor of larger and larger collectives. One could very well argue that the reason the older benevolence operated at all was simply because those who exercised it lacked the political power that newer social authorities by now have. Hence it would seem that newer protections of minority rights are now called for. So, there would seem to be a new requirement for majority society to see itself as duty bound to enforce even the rights of individual minorities *against* it, and not just the rights of one constituency against another within it as has always been the case. Indeed,

<sup>25</sup> See Plato, *Crito*, trans. H. N. Fowler (Cambridge: Harvard University Press, 1914), 50Aff.

<sup>26</sup> See Ronald Dworkin, *Taking Rights Seriously* (Cambridge: Harvard University Press, 1978), 172; Donnelly, *The Concept of Human Rights*, 19.

many have seen this new notion of rights and its correlative notion of duty as a hallmark of modernity as distinct from antiquity.<sup>27</sup>

What we can now begin to see is that just as the phenomena usually designated by the terms “individual” and “society” are better designated by the terms “person” and “community,” so the phenomena designated by the terms “rights” and “duties” are better designated by the terms “claims” and “responses.” Thus, rights are justified claims; duties are mandated responses to these claims.<sup>28</sup>

When we see the primacy of personal claims, we have better reason to understand the oft-stated point that rights and duties are correlative. That is, without a minimal duty of compliance, the notion of a right makes no sense.<sup>29</sup> Rights are socially sanctioned claims.<sup>30</sup> Minimally, they are claims of noninterference; maximally, they are claims for assistance.<sup>31</sup> All such claims presuppose social reciprocity.<sup>32</sup> For example, in cases where we are obligated to help the poor, the correlation of rights and duties is very much in operation. I am duty bound (obligated) to help the poor because they have a right to my help. Without that justified claim, what they ask of me is nothing but begging. And without that duty, my response to their cry for help is nothing but my subjective largesse. The difference between begging and a right to help, and subjective largesse and a duty to help, is that rights and duties are to be enforced, when necessary, by a third party in the person of society and its authorized agents, whereas begging and subjective largesse cannot invoke such external enforcement. Rights and duties always involve more than simply one-to-one personal relationships. Accordingly, a right without a correlative duty has no socially sanctioned person as the object of the exercise of its claim, and a duty without a correlative right has no socially sanctioned person as the object of its obligation. Law is the formal expression of these relationships.<sup>33</sup>

<sup>27</sup> See Emil Brunner, *Justice and the Social Order*, trans. M. Hottinger (New York: Harper and Row, 1945), 54; Nathan Rotenstreich, *Order and Might* (Albany: State University of New York Press, 1988), 219.

<sup>28</sup> See Wesley N. Hohfeld, *Fundamental Legal Conceptions*, ed. W. W. Cook (Westport, Conn.: Greenwood Press, 1964), 38, 60, 71; also, Joel Feinberg, *Rights, Justice, and the Boundaries of Liberty* (Princeton: Princeton University Press, 1980), 140.

<sup>29</sup> Note Samuel Stoljar, *An Analysis of Rights* (London: Macmillan, 1984): “*Ubi jus ibi remedium* is then another . . . way of saying that normative rights and duties are necessarily correlative” (38). See also Bernard Mayo, “What Are Human Rights?” in *Political Theory and the Rights of Man*, ed. D. D. Raphael (London: Macmillan, 1967), 75f.

<sup>30</sup> See Michael Freedon, *Rights* (Buckingham, UK: Open University Press, 1991), 7.

<sup>31</sup> The widely adopted designation of minimal claims as “option-rights” and maximal claims as “welfare-rights” has been made by Martin P. Golding in “The Concept of Rights,” *Bioethics and Human Rights*, ed. E. L. Bundman and B. Bundman (Boston: Little, Brown, 1978), 44f.

<sup>32</sup> See Maimonides, *Commentary on the Mishnah*: Peah, 1.1.

<sup>33</sup> For the primacy of commanded duty over voluntary duty, see B. Kiddushin 31a and Tos., s.v. “gadol.”

Thus Joseph Raz aptly notes that “legal personality is the capacity to have rights and duties.”<sup>34</sup>

Many have argued that even though a right without a correlative duty is meaningless, there can be duties without rights, nevertheless.<sup>35</sup> But, as I shall illustrate from the Jewish tradition in subsequent chapters, every duty has a correlative right, just as every right has a correlative duty. A duty is something I basically owe someone else. Hence that person has a right to expect the performance of my duty, even if there are times when that duty is not or cannot be legally sanctioned by any human society,<sup>36</sup> for what cannot always be sanctioned by a human society can always be sanctioned by God. The universe itself is the greatest social context for the operation of rights, and duties and the universe is ruled by God, however opaque that rule might be to us oftentimes.

Rights are not only correlative with duties, they actually generate them. This can be seen in two ways. One, at the level of creation, God has rights that generate the duties of his creatures. God clearly does not have a duty to create duties. To assume anything like that would lead to the absurd conclusion (at least in Judaism) that God is primarily subordinate to something greater than himself. Two, at the legal level, there are rights for which there are not yet any duties legislated, but which call for such duties to be legislated in the future.<sup>37</sup> Thus, to return to our example of the poor mentioned above, the poor are in need before we have a duty to help them. Hence our duty is for their sake, not for the sake of our own virtue. Whatever virtue we might have is subsequent to the fulfillment of our duty in response to their original right.

This bipolar relation of rights and duties can be seen as the cornerstone of the ethical philosophy of the recently deceased French Jewish philosopher Emmanuel Levinas. He showed quite powerfully that the very presence of other persons (*l'autre*) is itself a claim upon me, minimally obliging me to respect their right to live by not murdering them.<sup>38</sup> We might say that rights are held by the originator of a personal transaction and duties are held by its

<sup>34</sup> *The Morality of Freedom* (Oxford: Oxford University Press, 1986), 44.

<sup>35</sup> “There is no *ius* to which is not given, either by nature or by law, some obligation as a companion and guide; so that if need be it can protect itself through a judgment in an action in front of judges (*ministerium iudiciorum*) . . . soliciting the aid of judges (*quae iudicum fidem imploret*). . . . For a *ius* consists of a person, a possession, or the facts from which an obligation springs (*a quo obligatio oritur*).” François Connan, *Commentarium Iuris Civilis Librix* (Paris, 1588), 71r, in Richard Tuck, *Natural Rights Theories* (Cambridge: Cambridge University Press, 1979), 40.

<sup>36</sup> See B. Baba Kama 93a re Gen. 16:5 and Tos., s.v. “d’eeka,” where it is emphasized that divine justice for a violation of one’s rights may be sought in the absence of a human means to rectify the wrong. For the notion that divine justice comes quicker for those who do not hesitate to protest to God the violation of their rights, see *ibid.*, Tos., s.v. “ehad” re Exod. 22:22–23.

<sup>37</sup> See Raz, *The Morality of Freedom*, 171ff., 249; Gewirth, *The Community of Rights*, 9.

<sup>38</sup> See *Totality and Infinity*, trans. A. Lingis (Pittsburgh: Duquesne University Press, 1969), esp. 187ff.

recipient. Initially, the claim must be made before there can be a subsequent response to it. Thus the primary right/claim creates the duty; in effect, it commands a response by obliging its addressee. But I differ from Levinas by insisting with the Jewish tradition that God, not humans, is the One who makes the primary claim on our response in the world.<sup>39</sup>

Many do not see the full extent of the correlation of rights and duties because they confuse the duty to respond to a claim with the actual capacity of a human society to legally sanction such a claim. However, the true correlation of rights and duties and duties and rights always transcends the limited human capacity to enforce either part of the correlation with legal sanctions.<sup>40</sup> That is why moral claims include more than legally sanctioned rights, moral responses more than legally sanctioned duties.<sup>41</sup> Just as my right is a claim on the duty of someone else, so is my duty a response to the claim of someone else. But God alone is capable of fully enforcing rights or duties or both. That power is concurrent with the truth that all rights are ultimately his and thus all duties are what are owed to him.<sup>42</sup> The human attempt to enforce either too much or too little inevitably leads to a social context in which rights and duties become distorted. When human enforcement is too much, there is too little personal interaction, since impersonal institutions too frequently displace it. At the most extreme level, these institutions and those who control them attempt to replace the ultimate authority of God. And when human enforcement is too little, too much personal interaction loses the protection of social institutions. At the most extreme level, these individual persons attempt to replace the ultimate authority of God. So, as will be argued later, only when God's authority is presented in the covenant do the lesser authority of society and the lesser authority of the individual person find their rightful places respectively and their rightful correlation one with the other.

The ubiquity of the term "rights" in modern political discourse makes any elimination of the term risk elimination from the discourse altogether.<sup>43</sup> Rights by now have become a matter of elementary political vocabulary. But surely this discourse requires rights conceptualization from those who wish not only to participate in it but to contribute to it as well. And I think not only do

<sup>39</sup> See D. Novak, *Law and Theology in Judaism* (New York: KTAV, 1976), 2:15ff.

<sup>40</sup> See, e.g., B. Sanhedrin 37b; Y. Sanhedrin 4.9/22b.

<sup>41</sup> See Martin P. Golding, "The Primacy of Welfare Rights," in *Human Rights*, ed. E. F. Paul, J. Paul, and F. D. Miller, Jr. (Oxford: Blackwell, 1984), 125.

<sup>42</sup> Secularist theories, however, inevitably assume that socially unenforceable duties have no corresponding rights. See, e.g., J. Narveson, "Human Rights: Which If Any Are There?" *Human Rights: Nomos* 23 (1981): 176.

