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RIGHTS, LIBERTIES, FREEDOMS: A REAPPRAISAL*

CARL J. FRIEDRICH

Harvard University

When President Roosevelt proclaimed the "Four Freedoms" in 1941, he accepted a new conception of human rights far removed from the natural rights of the seventeenth and eighteenth centuries. The conception of rights which inspired the British Bill of Rights (1689), the Declaration of Independence (1776) and the Declaration of the Rights of Man and Citizen (1789) is grounded in simple natural law notions.¹ Man was believed to have a fixed and unalterable nature, to be endowed with reason, which gave him certain rights without which he ceased to be a human being. These natural rights, summed up in the Lockean formula of "life, liberty and property" (later broadened to include the pursuit of happiness),² were largely concerned with protecting the individual person against governmental power. Each man

was seen as entitled to a personal sphere of autonomy, more especially of religious conviction and property; the inner and the outer man in his basic self-realization and self-fulfillment. These rights depended in turn upon the still more crucial right to life—that is to say, to the self itself in terms of physical survival and protection against bodily harm. This right to life was recognized even by absolutists, like Thomas Hobbes. It was believed immutable, inalienable, inviolable. Locke exclaimed at one point that these rights no one had the power to part with, and hence no government could ever acquire the right to violate them.³

In the course of the nineteenth century it gradually became clear that such rights were not something absolute and unchangeable. As the rationalist beliefs of the preceding age acquired historical perspective, rights were recognized as constitutionally created and guaranteed. Comparisons of different "bills of right" reinforced the conviction that such

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¹ Carl J. Friedrich and Robert G. McCloskey, *From the Declaration of Independence to the Constitution—The Roots of American Constitutionalism* (1954); Carl J. Friedrich, "Rights, Liberties, Freedoms," *University of Pennsylvania Law Review*, Vol. 91, pp. 312 ff. (1942).

² Carl L. Becker, *The Declaration of Independence* (1922); Ursula M. von Eckhardt, *The Pursuit of Happiness* (1959). It continues to be the concept of many; e.g., Mr. Justice Hugo L. Black, in his recent contribution to a collective volume entitled *The Great Rights* (ed. Edmond Cahn, 1963), speaks of rights as provisions that "protect individual liberty by barring government from acting in a particular area or from acting except under certain prescribed procedures." (p. 43) That was precisely the formula of the French *Declaration* of 1789; it animates the British and American tradition of the seventeenth and eighteenth centuries throughout.

³ From the vast literature on human rights, the following might be selected: H. Lauterpacht, *International Law and Human Rights* (1951); B. Mirkine-Guetzevitch and M. Prelot, "Chrestomathie des Droits de l'Homme," *Politique* (1960), containing a number of essays of historical and comparative outlook; Zechariah Chafee, Jr., *Three Human Rights in the Constitution* (1956); the same: *How Human Rights got into the Constitution* (1952); Chafee has also published a collection, *Documents on Fundamental Human Rights* (3 pamphlets, 1951-52); Roscoe Pound, *The Development of Constitutional Guarantees of Liberty* (1957); in 1959, a report was published of the United States Commission on Civil Rights and an abbreviation of it under the title *With Liberty and Justice for All*—this report concentrates on voting, education and housing, i.e., in our terminology, one civil liberty and two social rights or freedoms.

rights varied from time to time and from place to place. Their adoption was seen as not merely an act of recognizing them, but of formulating and establishing them. To be sure, such a view was to some extent anticipated in the English and French revolutions at the height of revolutionary agitation, and the citizen's participation in government was, of course, a key claim from the outset. Natural rights thus gradually were transformed into "civil liberties," the range of activities of the citizen. This transformation was, of course, closely linked to the forward march of democratization, and a marked shift in the assortment of such rights occurred, as the right to vote and participate in government and public policy formation became generally recognized and extended to the underprivileged and to women. The freedom of religion became broadened into one of conviction; and academic freedom, the freedom to teach and to learn, was recognized even in countries like Germany and Austria-Hungary, where such participation was restricted. In the more advanced democratic countries, those rights which served the political function of better enabling the citizen to participate—freedom of the press, of assembly and of association, often summed up in the general freedom of expression—moved into the foreground of attention, while the right of property was subjected to restrictions and limitations arising from the widely felt need for greater social control and for restraining the concentration of economic power.

These civil liberties, vigorously advocated by progressive forces, often seemed to transcend the individual and his personal interest to such an extent that groups were brought into being, such as the American Civil Liberties Union, which lent their organized support to the defense of individuals otherwise unable or unwilling to protect themselves. Civil liberties were the key issue of such writings as John Stuart Mill's *Liberty*—the classic statement of the libertarian doctrine in terms of social utility. Liberalism in its broadest connotation was the belief in these civil liberties and in the need for constitutionally protecting them.⁴ This belief became, of course, associated with a great many more specific issues, political, economic and social, and it is therefore possible to see these rights merely as rationalizations for a

class interest, as Marx was inclined to do. Such an interpretation underlies the conception of rights in Communist states, as shown below. As against this one-sided analysis—for it contains an element of truth—the notion of civil liberties was grounded in the conviction that freedom required social and political organization which would overcome both natural and man-made obstacles to the realization of individual freedom. Bentham's view of democracy as the way to have all individuals participate in shaping the conditions of such freedom influenced (as it represented) a widespread belief.⁵

