SOCIAL JUSTICE AND HUMAN RIGHTS*

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In recent decades we have witnessed a multitude of increasingly urgent demands for social justice and for the protection of human rights. Politically, those struggling to promote social justice have worked hand in hand with human rights advocates. The social injustices of racial and sexual discrimination have been protested as violations of the fundamental human rights to equal opportunity and to the equal protection of the laws; a human right to an adequate standard of living has been proclaimed on the basis of the injustice of an affluent society in which the rich can enjoy luxuries while the poor lack the means to meet their basic human needs. Such political arguments suggest to the thoughtful observer that there is some close connection between social justice and human rights. At the same time, we have read, or tried to find the time to read, a deluge of books and articles dealing with the theory of justice and the theory of rights. What is remarkable about these two bodies of philosophical and jurisprudential literature is their virtual isolation from each other. In the index to *A Theory of Justice*, the monumental 587-page book by John Rawls, there are only three references to natural rights and none at all to human rights. The vast literature dealing with rights takes individual freedom or individual interest as central, depending upon whether the author is advancing a will theory or an interest theory of rights, but hardly mentions justice, whether individual or social. This is all the more surprising because philosophers and jurist typically

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assume that justice and rights are necessarily connected. The more I ponder the practical politics and moral theory of the past few decades, the more puzzling, and important, appears to me the problem I intend to address today: What is the relation between social justice and human rights?

Since my subject is complicated and controversial, it may be well to avoid unnecessary confusion by defining my terms at the very beginning. Many different kinds of things may be said to be just or unjust—persons, their acts, even their judgments, social systems, institutions, and laws. By «social justice» I shall mean the justice of a society, and of its acts and institutions. The sort of a society I have in mind is a politically organized group of people occupying a limited territory and distinguished from other such groups by a shared history, culture and set of institutions. Thus, I intend to simplify my discussion by excluding consideration of the justice or injustice of more limited societies, such as the General Motors Corporation, Washington University or the American Philosophical Association, as well as that of international societies, such as the United Nations or the IVR. Even so, social justice is far from simple, for it encompasses, but is not restricted to, political justice, legal justice and economic justice, that is, the justice or injustice of the political, legal and economic systems of a society.

Each of us possesses a variety of rights by virtue of our various stations in life. As a member of the faculty of Washington University, I have the right to use its libraries; as a citizen of the United States, I have a right to the protection of its diplomatic corps. As a member of my audience, you have a right that I speak sincerely and thoughtfully to you; as a member of the IVR, you have a right to vote in its General Assembly next Wednesday. By «a human right» I mean a moral right that one possesses *as* a human being. It is not merely that human rights are necessarily possessed by human beings; being human is all that is necessary to confer this sort of rights upon the individual. As I shall use the expression, a human right is one species of moral rights. There is also a species of legal rights that are quite properly called «human rights», for example, those legal rights enjoyed by many Euro-

peans by virtue of the fact that their governments have ratified the European Convention on Human Rights. But I shall set aside such rights for the time being in order to avoid ambiguity in my language and to recognize the fact that modern theories of human rights are the contemporary descendants of the traditional theories of natural rights.

I shall not limit the domain of human rights to fundamental rights. A right that is logically fundamental in one moral system may be derivative in another, and a right that is of fundamental importance in one century or one part of the world may be less important or even irrelevant to the political debates or individual lives in another time or place. Nor shall I stipulate that human rights are necessarily equal. If it is possible to possess the capacities of a human being to a greater or lesser extent, it might be possible for one person to possess more or less of a human right. It would be prejudicial, as well as futile, to attempt to settle such issues by mere definition. The proper function of definition is to clarify, not to beg, the question. My question can now be reformulated as follows: What is the relation between the justice of a society, and of its acts and institutions, and the moral rights individuals possess as human beings?

Some philosophers may believe that social justice and human rights are logically connected because they assume that the concept of justice is implicit in the very concept of a moral right. Indeed, Hugo Grotius defines «a right» in terms of justice.

Jus, Right, has another signification, derived from the former, as when we say *my Right*. In this sense Right is a moral quality by which a person is competent to have or do a certain thing justly (pp. 4-5).