<sup>43</sup> For the notion of convention determining the vocabulary of interhuman discourse, see B. Nedarim 49a; Y. Nedarim 6.1/39c. However, the conceptuality that uses such common vocabulary is determined by the reason exercised by the person who critically employs it for the sake of rational persuasion. See B. Baba Metsia 104a and Tos., s.v. "hayah"; also, Nahmanides *Hiddushei ha-Ramban* thereon re M. Ketubot 4.6; Y. Ketubot 4.8/28d–29a.

classical Jewish sources lend themselves to rights talk, but they can contribute to it significantly. Indeed, rights conceptualization is a new key for unlocking more of the intelligibility of these sources and drawing new rational suggestions from them. As such, rights talk should not be eschewed by traditionalists, as some communitarians have suggested.<sup>44</sup> It should not only be used by Jewish traditionalists, it should be embraced by us—critically, to be sure—because to discuss rights in a Jewish context is to restore them to their true origin. But that means the exercise of rights talk by Jews must not be confined to the rights of individual persons, who are only one component of the covenant. Rather, rights must now be seen as being exercised by both God and the community as well as by individual persons. As we shall see in the course of this book, constituting all three of these claimants enables us to constitute a truly coherent way to order their conflicting claims. That is the task of this book. Hence this Jewish use of rights talk is not only a rhetorical necessity; it is even more a philosophical desideratum. It is a way of actively entering ideas from the Jewish tradition into contemporary political discourse, a conversation that is happily becoming more pluralistic.

### AUTONOMY AND PERSONAL CLAIMS

Although nobody could cogently assert that there are rights without at least the implication of correlative duties, a number of great thinkers have asserted that there are duties without correlative rights. Their arguments are impressive and have been influential, even among Jewish thinkers. These arguments must be critically examined in order to better present, by contrast, the theory of ubiquitous rights advocated here.

As we shall see, all these assertions assume duties are required by autonomous states as distinct from the claims of other persons. That is the only way one can speak of duties without corresponding rights. There seem to be three theoretical forms of such autonomy that have been advocated. Let us briefly look at them in order to discern their ultimately impersonal character, which is so problematic for a biblically based political theory.

First, there is the assertion of autonomy generating these duties as found in those “goods” which are states of active being. This has been posited in one way or another by current natural law theorists who attempt to build on the ethical-legal theory of Thomas Aquinas.<sup>45</sup> Here one can speak of the duties

<sup>44</sup> Rights talk is most notably eschewed by Alasdair MacIntyre, who writes, “The truth is plain: there are no such rights, and belief in them is one with belief in witches and unicorns” *After Virtue*, 67).

<sup>45</sup> Most prominently, see Germain Grisez, *The Way of the Lord Jesus* (Chicago: Franciscan Press, 1983), 1:115ff.; also, Finnis, *Natural Law and Natural Rights*, 59ff.

that follow from one's aspiration to some good, but one cannot speak of that good actually making a claim on one inasmuch as an impersonal claim is at best a metaphor.<sup>46</sup> Only when there is a strong sense of a lawgiver behind natural law can the exercise of a right be seen as normatively foundational, and that requires a more theological basis for natural law theory than even many contemporary natural law theorists, even those who are themselves religious, have been willing to constitute.<sup>47</sup> Moreover, the problem is basically ontological before it is political or ethical, and it goes back to Aquinas himself, indeed back to Hellenistic Judaism. The problem stems from the basically futile attempt to wed the Platonic idea of the Good with the biblical creator God, that is, to equate God with Being.<sup>48</sup> The biblical God is certainly a person; Platonic Being/the Good is certainly not.<sup>49</sup>

Second, there also seems to be a notion of duties without rights in the strongest idea of autonomy constituted by any philosopher, namely, that of Kant. This usually sober philosopher actually becomes rhapsodic when he speaks of duty (*Pflicht*).<sup>50</sup> That is because truly moral persons are authentically autonomous selves, who will an ideal realm of nature for themselves and all other similarly rational selves. That is their duty.<sup>51</sup> Could one not say that this autonomous (or noumenal) self makes a claim on the physically embodied (or phenomenal) self, and that this claim is its right? However, it is difficult to see how an imagined self can actually exercise a claim on a real, embodied one—for *who* is making the claim?<sup>52</sup> In the end, is it not the real,

<sup>46</sup> For the priority of good over right (*ius*) in Aquinas, see *Summa Theologiae* 2/2, q. 57, a. 1 and a.2. See also Strauss, *Natural Right and History*, 183f., 297f. for the notion that the primacy of good entails the priority of duty over rights. For an attempt to see the "claims" of goods as more than metaphorical, however, see Hans Jonas, "Ontological Grounding of a Political Ethics: On the Metaphysics of Commitment to the Future of Man," in Schmittmann, *The Public Realm*, 158.

<sup>47</sup> For a natural law theorist aware of this problem, see Russell Hittinger, *A Critique of the New Natural Law Theory* (Notre Dame, Ind.: University of Notre Dame Press, 1987), 168ff.

<sup>48</sup> See LXX on Exod. 3:14; also, Aquinas, *Summa Theologiae* 1, q. 2, a. 1. For a discussion of the ontological implications of this equation: God = Being = the Good, see D. Novak, "Buber and Tillich," *Journal of Ecumenical Studies* 29 (1992): 159ff.

<sup>49</sup> See E. LaB. Cherbonnier, "The Logic of Biblical Anthropomorphism," *Harvard Theological Review* 54 (1962): 187.

<sup>50</sup> See *Critique of Practical Reason*, 1.1.2, trans. L. W. Beck (Indianapolis: Bobbs-Merrill, 1956), 1.1.2, p. 89.

<sup>51</sup> See *Groundwork of the Metaphysic of Morals*, trans. H. J. Paton (New York: Harper and Row, 1964), 105ff.

<sup>52</sup> Because of the necessary correlation of rights and duties, which presupposes an interpersonal relationship, H. L. A. Hart correctly notes: "The expression 'having a duty to Y' . . . indicates the person to whom the person morally bound is bound. This is an intelligible development of the figure of a bond (*vinculum juris: obligare*). . . . So it appears absurd to speak of having duties or owing obligations to ourselves" ("Are There Natural Rights?" *Philosophical Review* 64 [1955]: 181). See also Aristotle, *Nicomachean Ethics*, 1128a5ff.

embodied self who is projecting its own idealized self? The real, embodied self is not only creating an ideal realm of nature for an autonomous self, but is actually making the very autonomous subject of that realm itself its first basic ideal.<sup>53</sup> My idealized future self is more “other” than the *reabther person* before me here and now.<sup>54</sup> But how can the product make a claim on its maker? That is why, despite his constant use of the term *Autonomie*, Kant did not mean by it what we mean by “autonomy” today. Instead, he seems to mean what we might call “moral creativity,” that is, the human aspiration to create a perfect world for everyone.<sup>55</sup> Here we see a true idealism (in both the ordinary and philosophical senses of the term) that is lacking in more contemporary notions of autonomy, which seem to be concerned with rights only as necessary preconditions for the advancement of individual projects (*bonum sibi*). In his notion of morality ultimately intending what he calls a “kingdom of ends” (*Reich der Zwecke*), Kant clearly meant to constitute a notion of common good (*bonum commune*) that is consistent with the most immediate good, namely, the good of the purely moral will as an end in itself.<sup>56</sup> Isaiah Berlin has astutely designated this whole project as “a form of secularized Protestant individualism, in which the place of God is taken by the conception of rational life.”<sup>57</sup>

Third, it is only in some recent liberal theories more closely dependent on social contract theory that a claim *for* autonomy is made to others and can, therefore, be seen as a right. In this sense of autonomy, it is an individual personal claim rather than a desire to be a morally creative god. It does intend a real, other person, somebody already there in the guise of the majority to whom it appeals for maximum noninterference in its own projects or for help

<sup>53</sup> Note: “Freedom would then be the property . . . of being able to work independently of *determination* by alien causes. . . . The above definition is *negative* and consequently unfruitful as a way of grasping its essence; but there springs from it a *positive* concept. . . . What else can freedom of the will be but autonomy—that is, the property which will has of being a law [to] itself (*sich selbst ein Gesetz zu sein*)?” (Kant *Groundwork of the Metaphysic of Morals*, 114; the original quote in German is in *Grundlegung zur Metaphysik der Moral*, in *Kants Werke*, Prussian Academy ed., [Berlin: Walter de Gruyter, 1968], 4:446f.) In other words, after external interference has been cleared away by assuming freedom, autonomy as true human/rational substance “flows out.”

<sup>54</sup> See D. Novak, *Jewish-Christian Dialogue* (New York: Oxford University Press, 1989), 148ff.

<sup>55</sup> Kant actually suggests that in morality any human being can, as it were, “make himself a God” (*sich einen Gott mache*), indeed, “must make himself one” (*sich einen solchen selbst machen musse*) by comparing this “imaginative representation (*Vorstellung*) . . . with his ideal” (*Religion innerhalb der Grenzen der blossen Vernunft* in *Kants Werke*, Prussian Academy ed. [Berlin: Walter de Gruyter, 1968], 6:168f. n. [my trans.]). For the problem involved in seeing the will as constituting its own object, see Raz, *The Morality of Freedom*, 84; G. Dworkin, *The Theory and Practice of Autonomy* (Cambridge: Cambridge University Press, 1988), 36ff.

<sup>56</sup> See *Groundwork of the Metaphysic of Morals*, 61, 100ff.

<sup>57</sup> “Two Concepts of Liberty,” 138.

in achieving them. It is more closely tied to a Lockean type of social contract theory than it is to a strictly Kantian notion of autonomy.<sup>58</sup> However, the expression of such a theory often becomes muddled because most of the liberal theorists advocating this type of right have a tendency to confuse the freedom the exercise of the right presupposes with the autonomy to which it aspires.<sup>59</sup> Here freedom is the right, autonomy the duty. And that duty becomes the highest good itself.<sup>60</sup>

These three types of ethics—*thats*, social contract, Kantian, and Thomistic—alould be generally termed ethics of aspiration. One can dutifully aspire to attain the highest degree of personal autonomy, or dutifully aspire to participate in a certain state of autonomous good, or dutifully aspire to moral creativity without being claimed by another person. But one cannot be the subject or the object of a right/claim without the presence of another person before him or her. Rights in the modern sense, unlike *right* in the classical sense, seem to be inextricable from the personal subject and the personal object of a claim.<sup>61</sup> That inextricable personal locus of rights makes the concept attractive to a biblically based theology, precisely because persons are irreducible entities in biblical (and rabbinic) teaching.<sup>62</sup> In that sense, such a theology is closer to that of the moderns than it is to that of the ancients whose inspiration ultimately comes from Plato. Therefore, it enables one to formulate a biblically based natural law theory, one that does not fall into the Platonism that makes some natural law theories, whether in more Aristotelian or more Stoic form, so problematic theologically.<sup>63</sup> But it also does that without falling into the trap of subjective autonomy, which either makes

<sup>58</sup> Note Kant's critique of a society based on individual rights as distinct from the "ethical commonwealth," where "we have a duty that *isui generis*, not of men towards men, but of the human race towards itself" *Religion within the Limits of Reason Alone*, trans. T. M. Greene and H. H. Hudson [New York: Harper and Row, 1960], 89; see note thereon).