Freedom of independence was being crowded by freedom of participation. This freedom of participation was actually the older of the two. In the Greek cities it was this freedom rather than that of a personal sphere which had inspired such noble utterances as Pericles' Funeral Oration. The freedom of self-determination of "peoples" which the Draft Covenant of the Human Rights Convention of the UN proclaims in its article 1 (though it is not included in the Universal Declaration) is a modern version of this ancient freedom of classical Greece; the freedom of each man to live under a government belonging to the same national group as his own, as well as to participate therein. One must not allow oneself to be misled by the collective form of this freedom to exclude it from the civil liberties. It is the civil liberty *par excellence*⁶ and closely related to the freedom of participation and its collaterals. That this freedom may collide with and at times even negate other freedoms is undoubtedly true. But there are and always have been conflicts of principle between different liberties. The interpretation of constitutional provisions concerning rights by judicial bodies has had to weigh and balance conflicting claims of priority. Unless one were to construct a rigid hierarchy of these rights, or liberties, culminating in one highest and most important one, any broad recognition of rights will have to accept their pluralism, the fact that their relation and interdependence will evolve as concrete situations are confronted by courts and legislatures—in short, their pluralism. If it is argued that the

⁵ Maurice Cranston, *Human Rights* (1963); cf. also Leonard Krieger, "Stages in the History of Freedom," in *Nomos*, IV (1962), for perspective.

⁶ Cranston, *op. cit.*, does not wish to admit this, and argues to the contrary. A similar position is adopted by Isaiah Berlin, *Two Concepts of Liberty* (1958), p. 44–45, who calls it a "hybrid form of freedom." Actually, it was already recognized during the French Revolution, following Rousseau.

⁴ John Stuart Mill, *On Liberty* (1861), and volume V of *Nomos*, entitled "Liberty" and devoted to an exploration of Mill's thought; note also that the definition given is of course not meant to be exhaustive one; cf. my *Constitutional Government and Democracy* (1959), pp. 428 ff.

personal rights of the inhabitants of former colonial territories were or are more firmly protected by the colonial power, say by contrasting Hong Kong and Ghana, or Morocco before and after French domination, the answer will be that the right of self-determination is a paramount right which by many persons today is placed ahead of all personal rights.⁷

The civil liberties, including the right of self-determination, have, however, in the twentieth century been rivaled not only by the older personal rights, but also by the *freedoms* suggested in the Rooseveltian proclamation and embodied in quite a few of the postwar constitutions as well as the United Nations' Universal Declaration of Human Rights.⁸ These new freedoms are rights of an economic and social character which characteristically involve collective and more especially governmental effort. Among them are the right to social security, to work,⁹ to rest and leisure, to education, to an adequate standard of living, to participation in cultural life, and even to an international order ensuring these rights. Some of these rights which have come into prominence in the twentieth century actually appeared among other "natural" rights at an early date. Thus the French Declaration of May 29, 1793, declared in its article 22 that "education is the need of all and society owes it equally to all its members." This declaration also clearly faced the need for government action; in its article 24 it asserted that the national sovereign (*i.e.*, the people) must guarantee their enforcement. But the emphasis at that time and especially after the revolutionary fervor had subsided was upon the rights *against* the government and as the

nineteenth century progressed toward democracy, upon the rights *within* the government.¹⁰ Only in the twentieth century has the full significance of these social and economic rights become manifest. Such rights are obviously not protecting the individual against the government or other powerwielders, but call upon the public powers to see to it that such liberty as man possesses by himself is implemented by another set of freedoms which in contrast to those of independence and participation may be called freedoms of creation. They are rights which provide man with the freedom from fear and the freedom from want; that is to say, they liberate him from restrictions and inhibitions which hinder his full development as a human being. While radically different from the older freedoms, they are nonetheless rightfully claimed for all men *qua* men. When Anatole France wrote his bitter quip about every Frenchman's equal freedom to sleep in the open under the bridges over the Seine, he was asking for such implementation. It is no longer permissible to brush these rights aside as less basic than the earlier ones, or to question them because of the difficulty of effectuating them. All rights contain norms, and all norms fall short of their enforcement—if it were otherwise, why would norms be needed? No one insists that the law that all men must breathe be enforced by appropriate enactments. It is unwise to ridicule these economic and social rights, because at times the drafters of such bills are carried away by their humanitarian enthusiasm and provide for "periodic holidays with pay" or for "enjoying the beauties of nature."¹¹ Such extravaganzas are recurrent in the elaboration of principles. The constitutions of American states offer many illustrations. The validity of a principle is not invalidated by its over-extension, although such *reductio ad absurdum* is a favorite tool of political oratory.