The former signification of «Jus», from which the concept of a right is said to be derived, is that of what is right, meaning not unjust or not contrary to the law of nature (Grotius, pp. 3-4). This definition explains how the possession of a moral right can make morally permissible actions that would otherwise be impermissible. Thus, to say that a soldier has a right to kill an enemy combatant in time of war might be to say that he is in a moral position to do so without violating the moral law and,

therefore, that the soldier's act of killing is not, in contrast to acts of murder, morally wrong. This seems to capture the weak sense of «a right» as a liberty, but it fails to explain how or why a right typically imposes duties upon second parties.

One might try to solve this problem by defining a claim-right, or a right correlative to an obligation, in terms of the third sense of «Jus» Grotius distinguishes, that of what is right as obligatory, not merely permitted by but required by justice or the natural law (p. 9). For example, to say that a soldier has a right not to be killed after surrendering might be to say that justice imposes a duty upon others, especially his captors, not to kill him after he has surrendered and thrown down his arms. To my mind, there are two weaknesses in this attempt to save the conceptual analysis of rights in terms of justice. For one thing, it takes the language of rights to be fundamentally ambiguous, for it defines liberty-rights in terms of what is permitted by justice and claim-rights by what is required by justice. In the absence of compelling linguistic evidence of ambiguity, a univocal definition is more plausible, as well as more useful in the formulation of any general theory of rights. For another thing, to define rights in terms of liberties and duties only is to omit powers and immunities from the concept of a right. But one cannot explain what it means to say that a right-holder waives, alienates, claims or forfeits a right without recognizing such power-related aspects of the language of rights.

Moreover, the reasoning underlying the attempt of Grotius to define rights in terms of justice is deeply flawed. He presupposes that moral rights are conferred by the natural law and that justice is determined by the natural law. Now these assumptions may, if properly understood, be true. But they do not necessarily imply that rights can be defined by justice. H. L. A. Hart has argued convincingly that not every moral code would confer rights. If the natural law is thought of as analogous to the Ten Commandments, it would impose obligations but not confer rights (p. 182). Therefore, even if both moral rights and moral duties do arise from the natural law, moral rights arise from some special part or aspect of the moral law, not from natural law as a whole. Similarly, justice, in the strict

sense of that term, is determined by its entire breadth. Aristotle insisted, and Grotius admitted (p. 9), that justice proper is only a limited part of morality. Hence, the assumption that both rights and justice reflect the natural law, even if true, does not imply any necessary connection between them, for they may be grounded in different parts of that law.

Is there any reason to suppose that rights and justice arise from the same part or aspect of the natural law? Perhaps. As Hart and others have pointed out, the concept of a right is an essentially distributive concept (pp. 178, 180), in contrast to aggregative concepts like that of social utility. My right to life is quite distinct from your right to life, but my welfare and your welfare become indistinguishable in the sum total of the welfare enjoyed in our society. The concept of justice is also an essentially distributive concept, for justice seems by its very nature to concern the distribution of burdens or benefits, not the sum total of burdens or benefits. But I cannot see how this implies that the expression «a right» must or even can be defined in terms of justice. What does seem to follow is that the allocation of rights, however defined, to the members of any society ought to be governed by the principles of justice, whatever these may be. This is a normative, rather than a logical or conceptual, connection between rights and justice. We should, I conclude, abandon the effort to define moral rights in terms of justice.

While Grotius paid too little attention to the special nature of justice as only one limited part of morality, John Stuart Mill based his conception of justice squarely upon this insight.

It seems to me that this feature in the one case—a right in some person, correlative to the moral obligation—constitutes the specific difference between justice, and generosity or beneficence. Justice implies something which it is not only right to do, and wrong not to do, but which some individual person can claim from us as his moral right (p. 61).

If any such definition of justice in terms of rights is correct, there may be, after all, a logical connection between social justice and human rights. Let us, therefore, examine this proposal very carefully.

Mill's underlying reasoning is that justice can be defined in

terms of rights because the duties of justice are perfect duties and what distinguishes them from the imperfect duties of charity is that they are correlative to a claim-right of some second party.

In the more precise language of philosophic jurists, duties of perfect obligation are those duties in virtue of which a correlative *right* resides in some person or persons; duties of imperfect obligation are those moral obligations which do not give birth to any right. I think it will be found that this distinction exactly coincides with that which exists between justice and the other obligations of morality (p. 61).