<sup>59</sup> See Raz, *The Morality of Freedom*, 369ff., 415, who uses "autonomy" both as the ideal and the condition of the moral life, liberally conceived. Cf. Tara Smith, *Moral Rights and Political Freedom* (Lanham, Md.: Rowman and Littlefield, 1995), 180. Isaiah Berlin's concept of "positive liberty" seems to be identical with autonomy as an ideal (see "Two Concepts of Liberty," 131f.).

<sup>60</sup> Note: "It is, in short, not necessary for autonomy to be the only good thing; it suffices for it to be the best thing that there is" (Bruce Ackerman, *Social Justice in the Liberal State* [New Haven: Yale University Press, 1980], 368f.) See Jürgen Habermas, *Theory and Practice*, trans. J. Viertel (Boston: Beacon, 1974), 84.

<sup>61</sup> See Karl-Otto Apel, "Normative Ethics and Strategical Rationality: The Philosophical Problem of a Political Ethics," in Schmitt, *The Public Realm*, 124.

<sup>62</sup> Thus there is no essence/quiddity of God (see Exod. 3:14) since any such structure would limit the absolute freedom of God. There is no essence/quiddity of human being as the image of God (see Ps. 8:5). In the case of humans, having as they do limited freedom, we assume the conditions making their presence possible, but these conditions do not determine existence. In God's case we assume no such conditions at all (see Ps. 90:1–6). Also, see D. Novak, *The Election of Israel* (Cambridge: Cambridge University Press, 1995), xvii, n. 2.

<sup>63</sup> See Novak, *Natural Law in Judaism*, 154ff.

the self its ultimate object, as in social contract theory, or the self its transcendent creator, as in Kantian ethics. And it also does not fall into the trap of regarding the law of the covenant as a series of merely random commands rather than a system having rational coherence and appeal, which inevitably occurs when duties are emphasized without specific correlation to the rights behind them.

One could argue against all three types of moral aspiration on the same general philosophical grounds, for all three involve the hypostatization of abstract states of being: self-fulfillment, or moral creativity, or transcendent goods. From these hypostatizations norms are then deduced. But it would seem more philosophically cogent to see the source of norms in the transactional claims of real persons to one another in the world.

Of the three concepts, the concept of the good is clearly closest to the observation that morality must be dependent on something external to the self and its projects in order for it to be able to both restrain them and direct them. Furthermore, *good* seems to many to be a more basic moral term than *right*, either in the classical sense (“it is *right* to do that”) or in the modern sense (“he or she *has a right* to do that”).<sup>64</sup> Nevertheless, it is still insufficient to structure morality in general, and certainly the morality of the Jewish covenantal tradition, for goods are neither states of being *from* which persons derive norms, much less states of being generated *by* the human will. Instead, they are the measure of how adequate to the nature of both the claimant and the respondent, *between* whom the claim operates, that claim really is. Hence these claims/rights are the true criteria of justice. Justice as the order of rights is the more basic ethical-political term than good or *the Good*.<sup>65</sup> Justice is not a whole greater than the sum of its parts in which they participate, but rather justice as the Right is the sum of all the rights—the justified claims—the various persons who interact with each other in the world. Justice is in essence immanent. It is what connects all of these rights/claims.<sup>66</sup> Indeed, without an overall theory of justice, we would have no way of distinguishing true from fraudulent rights/claims.<sup>67</sup>

<sup>64</sup> For the distinction between these two notions of “right,” see Hart, “Are There Natural Rights?” 182; Donnelly *The Concept of Human Rights*, 3ff.

<sup>65</sup> Since in Judaism all moral terms are ultimately theological (see B. Shabbat 133b re Exod. 15:2; Maimonides, *Mishneh Torah*: Deot, 1.6), this argument can be made theologically: Whereas God’s justice (*mishpat*) is always assumed (see Deut. 32:4), God’s “goodness” is not always assumed (see Isa. 45:7), for we experience the results of God’s acts as both good and bad (see Lam. 2:5). Hence when we experience God’s acts as bad (*ra*, but never as “evil”—*resha*—which is only predicated of unjust human beings—see Gen. 18:25; Exod. 9:27; Job 34:1–10), we are still required to praise God’s justice (see M. Berakhot 9.5; B. Berakhot 59b; Maimonides, *Mishneh Torah*: Berakhot, 10.4).

<sup>66</sup> For an analysis of *mishpat*, the key biblical term for justice, see Novak, *The Election of Israel*, 124ff.

<sup>67</sup> There is a great debate among political theorists whether the modern notion of natural rights is a development of the ancient notion of natural law or a break with it. For the former view, see

But justice is not transcendent like God.<sup>68</sup> Hence, this view of justice (*mishpat*) combines the strengths of the ancient notion of “Right” (*dikē*) and the modern notion of “rights” (*droits*). Like the ancient notion, its range is cosmic; like the modern notion, its locus is personal.

The proper fulfillment of a right is what is *good*—that is, the duty elicited by the right has been *done well*. It benefits the rights holder or claimant *for* whom it is to be done. Something good has been done on his or her behalf. Only consequently does it benefit the person who has answered someone else’s claim. It contributes to the personal virtue of such a commandment keeper by helping designate him or her as a “righteous person” (*tsaddiq*), even though that consequent benefit is not to be one’s primary intention in doing his or her duty.<sup>69</sup> One primarily obtains good, what one truly needs, from others, who act *well* for him or her. The good to be done for someone is for the sake of the one who holds the right, who makes the claim.<sup>70</sup> The justice of the claim is what makes the content of the claim good. Hence right precedes good in the sense that persons are prior to their acts and to the things their acts involve.

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Berlin, “Two Concepts of Liberty,” 129, n. 2; J. R. Pennock, “Rights, Natural Rights, and Human Rights—A General View,” *Human Rights: Nomos* 23 (1981): 2; Golding, “The Primacy of Welfare Rights,” 126f.; and now, most learnedly, Brian Tierney *The Idea of Natural Rights* (Atlanta, Ga.: Scholars Press, 1997), 33ff., 214f. For the latter view, see Strauss, *Natural Right and History*, 175ff.; MacIntyre, *After Virtue*, 68. Nevertheless, a biblically based view of natural law can essentially avoid this quarrel by showing that the very idea of “natural law,” which the Greeks would have regarded as an oxymoron because it combines the opposites of *physis* and *nomos* (see Plato, *Gorgias*, 482E; also, Leo Strauss, “Natural Law,” in *International Encyclopedia of the Social Sciences*, 11:80b), was originally formulated by those who already believed in the biblical idea of God as creator/lawgiver (see Helmut Koester, “NOMOS PHUSEOS: The Concept of Natural Law in Greek Thought,” in *Religions in Antiquity: Essays in Memory of Erwin Ramsdell Goodenough*, ed. J. Neusner [Leiden: E. J. Brill, 1968], 521ff.). As such, a retrieval of this biblically based doctrine of natural law supplies the cosmic-theological dimension of natural rights that modern views have eliminated and have thereby made incomplete. It also avoids adopting a Platonic-Aristotelian ontology that is ultimately antithetical to biblical doctrines, however helpful the political insights of Plato and Aristotle often are for us.

<sup>68</sup> Part of the problem with Emmanuel Levinas’s attempt to substitute the transcendence/autonomy of ethics for that of God (see Novak, *Natural Law in Judaism*, 86ff.) is his acceptance of Plato’s supreme form, the Good in itself (see *Republic*, 517B–C; Levinas, *Totality and Infinity*, 102f.). This is part of Plato’s equation of the Good and Being itself (see *Republic*, 509B), which is the attempt to ground ethics in impersonal ontology, the very project Levinas himself so strenuously opposes (see *Totality and Infinity*, 42ff.). For Plato, justice is transcendent, including within itself all that is both divine and human (see *Gorgias*, 508A; *Timaeus*, 29A–C; also, Cicero, *De Legibus*, 1.7.27ff.).

<sup>69</sup> See M. Avot 1.3. Regarding what is good for God, i.e., fulfilling God’s covenantal purposes optimally, see, e.g., Deut. 6:18 and commentaries of Rashi and Nahmanides thereon. Regarding what is good for the human other, see, e.g., Deut. 23:17 and *Sifre*: Devarim, no. 259. Regarding what is good for oneself, see, e.g., Hullin 142a re Deut. 22:7 and 5:16 (cf. B. Kiddushin 39b and Tos., s.v. “matnitin”); B. Pesahim 8a-b and Rashi, s.v. “harei zeh tsaddiq gamur” and Tos., s.v. “she-yizkeh.”

<sup>70</sup> See Novak, *Natural Law in Judaism*, 164ff.

That is why the modern term “values” well describes the content of rights/claims. Values are what persons designate—evaluate—to good for them. Values are what rights holders claim from those who are to respond to them. The personal relationship, the transaction itself, is what is evaluative. The closer these values are to the basic rights/claims of persons, the more permanent they are; the farther from them, the more arbitrary they are.<sup>71</sup> But to designate basic moral principles as “values” or “goods” seems to be incorrect because they are derivative. Rights, and justice as the system of all rights, are always what are morally fundamental.

This might well explain why guilt is such a constant feature of human existence and cannot be reduced to something else and, therefore, explained away. It is the subjective result of one’s not having responded to a just claim. It explains *why* our moral life is forever bound to just *whom* we are to respond, then *how* we are to respond to that person or community, and, finally, *what* we are to respond with.<sup>72</sup> Guilt is justified when one has not responded at all to a just claim, that is, a claim proper to the nature of the person making it, the nature of the person to whom it is made, and the nature of the community in which it is made. And there is also secondary guilt when one has not responded well to a just claim. Conversely, guilt that psychologists would now call “pathological” is based on an unjustified claim, either unjustified altogether or in terms of improper content.<sup>73</sup> Thus just claims are *true*; unjust claims are *fraudulent*. As we can see, the terms *true* and *just* are more primary than the terms *good* or *valuable*.<sup>74</sup> All these terms are indispensable, but their proper order must be maintained.