I suggest that this way of thinking about justice is mistaken on at least two counts. Not every duty of justice is a perfect obligation. For example, each member of society has a duty to strive to eliminate, or at least reduce, the injustices found in the institutions of his or her society and to work greater justice in its legal, economic and political systems. But there are a wide variety of ways in which one may fulfill this duty of justice, just as one has discretion as to how he or she fulfills the duty to contribute to charity. Moreover, according to Mill, justice demands only that one respect the claim-rights of all second parties, but in fact justice also requires that individuals and societies respect liberty-rights, power-rights and immunity-rights as well. For example, a society that denies racially mixed couples the liberty-right to marry or denies to any couples the immunity-right to freedom from having their marriages arranged for them by their relatives is unjust. It may even be, as some moral philosophers argue, that a society that denies same-sex couples the power-right to marry is unjust. In any event, we cannot explain the stringency of duties of justice by defining justice in terms of claim-rights.

Indeed, any analysis of justice in terms of rights is ruled out by counter-examples. There are many violations of rights that are not unjust. As David Lyons reminds us

When we are not riding our favorite philosophical theories, we do not hesitate to speak of rights to life, to liberty, to security of person, and so on. Such rights can be violated or infringed—by killing, hindering and coercing, assaulting, stealing—but it does not seem to follow, nor does it seem to be true, that the victim is thereby done an injustice. He may be wronged, but not all wrongs against particular persons are injustices (p. 17).

Similarly, individuals very probably have a human right not to be tortured, but violations of this right, whether by society or other individuals, are not necessarily unjust in the strict sense. Such acts are morally wrong because they impose intolerable suffering, not because they are unfair to their victims.

Conversely, there are many injustices that are not violations of rights. One reason is that rights typically involve discretion. Therefore, if the right-holder chooses to accept unjust treatment, he or she has the option of waiving any threatened right so that the injustice is not a violation of that right. I treat my wife unjustly if I refuse to do my share of household tasks even though she also pursues a full-time career. Yet if she waives her right that I do my share of the chores, perhaps because she loves me in spite of my selfishness, then I do not violate her right by my unjust treatment of her. Again, the parent who consistently gives fine and expensive gifts to the other child treats the latter unjustly even though that child may have no right to be given any gift at all, much less a costly present. Hard cases like these show that one cannot establish any logical connection between social justice and human rights by defining justice in terms of rights.

There are, however, other ways of conceiving of the relation between social justice and human rights. Although Gregory Vlastos, like Mill, defines justice in terms of rights, he does not use this definition in his reasoning to establish the central place of human rights in social justice. Instead, he begins with the thesis that social justice is fundamentally equalitarian. He reminds us that the great historic struggles for social justice have focussed upon some demand for equal rights, for example, the struggles against slavery, political absolutism, economic exploitation, the disenfranchisement of the lower classes and women, colonialism, and racial oppression. Nevertheless, justice does not demand complete equality. It is not unfair for the general to have authority over the private or for the legislator to have more political power than the ordinary citizen. The same justice that requires equal pay for equal work also requires that those who work longer, harder or better earn more than their coworkers. But how is this possible?

An equalitarian concept of justice may admit just inequalities without inconsistency if, and only if, it provides grounds for

equal human rights *which are also grounds for unequal rights of other sorts* (p. 40).

The problem, of course, is to find some reason for the equality of human rights that is also a reason for the inequality of other rights.

The ultimate ground of social justice, according to Vlastos, is the equal human worth of all persons, a worth measured by the equal value of each individual's (1) wellbeing and (2) freedom. He then argues that

(3) One man's (*prima facie*) right to well-being is equal to that of any other, and (4) One man's (*prima facie*) right to freedom is equal to that of any other. Then, given (4), he could see how this would serve as the basis for a great variety of rights to specific kinds of freedom: freedom of movement, of association, of suffrage, of speech, of thought, of worship, of choice of employment, and the like. For each of these can be regarded as simply a specification of the general right to freedom, and would thus be covered by the justification of the latter. Moreover, given (3), he could see in it the basis for various welfare-rights, such as the right to education, medical care, work under decent conditions, relief in periods of unemployment, leisure, housing, etc. (p. 52).

Thus, social justice requires specific sorts of equality because it is grounded in equal human rights. At the same time, it permits other sorts of social inequality because the equal human worth of all persons also entails unequal rights of other sorts. For example, it is precisely because persons have *equal* rights to well-being and freedom that, given the special factual circumstances of distributing praise for merit, their right to this particular good is *unequal*. Along similar lines one may argue that differences in economic reward, economic power, and political power are justified by equalitarian justice. Accordingly, Vlastos explains that the relation between social justice and human rights is that equalitarian justice is grounded primarily on equal human rights.

Gregory Vlastos represents a venerable tradition that grounds demands for social equality upon human rights. The American Declaration of Independence, the French Declaration of the Rights of Man and the Citizen, and the United Nations

Universal Declaration of Human Rights all begin with pronouncements of human equality formulated in terms of natural or human rights. One can readily appreciate the logic of basing arguments against social inequalities upon human rights, for if every human being does possess certain fundamental moral rights simply as a human being and if these rights really are equal as well as universal, then political, economic, sexual or racial discrimination against any group of human beings must be unjust.

Nevertheless, one must ask whether social justice is *essentially* equalitarian. That is, is respect for the equal rights of all individuals exhaustive of social justice? I believe not, for we must not forget the social relevance of what Joel Feinberg has called noncomparative justice.

When our task is to do noncomparative justice to each of a large number of individuals, we do not compare them with each other, but rather we compare each in turn with an objective standard and judge each (as we say) «on his merits». It follows that equality of treatment is no part of the concept of noncomparative justice, even though it is, of course, a central element in comparative justice. If we treat *everybody* unfairly, but equally and impartially so, we have done each an injustice that is, at best, only mitigated by the equal injustice done to all the others (p. 268).

It is, for example, unjust to punish an innocent person. But this is not because it is unfair to treat this innocent person less well than the society treats other innocent persons; it is in and of itself unfair to punish this individual for a crime he or she has not committed. Suppose, to take a closely related example, a society has a legal system with rules of criminal law and punishments for violations of these legal rules, but that its courts, if one may call them that, make no provision for due process or fair trials. They might, let us imagine, throw dice to determine guilt or use a quota system so that the first fifteen individuals indicted each day are convicted and all others declared not guilty. Would the fact that every member of the society is equally subject to this legal system guarantee that there is no social injustice here? I think not. Again, consider a society that ignores the requirements of due notice so that welfare benefits are universally terminated without any opportunity

for the individual recipient to appeal and receive a fair hearing. Once more this equality of treatment constitutes a grave social injustice. It is clear that equalitarian justice is only a part of social justice in its full complexity.

Moreover, I doubt that the injustice of unequal treatment is always grounded on a failure to respect the equal rights of those affected. It may well be, as Vlastos could argue, that to allocate less police protection to black neighborhoods than to the white suburbs is unjust because it is a violation of the equal human right of blacks to security of the person, but this sort of argument seems inapplicable to a society that allocates less mail service to black neighborhoods, say a community in which mail is delivered to the suburbs every day but to the areas in which most blacks live only three times each week. Neither blacks nor whites have any moral right to public mail service; there is nothing unjust in a society where postal service is provided by private businesses. Thus, this sort of unequal treatment is not unjust because it is in violation of equal rights. Where there are no rights to service, there are no equal rights to service. Nevertheless, this is a clear instance of a social injustice. Again, although one might be able to explain the injustice of discrimination against blacks or unmarried mothers in public welfare programs as a failure to respect the equal human right to social security of all individuals, one cannot explain the injustice of discrimination against black artist in public subsidies for the arts or discrimination against female researchers in awarding National Science Foundation grants in this manner, for applicants to such programs have no right to these forms of financial assistance.

Vlastos might reply, however, that in these instances the racial or sexual discrimination is unjust because it is a violation of the human right to equitable treatment. But this reply, even if true, does not meet my objection to his theory. For one thing, this reply appeals to the right of each individual to equal treatment rather than to the equal rights of the several individuals affected by the social action, policy or institution in question. That is, it appeals to a human right to equality rather than to equal human rights. For another, equitable treatment is essentially just treatment. Hence, to appeal to *this* right presup-

poses some standard of justice in terms of which this right is defined. It would be circular reasoning to then attempt to ground justice upon this right to justice.