In this way of looking at the normative world, *good* functions primarily as an adverb modifying verbs that describe transactions. It is a qualification, not a ground. Thus when a right has been properly made or responded to, one can say “you have have done *right*,” where *right* is a synonym for *good* or *well*, which modifies action.<sup>75</sup> Secondly, *good* functions as an adjective modifying

<sup>71</sup> See Walzer, *Spheres of Justice*, 7f. This might be the distinction between what jurists call *ius in rem* and *ius in personam*, viz., the former involve rights that are held by everyone in general and hence are inalienable; the latter involve rights created by individual agreement and hence are alienable. For this analysis of this distinction, see Hohfeld, *Fundamental Legal Conceptions*, 72ff.; Feinberg, *Rights, Justice, and the Bounds of Liberty*, 130ff.; Stoljar, *An Analysis of Rights*, 45ff., 72.

<sup>72</sup> See A. R. White, *Rights* (Oxford: Clarendon Press, 1984), 27f.; also, Feinberg, *Rights, Justice, and the Bounds of Liberty*, 155.

<sup>73</sup> See Martin Buber, “Guilt and Guilt Feelings,” trans. M. Friedman, in *The Knowledge of Man*, ed. M. Friedman (New York: Harper and Row, 1965), 121ff.

<sup>74</sup> See Novak, *Jewish Social Ethics*, 14ff. For the primarily aesthetic and only secondarily moral meaning of the terms “good” *tov* and “bad” *ra*), see Maimonides, *Guide of the Perplexed*, 1.2; also, R. Joseph Bekhor Shor, *Commentary on the Torah*: Gen. 1:4, 7, who defines the first use of *tov* in Scripture on aesthetic grounds, viz., what gives pleasure because of its own complete order.

<sup>75</sup> See, e.g., I Kings 8:18.

various things or institutions that function within these transactions for these institutions' sake.<sup>76</sup> For example, one can say about a social institution like marriage, "it is a *good* thing." That is, it functions well by facilitating the natural claims of persons for family life and the community for its own continuity. Thirdly, one can use the abstract noun *a good* to refer to such well-functioning things or institutions themselves. In the aggregate such institutions can be called "goods."<sup>77</sup>

But a biblically based theology should never stretch the use of the term "good" to function as a proper name, that is, "the Good." Moreover, almost everything asserted here about goods can also be asserted about virtues, which have been so emphasized by Alasdair MacIntyre and those whom he has influenced in his critique of the type of political and ethical theory where rights are the central concern.<sup>78</sup> "Virtues" like "goods" usually designate some state of active being.<sup>79</sup> Even more obviously, they are not proper names.<sup>80</sup> They seem, especially, to be more concerned with the character of the dutiful person than with the needs of the rights-bearing person who elicits that duty in the first place.<sup>81</sup> That is why virtues are secondary to rights.

Even when God is taken to be final end of all our desire, his very attractiveness is not because of his autonomous self-sufficiency.<sup>82</sup> Instead, it is because God has already exercised his active claim upon us in both creation and revelation.<sup>83</sup> As such, our desire for God is responsive, not heuristic. In creation, God's claim is experienced negatively, namely, we desire what all of creation lacks. "How indeed could God dwell on earth, for even the highest heavens do not contain you?" (I Kings 8:27). "Who is there for me in heaven? And along with you (*imekha*) I desire (*hafatsti*) no one on earth" (Psalms 73:25). In revelation that claim is experienced positively: "O' Lord, to you (*negdekha*) is my whole desire (*kol ta'avati*)" (Psalms 38:10): "I desire your salvation and your Torah is my delight (*sh'ashu'ai*)" (Psalms 119:174). Accordingly, it is not that God *is good* or *the Good*,<sup>85</sup> but rather that "it is *good* to give thanks to the Lord" (Psalms 92:2). Here "good" (*to*) describes how

<sup>76</sup> See, e.g., Deut. 1:14.

<sup>77</sup> See, e.g., II Kings 25:28.

<sup>78</sup> See *After Virtue*, esp., 137ff.

<sup>79</sup> See Aristotle, *Nicomachean Ethics*, 1103a10.

<sup>80</sup> See *ibid.*, 1096a10ff. where Aristotle differs with Plato over whether there is one overall form, the Good. But, nevertheless, he does see "good" (*agathon*) as naming entities (*to onti*) like God (*ho theos*) and intelligence (*ho nous*) as well as functioning as a qualifier (1096a25).

<sup>81</sup> See *ibid.*, 1098b30ff.

<sup>82</sup> Cf. Aristotle, *Metaphysics*, 1072b30–35.

<sup>83</sup> See Novak, *The Election of Israel*, 119f.

<sup>84</sup> See Ps. 73:25ff., 119:35, 40; also, *Selected Religious Poems of Jehudah Halevi*, ed. H. Brody (Philadelphia: Jewish Publication Society of America, 1924), 87.

<sup>85</sup> See B. Megillah 25a and Tos., s.v. "yevarkhukha" (second opinion).

we experience our response to God.<sup>86</sup> What God does for humans is also described as being experienced by us as “good,” as for example, “the nearness of God is good for me (*tov li*)” (Psalms 73:28).<sup>87</sup> But God’s right always precedes the good he might do for us. As Maimonides most astutely pointed out, valuable qualities predicated of God all describe the effects of God’s action, what God has already done *to* the world.<sup>88</sup> But he could not very well say that about God’s immediate demands upon his human creatures, his right to oblige us, because that involves God’s direct action *for* us and *with* us as our creator.<sup>89</sup> Hence neither in the case of human response nor of divine claim is “the Good” the ultimate *telos* of the transaction. All designations of “good” are *arēaluable*, that is, they are penultimate and instrumental.<sup>90</sup> Good describes the quality of the personal act, but neither its subject nor its object.

At this point, I agree with John Rawls that rights are prior to goods in a theory of justice<sup>91</sup>—that is the case when a right is exclusively understood as a claim that can be made only by a person to another person. However, as will become apparent in the subsequent chapters, my understanding of persons as rights bearers is much wider than that of Rawls and, consequently, so is my understanding of their interrelationships. In that sense, I disagree with just about everything else he has said about the bases of justice. And, in fact, right is only prior to good, for Rawls, in the political order, where one cannot assume that all the citizens share the same notion of what is good for themselves. That is why society settles for the minimal conditions that enable everyone to pursue his or her own good individually as much as is just for everyone collectively.<sup>92</sup> Like all liberals, he has to see individual autonomy as the primary good, the *telos* of all striving, for which justice is its necessary political precondition. Indeed, it is difficult to see how for any liberal, rights as the *conditio sine qua non* cannot become anything but the *conditio per quam*, that is, the means

<sup>86</sup> See Ps. 54:8–9.

<sup>87</sup> See Jer. 33:11; Ps. 119:72.

<sup>88</sup> See *Guide of the Perplexed*, 1.53 re Exod. 33:19 and Gen. 1:31; also *ibid.* 3.54 re Jer. 9:23.

<sup>89</sup> Note *ibid.*, 3.24, trans. S. Pines (Chicago: University of Chicago Press, 1963), p. 501: “For Abraham our Father did not hasten to slaughter Isaac because he was afraid that God would kill him or make him poor, but solely because of what is incumbent upon Adamites—namely to love Him and fear Him” (see B. Sanhedrin 56b re Gen. 2:16). In other words, God as he speaks himself to us, not the effects of God’s acts, is to be the direct object of human love and fear (See Novak, *Natural Law in Judaism*, 130ff.). When we experience God’s justice (either what we are to do or what we are to suffer) as *good for us*, we declare it to be good (e.g., Ps. 119:39; B. Berakhot 5a re Ps. 94:12). But God’s judgments (*mishpatim*) are valid even when this is not our experience (see Job 42:1–5; Lam. 3:38).

<sup>90</sup> For the distinction between teleology and instrumentality, see Aristotle, *Nicomachean Ethics*, 1094a1ff.

<sup>91</sup> *A Theory of Justice* (Cambridge: Harvard University Press, 1971), 31.

<sup>92</sup> *Ibid.*, 396; cf. *ibid.*, 560.

inevitably becomes its own end.<sup>93</sup> Thus in the existential order, for Rawls too, the good is prior to rights.<sup>94</sup>

In my view, however, rights are also prior existentially because they are that to which/to whom I am to respond. They are made with a partial response when claimed by a fellow creature; they are made with a total response when claimed by God.<sup>95</sup> *Good* is only the adverb that modifies the way I have so responded, or the adjective that modifies the things I have included in that response. But, clearly, that priority of rights can be constituted only when the first right is God's claim on his human creatures, for whom, in the words of the Protestant theologian Paul Tillich (d. 1965), that claim is to be their "ultimate concern."<sup>96</sup> As Peter Jones states about rights in general, "To possess moral rights is to be not merely an *object* of moral concern, it is to be a *source* of moral concern."<sup>97</sup>

The priority of rights to goods also offers a more convincing solution to the "is/ought problem" that has so bedeviled modern ethical theory. The problem, which was originally formulated by Hume, is that no descriptive proposition ("is") entails any prescription ("ought").<sup>98</sup> What this assumes, however, is that we primarily live in a world of things, *about which* we are basically uninterested. Somehow we must then constitute a world of persons, in whom we are interested and *with whom* we must act in specific ways. But this world is considered epiphenomenal.

The usual philosophical solutions to this problem are: (1) The notion that "goods," which are not themselves things but higher states of being, are built into nature. By their inherent attractiveness, these states of being entail duties ("oughts") for rational subjects.<sup>99</sup> However, this view depends on the ontological assumption of universal teleology, and that is quite impossible to rationally ascertain without reverting to a by now irretrievable scientific cosmology.<sup>100</sup>

<sup>93</sup> Along these lines, see A. Ingram, *A Political Theory of Rights* (Oxford: Clarendon Press, 1994), 150, 197, 207.

<sup>94</sup> However, that good ultimately becomes the capacity to have rights. See *A Theory of Justice*, 560.

<sup>95</sup> See B. Berakhot 61b re Deut. 6:5; cf. B. Baba Metsia 62a re Lev. 25:36. This priority of rights over goods, first regarding divine claims on humans and then human claims on one another, was also emphasized by the Protestant reformers in their attempt to return from Aristotelian/scholastic to more biblical views of polity. See R. V. Andelson, *Imputed Rights* (Athens: University of Georgia Press, 1971), 14.

<sup>96</sup> See his *Systematic Theology*, vol. 1 (Chicago: University of Chicago Press, 1951), 11ff.

<sup>97</sup> *Rights* (New York: Macmillan, 1994), 69.

<sup>98</sup> See *A Treatise of Human Nature*, ed. L. A. Selby-Bigge (Oxford: Clarendon Press, 1888), 3.1.1; cf. G. E. M. Anscombe, "Modern Moral Philosophy," in *The Is-Ought Question*, ed. W. D. Hudson (London: Macmillan, 1969), 175ff.; Novak, *Jewish Social Ethics*, 49ff.

<sup>99</sup> See Thomas Aquinas, *Summa Theologiae*, 2/1, q. 91, a. 3; q. 94, a. 2.

<sup>100</sup> See Strauss, *Natural Right and History*, 8; Jürgen Habermas, *Communication and the Evolution of Society*, trans. T. McCarthy (Boston: Beacon, 1979), 201; MacIntyre, *After Virtue*, 152.

Without rationally determining the existence of a superhuman, self-sufficient being who is the end of all ends, the apex of the whole cosmos, it is quite difficult to argue against Kant's insistence that humans themselves are the only examples of rational teleology in the world, and as such the only ends-in-themselves, for-themselves.<sup>101</sup> (2) The notion that there is a realm of "values" (axiology) that is neither natural nor the product of human projection, which then entails duties for rational subjects.<sup>102</sup> However, this view's very lack of ontological causality (whether adequate or even inadequate as in the solution just mentioned above) makes it ultimately indistinguishable from humanly invented goods.<sup>103</sup> (3) The notion that rational subjects are able to construct an ideal world for themselves. However, this view requires the invention of a god, who is neither discovered in nature nor revealed in history, to ultimately

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Whereas Habermas rejects the notion of transcendent ends and MacIntyre seems to bracket it, Strauss returns to it. In *What Is Political Philosophy?* (Glencoe, Ill.: Free Press, 1959) he tentatively proposes that human teleology and classical (viz., Aristotelian) cosmology are both a "quest" for knowledge of the whole rather than a demonstrated cosmology that is "the solution to the cosmological [i.e., teleological] problem" (39). But since, for Strauss, "knowledge of the whole . . . is not at our disposal" (39), yet human teleology is at our disposal ("we know parts . . . knowledge of the ends of human life" [39]), would he not have been better advised, based on his own criteria, to more cogently follow Kant's constitution of the autonomous human subject's projective (i.e., immanent) teleology, including its cosmological project of knowledge of the whole (see n. 103 below)? Because of this impasse, the quest for transcendent ends now requires a very different teleology from that of the whole Platonic tradition. Somehow or other, in order for ends to be transcendent, they must *show* themselves. But without a teleological natural science, there is no basis for assuming that the human ends proposed by Plato and Aristotle are not in truth human projects—transcendent in the Kantian sense, but not transcendent, i.e., shown by the human mind but not showing themselves to it (see *Critique of Pure Reason*, A12).

<sup>101</sup> See *Critique of Judgment*, sec. 84; D. Novak, *Suicide and Morality* (New York: Scholars Studies Press, 1975), 90ff. Cf. Novak, *Jewish Social Ethics*, 141f.

<sup>102</sup> See Nicolai Hartmann, *Ethics*, vol. trans. S. Coit (London: G. Allen and Unwin, 1932), 263ff.; Max Scheler, *Formalism in Ethics and Non-Formal Ethics of Value*, trans. M. S. Frings and R. L. Funk (Evanston, Ill.: Northwestern University Press, 1973), 12ff.

<sup>103</sup> In arguing against Leo Strauss's earlier assertion in *Natural Right and History* that a teleological ethics is connected with a teleological natural science (see n. 100 above), John Finnis writes (*Natural Law and Natural Rights*, 52): "There is much to be said for the view that the order of dependence was precisely the opposite—that the teleological conception of nature was made plausible, indeed conceivable, by analogy with the introspectively luminous, self-evident structure of human well-being, practical reasoning, and human purposive action." But if natural teleology is only an analogical human projection, then is it not more reasonable to assume that human morality is such a projection too? Humanly sought goods, for Aristotelian Thomists, are only more than human projects if they are all ordered to a God whose existence is demonstrated by natural teleology (see Thomas Aquinas, *Summa Theologiae*, 1, q. 2., a. 3: 4th way; *Summa Contra Gentiles*, 1.41 and 3.17). As such, Thomistic ethics surely presupposes a teleological natural science and metaphysics, a point that Finnis explicitly denies (see *Natural Law and Natural Rights*, 48f.). But is not the attempt to constitute a teleological ethics without a teleologically demonstrated God more convincingly done by Kant's projective teleology than by the various nonmetaphysical moral axiologies that have been proposed, be they either neo-Kantian or neo-Aristotelian or neo-Thomist?

accomplish what is clearly beyond the capacity of finite, mortal humans.<sup>104</sup> It would seem that if one has to employ theology to save ethics, one would be more successful by employing a God discovered by pure reason or a god presented in revelation, neither of whom is invented. Is there not something quite absurd about the maker worshipping what he or she has made for him- or herself?<sup>105</sup>

In each of these solutions to the is/ought problem, the ought follows from a higher state of being, which, unlike the world of things, seems to make claims on persons. But the inadequacy of all of them is that only persons themselves can really make claims on other persons in a truly nonmetaphorical way. Therefore, what a theory of primary rights accomplishes is to make personal claims truly original and not to derive them from an abstract state of being, which, being ideal, is neither person nor thing.

Indeed, the world of things that Hume and so many others have constituted as primary, be these things natural entities or human-made artifacts, is always within the context of interpersonal transactions. As such, we can never stop evaluating things in one way or another. It is not that “is” functions independently of “ought,” or that “ought” is constituted after “is,” so that it must be derived from a higher state of being that functions as a transcendental base for the deduction of duties. Instead, every “is” functions within a prior world of “oughts,” which are personal claims. Things *are found*; persons *claim*. Things themselves are constituted within what Husserl called the “lived world” (*Lebenswelt*). This world can best be seen as the domain of interpersonal transactions.<sup>106</sup> Things that are human artifacts or potential human artifacts (“raw materials”) are included in this realm by technology. They are useful; hence, they are to be taken up into our place. Things that are natural entities, which are seen as limits on human praxis to be placed beyond human use, are included in this interpersonal realm by pure science (*theōria*). They are beautiful, hence to be left to exist in their own place.<sup>107</sup> Science itself begins as an aesthetic quest.<sup>108</sup> And works of fine art (*poiēsis*) are also inviolable because they are

<sup>104</sup> See Kant, *Critique of Practical Reason*, 1.2.2.5.

<sup>105</sup> See Isa. 44:9ff.

<sup>106</sup> See *The Crisis of European Sciences and Transcendental Phenomenology*, trans. D. Carr (Evanston, Ill.: Northwestern University Press, 1970), 103ff. Husserl does not constitute, however, the realm of the interpersonal until after he has constituted the nonpersonal realm. See *Cartesian Meditations*, trans. D. Cairns (The Hague: M. Nijhoff, 1960), 89ff. Cf. Levinas, *Totality and Infinity*, 67.

<sup>107</sup> This closely follows Heidegger’s distinction between “things-at-hand” (*Zuhanden*) and “things-before-hand” (*Vorhanden*). See *Sein und Zeit*, 15th ed. (Tübingen: Max Niemeyer Verlag, 1979), sec. 16. Along these general lines, see Jürgen Habermas, *Knowledge and Human Interests*, trans. J. J. Shapiro (Boston: Beacon, 1971), 113ff.

<sup>108</sup> Note Aristotle, *Metaphysics*, 980a22: “All humans naturally desire to know, which is indicated by our love of our senses. For they are loved for themselves apart from any use . . . even when no action (*pratein*) is intended” (my translation).

imitations of this natural beauty. But the realm of interpersonal transactions is more than technology or pure science or fine art, or even than any combination of all three. It always surrounds them all inclusively. No things are ever beyond the human capacity for categorical description, beyond the capacity for giving common names. Humans themselves, however, receive their proper names as a call from other persons. Only God names himself.<sup>109</sup>

This emphasis of the primacy of personal claims in the moral life also supplies an answer to the frequently invoked question about the idea of natural law: If law qua law requires promulgation, who promulgates natural law?<sup>110</sup> In the case of human-made law, the voice of the human lawgiver is clearly heard and duly recorded, simultaneously noting when and where the law was so promulgated. But if one says that natural law is promulgated by God, who creates and governs the universe, how is that voice heard?<sup>111</sup> Revelation cannot be the answer because even if one holds that natural law is divine law, it is also universal. Conversely, revelation is always to a singular community at a definite point in history.<sup>112</sup> In that general sense, revealed law like human made law is positive law, the specific differences being *who* promulgated it to *whom*, *when* and *where*, not so much *how* it was promulgated. In both these cases, the lawgiver speaks directly to the governed. However, in the case of natural law, the voice of the lawgiver to the governed is mediated. In determining the basic rights of *any* human person and *any* human community, we justify listening to their voices responsively, if these voices make valid universal claims on all of us. So far, we are at the level of universal morality. Moving deeper down to the ontological level, we attribute the justice of these claims to the universal nature God creates by his command. “He spoke and it came to be; he commanded and it endured (*va-ya ‘amod*)” (Psalms 33:9). Thus human dignity, both personal and communal, reflects the voice of God through the real voices of the humans who make their natural claims upon us here and now. But in the truly original sense, only God can call for our full obedience. Nature itself in general and human nature specifically are the obedient results of God’s command. All law must be originally justified by divine law: what is to be obeyed in and of itself.<sup>113</sup> Just humans claims are truly in the image of God,

<sup>109</sup> Regarding human descriptive naming of the world, see Gen. 2:19–20. Regarding humans being personally named by others, see Gen. 2:23; also, Novak, *Jewish-Christian Dialogue*, 145ff. Regarding God’s self-naming, see Exod. 3:13–15, 6:2–3, 33:17–23.