Finally, it is a serious error to imagine that social justice demands respect for human rights only. Indeed, social justice has a special concern for rights that are not universal to all humans as humans but special rights conferred by social roles, e. g., one's rights as a wife or husband, as a dependent child, as a judge, as a property owner, and especially as a citizen. It is a gross social injustice to deny the vote to blacks, women or the impoverished. But the right to vote is a civic, not a human right; it is a right that any individual possesses, not as a human being, but as a member of society. Hence, there is no social injustice in refusing to allow nonresidents equal opportunities to vote in one's society. An important part of the demand for social justice in modern societies has been the demand for social security. Even the United Nations half-recognizes that it is a mistake to ground this aspect of social justice upon a human right. Article Twenty-two of the Universal Declaration of Human Rights reads in part, «Everyone, as a member of society, has a right to social security...». Thus, even when social justice is grounded on a fundamental moral right, this need not be a human right. Another species of moral rights, and one more specifically relevant to social justice, consists of civic rights, those moral rights the individual possesses as a citizen, as a member of a given society. Vlastos unduly restricts the range of moral rights that bear crucially upon social justice. There is a deeper wisdom in the French Declaration of the Rights of Man and of the Citizen. Article Nine affirms the right of «every man» to be counted innocent until he has been convicted, but Article Fourteen asserts the right of «every citizen» to a free voice in determining the necessity of public contributions, the appropriation of them, and their amount, mode of assessment, and duration. Such civic rights are at least as relevant to social justice as human rights are, and lesser species of moral rights are not entirely irrelevant. I conclude that the attempt to ground social justice exclusively on human rights must inevitably fail.

We are left, it would seem, with one remaining obvious

alternative. Since social justice is not grounded on human rights, perhaps human rights are grounded on social justice. In one brief passage, John Rawls himself hints darkly at such a view.

Thus justice as fairness has the characteristic marks of a natural rights theory. Not only does it ground fundamental rights on natural attributes and distinguish their bases from social norms, but it assigns rights to persons by principles of equal justice, these principles having a special force against which other values cannot normally prevail (p. 506n).

Charles Beitz explicitly adopts and defends the thesis that human rights are grounded on social justice.

According to the social justice model, human rights are entitlements to the satisfaction of various human interests that would be guaranteed to members of a group by principles of social justice roughly in Rawls's sense: principles of justice express the conditions under which social institutions may be regarded as morally legitimate, and these conditions, in the first instance, have to do with the manner in which a society's basic institutional structure distributes the benefits and burdens of social cooperation (p. 59).

It is, however, Rex Martin who, in *Rawls and Rights*, has most systematically explained the way in which human rights might be grounded on social justice within a Rawlsian theory.

This sort of theory has considerable plausibility. Since the concept of a human right is a essentially distributive concept, it might seem that the appropriate sort of ground would be the principles of social justice that determine how burdens and benefits ought to be distributed among the individual members of a society. There are additional reasons to adopt a Rawlsian approach to human rights. All the great human rights documents, and the declarations of natural rights that preceded them, are essentially political statements addressed to governments and calling for social reform. Moreover, the content of human rights, at least if the most influential formulations can be trusted, are essentially social. Witness the titles of the two conventions that spell out in more detail the interpretation and practical significance of the various rights affirmed by the United Nations —the International Covenant on Economic, Social

and Cultural Rights *and* the International Covenant on Civil and Political Rights. All five categories of rights mentioned are essentially social. It is no wonder that Rex Martin can conclude at one point:

This brings us back to the main contention that I have tried to advance in this section; namely, that for Rawls, basic moral rights —natural rights— are basic structure rights (and in that sense constitutional rights) (p. 40-41).

Yet it is, in part, because this conclusion does seem to follow from a Rawlsian approach that I reject that approach. Since human rights are a species of moral rights, they must be distinguished from every species of institutional rights, even constitutional rights. Indeed, constitutional rights are often, although not always, grounded on and intended to protect more fundamental human rights.

There are, however, more compelling reasons to reject any attempt, whether Rawlsian or not, to ground human rights on social justice. These reasons reflect the incongruity between *human* rights and *social* justice. Social justice, at least if thought of in the usual manner as determining the just distribution of burdens and benefits within a society, could not ground a specifically human right. This is because the principles of just distribution within a society apply to the individual members of any society, not as human beings, but as members of that society. Charles Beitz makes this explicit.