<sup>110</sup> This was the argument of Hans Kelsen against natural law, viz., “nature has no will” *The Pure Theory of Law*, trans. M. Knight [Berkeley: University of California Press, 1967], 221). Cf. Novak, *Natural Law in Judaism*, 124, n. 3.

<sup>111</sup> For the view that natural law is divine law, promulgated by God, but through human nature not by historical revelation, see B. Sanhedrin 56b re Gen. 2:16; also, Thomas Aquinas, *Summa Theologiae*, 2/1, q. 90, a. 4.

<sup>112</sup> See Novak, *Jewish-Christian Dialogue*, 129ff.

<sup>113</sup> See Maimonides, *Mishneh Torah: Melakhim*, 8.11; also, Thomas Aquinas, *Summa Theologiae*, 2/1, q. 94, a. 4 ad 1.

which express God's entitlements to his unique human creatures, but which require constant reference to their source: "All is given from the one shepherd" (Ecclesiastes 12:11).<sup>114</sup>

How fundamentally different all this is from seeing natural law as some sort of translation of a higher nature down to the actual affairs of human beings. In that view, there is no primary voice, but only a vision of a polity that might conform to a higher paradigm in the heavens. It is duty without an originating right/claim,<sup>115</sup> for such a right/claim cannot be imagined, but only heard.

The Jewish covenantal tradition, with its attendant legal system of Halakhah, is the best example of a historical community where the correlation of rights and duties and duties and rights seems to be without exception. As we shall see in greater detail, rights generate duties inasmuch as claims generate responses in a way that duties do not generate rights. For responses cannot generate the claims made prior to them for them. However, we must see in far greater detail that the notion of rights defended in this book is beholden neither to notions of social contract nor to notions of moral creativity nor to notions of personal autonomy. Furthermore, if one sees all three of these modern views as deconstructions of the biblical covenant, then one can very well retain the term and concept of rights by returning it to its original source and then develop the concept *from* that source and not *against* it.<sup>116</sup> The legacy of Athens is not the only alternative to the individualistic or collectivist excesses of modernity. The voice from Jerusalem makes its own alternative claims, claims that I am convinced are in truth superior.<sup>117</sup>

### THE POLITICAL DILEMMA OF MODERN JEWS

Jews can well be seen as one of the chief beneficiaries of modern notions of rights. Rights-based political theories and the polities that they inspired justified the entry of Jews into the uniquely modern nation-states, which began to be constituted in the wake of the French Revolution. Prior to this time, Jews faced the problem of being an alien minority community that was, at best, tolerated by an unsympathetic majority and the culture and societies it controlled; at worst, persecuted by a hostile majority and the cultures and societies

<sup>114</sup> See B. Hagigah 3b.

<sup>115</sup> See Plato, *Republic*, 369Cff.; also, Plato, *Timeaus*, 30A–D.

<sup>116</sup> One can see social contract as a reduction of the covenant to a humanly initiated agreement (see Hobbes, *The Elements of Law*, 1.15.9). One can see moral creativity as a substitution of man for God. And one can see personal autonomy as an overelaboration of human free choice, which is integral to the covenant (see Novak, *The Election of Israel*, 163ff.). For the project of retrieving originally biblical doctrines from their modern deconstructions, see 5ff.

<sup>117</sup> Along these lines, see Susan Orr, *Jerusalem and Athens* (Lanham, Md.: Rowman and Littlefield, 1995), 147ff.

it controlled. But with rights-based political theories, there was only the recognition of lone, ahistorical individuals and the particular societies they had constructed for the protection and enhancement of their rights. In theory, anyway, one's religious and cultural distinctions were no longer to be matters of any normative concern. Jews were to be treated like any other individuals.<sup>118</sup> Following this logic in its historical trajectory, its adherents have seen the continued discrimination against Jews in any particular society as attributable to the fact that egalitarian liberty, which is the very project of modern European and North American polities, has not yet been completed. Practice always lags behind theory. Progress is always incremental. As such, this sort of discrimination against the Jews, let alone persecution and genocide, is seen as being due to periodic lapses into older forms of inequality and tyranny. The hope is that these lapses will become fewer and fewer due to higher cultural development and political enlightenment, eventually resulting in a zero sum.

The problem this has raised for Jews, however, is that there seems to be little connection of such a political program to the Jewish tradition, which like any tradition is inherently political, even without having national independence for most of its history.<sup>119</sup> Even though having one's own state is a desideratum of a political tradition, it is not a *sine qua non*. The community is the smallest self-contained political entity, and Jews have always had some sort of community, even if membership in it has been sustained without the availability of state-enforced sanctions. Indeed, virtually the entire rabbinic tradition developed under circumstances of less than actual national independence. Thus it is to that tradition we must look in constituting what could be termed a Jewish political theory. Maximally, the traditional sources should provide specific source material ready for theoretical development; minimally, that theoretical development should not contradict the specific teachings of these sources.<sup>120</sup> That is, maximally, one's theory should be directly derived from these sources in such a way that its validity is verified by them; minimally, one's theory

<sup>118</sup> For the background of this, see Jacob Katz, *Out of the Ghetto* (Cambridge: Harvard University Press, 1978), 191ff.

<sup>119</sup> See Eugene B. Borowitz, *Renewing the Covenant* (Philadelphia: Jewish Publication Society, 1991), 17f.

<sup>120</sup> See, e.g., Maimonides' *Maamar Tehiyyat ha-Metim*, which is his attempt to show that his theological constitution of the doctrine of "the world-to-come" (*olam ha-ba*) does not contradict the rabbinic designation of the doctrine of the resurrection of the dead as a Jewish dogma (see M. Sanhedrin 10.1). In other words, maximally a theologian's theory should be verified by extensive reference to the scriptural and rabbinic sources; minimally it should not be falsified by these same sources. A Jewish theory of rights in the modern sense would seem to fall in the latter category of validation, as did Maimonides' medieval theory of the world-to-come. That is, at best it can develop only what is implicit within the tradition. It cannot literally derive it from specific sources, however. For the recognition that the answer to every new question cannot be simply deduced from traditional sources, see Nahmanides, *Commentary on the Torah*: Deut. 6:18; R. Vidal of Tolosa, *Magid Mishneh* on Maimonides, *Mishneh Torah*: Shekhenim, 14.5.

should avoid refutation from these sources in such a way that its validity is not falsified by them. In cases of much new theory, the criterion of falsifiability *from* the sources pertains far more often than the stricter correspondence that verifiability *by* the sources entails.<sup>121</sup>

It would seem that the Jewish political tradition has no place for the modern notion of rights. When the question has been raised, some Jewish scholars have pointed out that rights are a foreign import into Jewish legal and political discourse. One of the chief arguments made along these lines is that in Judaism there are duties and anything that could be termed rights is strictly derivative from these duties except, of course, God's primal right to demand all our duties as what is owed to himself.<sup>122</sup> Proof of this is that there are a number of ready-made terms for "duty," most obviously *hovah* (literally, a "debt"), but there is no real term for a "right."<sup>123</sup> The closest term that comes to mind for the concept of right (and the one used in discussions of rights in modern Hebrew) is *zekhut*.<sup>124</sup> But in its original rabbinic setting, a *zekhut* is a privilege, that is, an entitlement. It is not what a person "holds" as much as it is what a person has been granted—and by implication, what can be revoked.<sup>125</sup> The same is true of the term *reshut* (literally, "permission"), which could be defined as that which has not yet been legislated.<sup>126</sup> Thus, whereas duty finds a number of ready-made elementary terms in the traditional system of commandments (*mitzvot*) known by the generic name Halakhah, rights seems to have to borrow one term or other and thus stretch its original meanings considerably, perhaps to the breaking point.<sup>127</sup> Nevertheless, as we shall see, the term that does corre-

<sup>121</sup> This closely follows Karl Popper's distinction between verifiability, falsifiability, and conventionalism. Popper correctly shows how the criterion of verifiability alone relies too much on strict correspondence of theory *to* data (what in regard to religious traditions one could call "fundamentalism"), whereas the criterion of conventionalism (which he attributes to Kantianism) makes the data essentially arbitrary (which is much harder to do when the data are from a verbalized tradition, i.e., words, not mute things). The criterion of falsifiability, conversely, makes the data limits on a theory, which it can neither ignore nor simply refer to. That, it seems, is how a religious tradition like Judaism develops with continuity. See "Falsification versus Conventionalism," in *Popper Selections*, ed. D. Miller (Princeton: Princeton University Press, 1985), 143ff.

<sup>122</sup> See Robert M. Cover, "Obligation: A Jewish Jurisprudence of the Social Order," *Journal of Law and Religion* 5 (1987): 66.

<sup>123</sup> Generally, "commandments" (*mitzvot*) are conditional norms; "duties" (*hovot*) are unconditional norms (see Maimonides, *Mishneh Torah*: Berakhot, 11.2). Hence one has an option/right to avoid the conditions that would obligate one to perform a *mitsvah*. Nevertheless, it was often suggested that one should exercise such an option/right since it is more of a privilege (*zekhut*) to be able to observe a *mitsvah* than to avoid one (see, e.g., B. Kiddushin 31a).

<sup>124</sup> Hence "human rights" in modern Hebrew are called *zekhuyot enoshiyot*.

<sup>125</sup> See, e.g., M. Eruvin 7.11; M. Makkot 3.16 re Isa. 42:21; B. Pesahim 19a–b and Rashi, s.v. "zakhinu." For the revocation of such an option/right, see, e.g., B. Kiddushin 12b. Cf. Z. W. Falk, *Law and Religion* (Jerusalem: Meisharim, 1981), 80.

<sup>126</sup> See, e.g., B. Betsah 36b.

<sup>127</sup> See Cover, "Obligation," 65.

spond to rights is a “cry” (*ta‘aqah*) in the language of Scripture, or a “claim” (*ta‘anah*) in the language of the Rabbis.<sup>128</sup>

This has led to two divergent Jewish solutions to this theological-political dilemma. On the one hand, that majority of modernity-affirming Jews who did not go over to Marxism (with its denial of the concept of rights) accepted rights as primary, even if that meant a tenuous connection to the Jewish tradition or no connection to it at all.<sup>129</sup> The needs of Jews as individual citizens were seen as taking complete precedence over the needs of the older Jewish communal tradition. But, of course, it is that tradition that makes Jews Jewish. Anything less than it seems to be a ticket to either instant or gradual assimilation, whether individual or collective.

So, on the other hand, there has been a persistent minority of Jews who have basically been adverse to the whole liberal rights culture, attempting to distance themselves from it as much as is politically possible for Jews who, after all, still do not want to live in any of the illiberal polities available in the world today. And when such Jews have gained a measure of political power in the Jewish State of Israel, a state that is still without a written constitution and bill of rights, some of them have been openly contemptuous of the concept of rights—that is, human rights—altogether.<sup>130</sup> In addition, they have often pointed out how indifferent the Western liberal democracies were to the plight of the Jews during the Holocaust, despite the fact that most Jews were enamored of their promise of political equality and opportunity.<sup>131</sup>

Yet at this juncture of our vulnerable history, Jews should realize that only in democracies have we been able to survive, let alone flourish, politically, economically—and even religiously. This certainly explains why the vast majority of Jews, both in Israel and in the diaspora, would not choose to live under any regime but a democratic one. In fact, as is so well known, it is under the other two forms of government available in the modern world—fascism and communism—that Jews have often been the greatest victims of persecution and destruction. Therefore, I think Jews could well conclude from their experience of modernity that what we abhor externally we ought to abhor even on our own communal turf.<sup>132</sup> There is much support for that moral consistency and integrity within the tradition itself. As such, any system of Judaism that cannot factor into its operations at least some of the major democratic principles, most especially the principle of human rights, is attractive only to those who think that Jews can withdraw from the world into the hermetically sealed

<sup>128</sup> See, e.g., Job 19:7; M. Ketubot 13.4.

<sup>129</sup> For Marx’s rejection of the concept of individual human rights, see “On the Jewish Question,” in *The Marx-Engels Reader*, 2nd ed., ed. R. Tucker (New York: W. W. Norton, 1978), 40ff.

<sup>130</sup> See Meir Kahane, *Uncomfortable Questions for Comfortable Jews* (Secaucus, N.J.: L. Stuard, 1987), 45ff., 155ff.

<sup>131</sup> See Meir Kahane, *Never Again* (Los Angeles: Nash, 1971), 5ff.

<sup>132</sup> See B. Sanhedrin 59a and parallels.

safety of a world totally under their own control. Such blindness to contemporary experience is, of course, not unique to Jews. We see examples of it today among Muslims, Christians, Hindus, and Buddhists. The suffering brought by such fanatics on others, even others in their own communities, is obvious to anyone who follows current events.

This theological-political dilemma lies at the heart of the persistent *Kulturkampf* afflicting the Jewish people throughout the world, most acutely in the Jewish State of Israel but certainly not limited to it. The question is whether it is possible to bridge a commitment to the Jewish tradition and a concern for human rights. It would seem that the only way to do so with integrity would be to locate the concept of human rights *within* the Jewish tradition itself and then develop it from there. The only alternatives to this are either to concede that on *the* major political issue of the modern age Judaism has nothing to say and is thus irrelevant or to simply avoid the issue altogether by reducing it to some sort of pseudo-problem. The first alternative, however, leads to intellectual if not cultural assimilation, for a political vacuum is inevitably filled by something else. The second alternative leads to intellectual and cultural obscurantism. And that obscurantism is anything but benign in the world today. Even the suggestion of a Jewish regime in which the need for rights is denied will inevitably be compared to antiliberal polities already functioning that employ racial or religious coercion. Like it or not, these regimes will be taken as the practical models at hand here and now. But, most importantly, the passion for social justice so obvious in biblical and rabbinic teaching seems to have enough in common with the modern concern for human rights to strongly suggest that looking at the tradition for insight into this whole issue of political theory will by no means be futile.

The philosophical question before us is whether there is some way to avoid—~~or~~ better, overcome—the standoff we seem to have between the theocratic principles of the Jewish tradition and the democratic principles of the societies in the world where Jews have survived and flourished.<sup>133</sup> That overcoming cannot be one of a superficial “synthesis,” where one simply settles for some questionable similarities between the two political systems. When this happens, what we really have, in effect, is one tradition supplying the principles and the other accommodating itself to it by supplying examples for it—~~and~~ only convenient examples at that. It is easy to see how Judaism can be used by democratic theorists in this accommodating way.<sup>134</sup> The task for Jewish thinkers, conversely, is to formulate a political theory out of the Jewish tradition that recognizes the institution of rights, but that also does not base

<sup>133</sup> Cf. Yeshayahu Leibowitz, *Yahadut Am Yehudi u-Medinat Yisrael* (Jerusalem: Schocken, 1976), 181ff.

<sup>134</sup> This is the problem with most of the essays in the volume *Judaism and Human Rights*, ed. M. Konvitz (New York: W. W. Norton, 1972).

them on principles that are either un-Jewish or anti-Jewish. In order to do that, we must return to the *theocratic* principles of the Jewish covenantal system. And by “theocracy,” I do not mean its usual connotation today as basically the dictatorship of clerics, but, rather, its original denotation as “the rule of God.”<sup>135</sup> As we shall see, this will also require a critique of the political philosophy of some of those Jewish clerics who speak for the Jewish tradition, even with learning and communal authority behind them. Their philosophy (more often, their ideology) seems to reach the conclusion that the Jewish idea of polity is a dictatorship of rabbis.<sup>136</sup>

The Jewish people has always considered herself to be under the ultimate rule of God who has made a unique and everlasting covenant with her, but the forms of polity she has been able to appropriate have often been borrowed from her historical surroundings. Thus, for example, when the Israelite nation became a monarchy, the motivation behind the choice of this form of government was the people’s desire for “a king to judge us like all the nations . . . to go out before us and fight our wars” (1 Samuel 8:6, 20). During much of the history of the monarchy in Israel, the task for Jewish thought was to determine the place of this institution, not at all uniquely Jewish, in the uniquely Jewish idea of covenantal theocracy.<sup>137</sup> This led to both an appropriation of a new form of polity and a critical reworking of it.

In the ancient world, the Israelite nation had the choice of being either a monarchy or a tribal confederation. In the modern world, the Jewish people has a choice, collectively as in Israel or individually as in the diaspora, of affirming either a democracy or some type of tyranny, secular or religious. Just as the ancient world offered several basic political options, so does the modern world. And just as the ancient Jewish nation clearly opted for monarchy (with conditional divine approval), so has the modern Jewish people clearly opted for democracy, everywhere (hopefully, with the same conditional divine approval). The real challenge for contemporary Jewish thought is to ground those aspects of democracy it can accept in good faith in the uniquely Jewish covenantal theocracy, and with as much good faith reject those aspects of it that it cannot accept.<sup>138</sup>

Democracy is not just the rule of the majority as opposed to that of an oligarchy. If that were all democracy is, then Nazi Germany or the Soviet

<sup>135</sup> The term seems to have been coined by Josephus. See *Contra Apionem*, 2.164ff.

<sup>136</sup> See Isaac Halevy Herzog, *Tehuqah le-Yisrael al-pi Ha-Torah* (Jerusalem: Mosad ha-Rav Kook, 1989), 7ff.

<sup>137</sup> See Yehezkel Kaufmann, *The Religion of Israel*, trans. M. Greenberg (Chicago: University of Chicago, 1960), 266; D. J. Elazar, *Covenant and Polity in Biblical Israel* (New Brunswick, N.J.: Transaction Books, 1995), 295ff.

<sup>138</sup> See S. Federbush, *Mishpat ha-Melukhah be-Yisrael*, 2nd ed., rev. (Jerusalem: Mosad ha-Rav Kook, 1973), 26ff.; Z. W. Falk, *Erkhei Mishpat ve-Yahadut* (Jerusalem: Meisharim, 1980), 40f.

Union would have been a democracy. In both societies, the governing powers surely had the support of the vast majority of the citizens. Instead, democracy combines majority rule with the protection of minority rights, especially the rights of the smallest minority possible, the individual human person, even when these rights are in conflict with the interests of the majority society as a whole. That is the case as long as they do not pose a clear and immediate danger to the survival or liberty of the society itself. Ronald Dworkin has put it quite well: individual rights are what prevent a society and its legal system from becoming “ordered brutality.”<sup>139</sup> For today’s Jews, this insight is anything but arcane. The question is how to find the justification for these rights in the Jewish tradition.<sup>140</sup> (What they specifically are is itself, of course, a matter of dispute even when the concept of them is accepted in principle.) Those who desire a closer connection between the cultural heritage of the Jewish people and their current political interests ought to be especially motivated to find the concept of rights and elaborate on its philosophical implications. The task, to be sure, is not easy.

The blind spot of many in the Jewish tradition concerning at least the potential for developing a theory of rights out of the tradition might be explained in this way. Most of these opponents of this rights theory uncritically accept the modern assumption that rights pertain exclusively to individual persons. Because an individual person is clearly the smallest component in the covenantal system, it follows that he or she has many more duties than rights, since God and the community have more claims on the individual person than he or she has on them. Hence, this fact has caused many to conclude that there are no rights at all in the covenantal system governed by Halakhah. However, once it is shown that all duties presuppose correlative rights, including duties owed to God or the community, and that individual rights as claims are as valid as those of God or the community, this erroneous dismissal of a Jewish rights theory can be refuted, for it is based on the mistake of assuming that Judaism is nothing but a system of heteronomous duties for their own sake. A theory of rights supplies adequate reasons for these more ostensive duties, and it can be coordinated into a rationally compelling system. In this way, Jewish law, especially as it pertains to interhuman relations, can be seen as based on a theonomous wisdom that avoids the idealism that comes with autonomy and the unintelligibility that comes with heteronomy.<sup>141</sup> Indeed, the insistence that all Jewish duties are correlated with prior rights follows from the assumption that, at least as regards all the commandments pertaining to interhuman rela-

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For the variety of political systems under which the covenant can function, see D. J. Elazar, ed., *Kingship and Consent* (Washington, D.C.: University Press of America, 1983).