Because the social justice model recognizes that some rights find their philosophical foundation in certain characteristics of human social cooperation, it can explain the basis of (at least some of) those human rights which do not belong to persons as persons, but rather belong to persons because of the social relations in which they stand (p. 59).

Accordingly what level of income constitutes an adequate standard of living or which forms of social security benefits are called for will vary from society to society. This explains, he concludes, how problematic human rights such as the right to an adequate standard of living or the right to social security can be genuine human rights in spite of the very limited resources of nonaffluent societies.

To my mind, he, and others who think in these terms, have drawn an inappropriate conclusion. The correct conclusion is that many of the rights affirmed in the Universal Declaration are really not human rights at all but are and ought to be accepted as civic rights. It is civic rights, fundamental moral rights one possesses as a citizen or member of a society, that might be grounded on social justice. One would be wise, however, to draw a second conclusion, also. Social justice is not limited to the distribution of burdens and benefits within a society. A society can treat visitors, aliens and foreigners fairly or unfairly. Any society can and should give visitors accused of crimes a fair trial, have a fair immigration policy and treat enemy soldiers with justice, even if not always with mercy. Hence, one needs a broader conception of social justice than Beitz offers us.

Another reason to reject every attempt to ground human rights on social justice is that this would preclude their direct relevance to interpersonal contexts. If human rights were grounded upon social justice, even if broadly conceived and in non-Rawlsian terms, they would apply directly and in the first instance to the society and only indirectly and through its institutions to those individual persons affected by those social institutions. Rex Martin makes this implication explicit.

In talk of specifically human or natural rights, it is assumed that human beings live in societies. The goods that are identified in claims-to are here conceived as goods obtained and enjoyed in a social setting. That is, such goods are conceived as provided peculiarly or especially through life in a society. They are not, in short, thought to be attained principally, if at all, on a mere individual-person-to-all-others basis (p. 36).

He offers two sorts of evidence to support this way of interpreting human rights. All the great human rights manifestoes are addressed to governments in particular, and the content of specific human rights is essentially social.

I do not believe that he has proved his case. It is true that the great natural rights and human rights manifestoes do focus on social issues. But this is because they are polemical documents written for political purposes, such as to justify the American Revolution or to provide a moral standard for the United Nations, and not because of the nature of human rights *per se*.

Again, although it is true that some human rights do, because of their content, apply primarily to social contexts, this is not true of them all. The rights to a fair trial or to equal protection of the laws do apply directly to the society and its institutions and only indirectly to the human individuals affected by those institutions. But other human rights, such as the rights to life, security of the person, and privacy, hold «against the world». These human rights apply just as directly to individual second parties as to governments or to private organizations. This direct relevance of many human rights to interpersonal confrontations cannot be explained by any theory that would derive those rights from social justice. We must, therefore, abandon every attempt to ground human rights on social justice.

When all is said and done, what is the relation between social justice and human rights? The most obvious conclusion we have reached is negative; there is no single simple relation between them. Rights cannot be defined in terms of justice, nor can justice be defined in terms of rights. Social justice is not based exclusively upon human rights, and human rights are not grounded on social justice. Although this negative outcome of our philosophical inquiry may seem disappointing, it is important because it disabuses us of the common presupposition that social justice and human rights are necessarily and uniformly connected.

More positively, we may conclude that there are a number of separate and limited relations between social justice and human rights. Some, although not all, human rights are defined in terms of justice because of their specific content. These include the right to a fair trial, more broadly, the right to due process, and probably the right to equitable treatment. Human rights do hold against society, although not exclusively so, and among the most important duties of social justice are those obligations imposed by respect for human rights. An important aspect of social justice is equalitarian, the demand that society respect equally the human rights of all persons, citizens and noncitizens alike. This is one ground, although not the only one, for objecting to racial, religious, sexual, political or economic discrimination by any society. Several fundamental moral rights grounded on social justice are misconstrued as human

rights. Actually, rights such as the right to social security, the right to participate in the government of one's society, and the right to equal opportunity are civic rights, moral rights the individual possesses as a member of a society. In short, the reality is more complicated and less neat than our theories have led us to believe. As philosophers and jurists we must work together to achieve a fuller and richer understanding of the several relations between the justice of a society and the moral rights individuals possess as human beings.

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