<sup>139</sup> *Taking Rights Seriously*, 205.

<sup>140</sup> Cf. Herzog, *Tehuqah le-Yisra'el al-pi Ha-Torah*, 12, 23, n. 2.

<sup>141</sup> See Novak, *Jewish Social Ethics*, 45ff.

tionships, all these duties have specific reasons (*ta'amei ha-mitsvot*) in addition to being like all the commandments: God's inviolable will.<sup>142</sup> Thus there is a strong link between the discussion of natural law in classical Jewish sources and the modern Jewish concern for human rights. It is, furthermore, no accident that many students of Jewish law who are most suspicious of Jewish rights talk are also advocates of highly hierarchal, authoritarian interpretations and applications of that law, for authoritarianism is equally contemptuous of both reasons and persons. Authority becomes more and more its own justification, requiring no persuasive reasons. It merely asserts that the duties of persons under it are to obey those other persons who possess it. The needs of those persons living under such authority become less and less significant.

### HAIM COHN AND THE SECULARIZATION OF JEWISH LAW

The Jewish legal tradition has long been the area where one could engage in the most systematic discourse. Thus it is here that some of the most astute Jewish thinkers have turned to develop a Jewish political theory. This has been the case, most especially, with discussions of rights, since *rights* has such an immediately legal meaning.

To date, the most coherent and learned attempt to incorporate the concern of rights talk into the study of Jewish law has been that of the now retired Israel Supreme Court justice, Haim Cohn. Cohn's project has been basically to argue as follows. In the area of interhuman relationships (*bein adam le-havero*), even though the traditional language of Jewish law is that of obligation—duty (*hovah*) or commandment (*mitsvah*)—these duties do not create subsequent rights but, rather, they recognize rights that are prior to the enactment of the duties that are to be the proper responses to them.<sup>143</sup> One of his prime examples is the obligation to give charity (*tsedaqah*) to the poor. It is not a duty that then creates the right of the poor person to receive it. Instead, it is the recognition of the poor person's right to be helped that leads to the enactment of the proper response to his or her need as a duty on others. This example is one that I too used earlier to demonstrate how a duty presupposes a correlative right. The question regarding Cohn's theory, however, is whether his range of rights and duties extends wide enough.

Using his great erudition in the biblical and rabbinic literary sources, Cohn has made an impressive argument for a new way of looking at Jewish civil and criminal law. However, since the obligations of Jewish law are seen as commandments (*mitsvot*), that is, expressions of God's will, there is a fundamental theological problem with Cohn's theory of human rights in Jewish law.

<sup>142</sup> See Novak, *Natural Law in Judaism*, 64ff.

<sup>143</sup> *Human Rights in Jewish Law* (New York: KTAV, 1984), 17f.

It is uncertain, from what he writes, anyway, whether Cohn actually believes in God, and even if he does as a personal matter, whether he sees such belief as legally foundational. Indeed, Cohn seems to explain the religious form of even Jewish civil and criminal law as being the recognition of an essentially human reality, which is then projected onto the level of the divine (*bein adam le-maqom*).<sup>144</sup> This has the effect of giving the laws that protect and enhance human rights a greater sanction, a cosmic status, as it were. Yet it seems that for Haim Cohn, the notion of a divine lawgiver, from whom all rights are gifts and to whom all duties are obligations, functions very much like what Plato called “necessary lies,” namely, falsehoods needed to motivate the gullible masses to do what is inherently right.<sup>145</sup> However, what happens when the lie is exposed for what it is: deceit, however well intentioned? At that point, the lie becomes a *myth*, which at best can be remembered nostalgically for what it *once* effected. But how can it ever be retrieved again after the quintessential modern critique of religion expressed by Feuerbach (and after him, *mutatis mutandis*, by Nietzsche, Marx, and Freud), namely, that religion itself is a projection of human ideals onto a superhuman reality.<sup>146</sup> What is to be retrieved is not that fictitious reality, but the human ideals that lie buried in it. But would not this retrieval lead to a form of polity so antithetical to the whole Jewish tradition as to be forever broken off from it?

Cohn has definitely asked the right questions. Nevertheless, his theory becomes inadequate to the task of constituting a Jewish theory of rights because it cannot locate its foundation in the Jewish tradition itself. If the tradition’s constitution of rights has been presented upon a foundation now seen to be fictitious, then it would seem that once that fiction has been uncovered, Jews concerned with rights would have to go elsewhere to find principles that adequately justify rights. As such, the overcoming of the Jewish tradition itself, however fondly it might be remembered, becomes a necessity for anyone concerned with truthfulness as a moral imperative: “Move far away from deceit (*dvar sheqer*)” (Exodus 23:7). Can one consciously lie to himself or herself, however much he or she might lie to others, and still engage in any coherent pursuit?<sup>147</sup>

<sup>144</sup> Thus he tellingly writes: “Most talmudical human-rights pronouncements . . . while clothed with divine (or quasi-divine) authority . . . are but normative expressions of their authors’ humanitarian creeds . . . the ‘divinity’ is inherent, so to speak . . . determining the nature of the law as if by legal fiction” (*ibid.*, 5).

<sup>145</sup> See *Republic*, 389B and 414C. Cf. Karl Popper, *The Open Society and Its Enemies*, vol. 1, 5th ed. (Princeton: Princeton University Press, 1966), 138f. Such a fiction is more than the occasional *fictio juris* present in any legal system. Rather, it can only be seen as the source of a *corpus juris fictiois*. Cf. Novak, *Natural Law in Judaism*, 22f.

<sup>146</sup> See Ludwig Feuerbach, *The Essence of Christianity*, trans. George Eliot (New York: Harper and Row, 1957), 197ff.

<sup>147</sup> See Plato, *Republic*, 351C–D.

Haim Cohn's attempt to secularize Jewish law, especially on the whole question of human rights, is a radical project because it moves away from the root (*radix*) of its tradition. However, it might very well be even more radical to constitute a theory of rights that reaffirms the root of the tradition in such a way as to discover new implications of it for the political needs of our time. In my view, this requires a more explicitly theological way of looking at the law and its sources than is usually the case in the scholarly treatment of Jewish law, either by traditionalists or modernists.<sup>148</sup> That way also has to be more philosophical since its insights are being inserted into general discussions of political *theory*, which itself seems to require the rational rigor of philosophy. Along these lines, I shall attempt to argue that not only is the divine-human relationship the basis of all rights in the Jewish tradition, both those of persons and those of communities, but that it is also the missing link in the current impasse in political theory.

A generation ago, in his introduction to a volume of essays on Judaism and human rights, the Jewish political theorist Milton R. Konvitz correctly noted, "There is no word or phrase for 'human rights' in the Hebrew Scriptures or in any other ancient Jewish text. . . . Yet . . . the absence of these and related words and phrases does not mean the nonexistence of the ideals and values for which they stand or to which they point."<sup>149</sup> Konvitz was right, of course, by arguing against the kind of historicist reduction that would dismiss the question of rights by severing any connection between the issues of the present and the teachings of the past. Nevertheless, the other extreme to be avoided is simply to assume that ancient religious texts can function as precedents for moral and political principles that are already formulated in and for the present. When this is done, the continuing moral necessity of rereading these ancient texts becomes lost because the modern principles of which these texts are precedents are assumed to be true in and of themselves here and now. They are taken to be self-sufficient even if not always self-evident. And, indeed, anything but tangential concern with these ancient precedents might actually be counterproductive by diverting attention from the real and pressing concerns to which moral and political principles are always to be addressed.

A good example of this fallacy, what might be called the "fallacy of immediate relevance," is the simple location in the Jewish tradition of precedents for the modern democratic interest in human rights. Without a critical role for Judaism in its relation to this modern democratic interest, which is a role where it attempts to rethink democracy as to what it is-to-be and not just to confirm it as-it-is—without that critical role I do not see how Judaism would not quickly be turned into a matter of ultimately antiquarian interest. Such a matter is irrelevant when moral and political principles are practically *directed toward*

<sup>148</sup> See D. Novak, *Halakhah in a Theological Dimension* (Chico, Calif.: Scholars Press, 1985).

<sup>149</sup> *Judaism and Human Rights*, 13.

the future and not just *traced from* the past parenthetically. In other words, in order for a Jewish thinker to get involved in the conversation about human rights altogether, he or she must insist on being more than a provider of background music, as it were. As the greatest German Jewish philosopher, Hermann Cohen stressed, there is an essential difference between a historical origin of facts (*Anfang*) and a philosophical source (*Ursprung*) of concepts.<sup>150</sup> The task, then, is to look for a definition of rights that can make a bridge between the full vision of rights in the Jewish tradition and the partial vision of rights and duties by both liberals and communitarians today. When this is done, we might be in a better position to see the Jewish tradition in a critical relation to the reality of modern democracy and its concern with human rights. That is, we must see how the Jewish tradition can provide an intelligent viewpoint from which not just to follow contemporary interest in rights, and at best to be patronized by most of its proponents, but to judge it and redirect it. By so doing, we might actually find in and for contemporary democracy those practices that are indispensable for the conduct of a society truly worthy of the moral allegiance of rational human persons, and concurrently reject those practices in it and for it that make a society unworthy of such moral allegiance.

Seeing Judaism as a system of rights, the ensuing chapters will deal with the specific types of rights and correlative duties embedded in seven primary interpersonal relationships. In these relationships, the first term designates the rights bearer, the second the duty bearer. They are: (1) God and human persons; (2) human persons and God; (3) God and covenanted community; (4) covenanted community and God; (5) between human persons; (6) covenanted community and human persons; and (7) human persons and covenanted community.

<sup>150</sup> *Religion of Reason Out of the Sources of Judaism*, trans. S. Kaplan (New York: Frederick Ungar, 1972), 10, 63f.