Nor is it true to say that these rights are propounded by enemies of the established order, that the social rights, especially those associated with the freedom from want, are "Communist" or "Unamerican." Actually, Marx and Engels had little use for the tradition of natural or any other rights, which they considered a bourgeois prejudice. The adoption and incorporation of them in the "constitutions" of Communist states is part of the general function of such constitutions: to provide a facade of principles. All constitutions have, of course, this

¹⁰ In *The Great Rights*, ed. Edmond Cahn, 1963, the distinguished authors still largely operate with that notion, esp. Justice Black.

¹¹ Art. 24 of *Universal Declaration*.

⁷ Cranston, *op. cit.*, pp. 66 ff.

⁸ Arts. 22-28.

⁹ The right to work is actually not new; it was explicitly urged even before the French Revolution by Turgot who in the *Edit sur l'abolition des jurandes*, 1776, wrote: "Dieu, en donnant à l'homme des besoins, en lui rendant necessaire la ressource du travail, a fait du droit de travailler la propriété de tout l'homme, et cette propriété est la première, la plus sacrée et la plus imprescriptible de toutes." It appears in Robespierre's proposal of a restatement of the *Droits de l'homme et du Citoyen* of April 24, 1793. See for these texts "Chrestomathie des Droits de l'Homme," in *Politique—Revue Internationale des Doctrines et des Institutions*, 1960, Nrs. 10-13, pp. 179-80 and 248. The classic *Declaration* is reprinted there on pp. 246-249. In this collection is also found the next *Declaration* of 1793. Cf. also the discussion, *op. cit.* by McCloskey and myself, on the American rights.

function to perform and there is no gainsaying their role as myth. Still, the elaboration of these social rights in traditional constitutions was and is the result of protracted struggles by particular groups and minorities for equality and freedom. These rights, far from being "Communist" or "Unamerican," represent a response to a new and different situation of men frustrated by technological innovation and the like. Unfortunately certain Congressmen saw fit to engage in this kind of misleading oratory, when they persuaded the House of Representatives at the time when Puerto Rico's new constitutional status was being debated, to strike these rights from the proposed constitution of Puerto Rico. It had been thought that the acceptance of the UN's *Universal Declaration* by the government of the United States would automatically make these rights admissible in the Puerto Rican Constitution. But the Congress insisted on having them eliminated, thereby causing serious opposition in the United Nations, when they were asked to recognize that Puerto Rico is self-governing. The Congressional action was also indefensible in view of the fact that numerous American state constitutions contain provisions granting one or another of these economic and social rights.¹²

To claim that these rights be considered "Communist" inventions is historically untrue and philosophically and legally unsound. The right to work goes back to the Great Revolution in France; a number of these rights, as just mentioned, have appeared in constitutions of the American states; and they are found in many constitutions of the period after World War I, more especially the Weimar constitution.¹³ Indeed, it has recently been argued that the formulation and enforcement of these newer human rights is a central concern of Western as much as Eastern, of non-socialist as well as socialist societies. Thus both Italy and the Federal Republic of Germany have included in their recent constitutions most of the economic and social rights which the *Universal Declaration* contains.

Recognizing these rights as true rights must not prevent their being seen as different from the older rights. In order to appreciate fully this difference between the three sets of rights, as evolved in the history of the last three hun-

dred years, it is necessary first of all to determine what they have in common. If one takes these three rights, the right to one's religious conviction, the right to vote and the right to work—three rights which illustrate the freedom of independence, the freedom of participation and the freedom of creation, invention and innovation—one finds that like the corresponding freedoms these rights are all related to enabling a human being to become a rounded self, a fully developed person. Not to be allowed to believe what one does believe, not to participate in choosing one's ruler, not to be active in the sphere in which one could produce and create anew—every one of these deprivations is readily recognized as de-humanizing, as crippling the man so afflicted and preventing him from being a person in the full sense. That it may be difficult to implement such rights, even after they are proclaimed, does not invalidate them, anymore than the failure to claim a right makes it disappear. The rights which the Negroes now claim in the United States have been theirs for a long time and their claims are based upon this very fact. Rights have an objective existence; they flow existentially from the recognized nature of man, as do the freedoms which correspond to them. For these freedoms are the manifestation of the power of human beings, of their capacity to put them to some account. There no doubt exists, as far as capacity goes, a wide range of difference between individual human beings; but all men are capable of religious conviction, of voting, of working—to stay with our illustrations. The fact that each of the rights may be expressed as a capacity, as a power of man to achieve self-realization, is the hard core of all rights. Hence we may say that the most comprehensive right is this right to self-realization which has also been simply called the right to freedom.¹⁴

¹⁴ This right is related to the freedom of self-realization, of course. This freedom was found, in the history of philosophy, to be one of three, the other two being the freedom of self-perfection and of self-determination; but we wish it to be understood to comprehend these other two to be included under it—for self-determination is involved in self-realization, looked at from the viewpoint of the acting self, and self-perfection is the special form which self-realization takes in those human beings who are capable of the convictional trust of a higher destiny. Cf. Mortimer J. Adler, *The Idea of Freedom*, vol. I (1958), pp. 606 ff., for the trichotomy. It has recently been interestingly commented upon by C. W. Cassinelli in an (as yet unpublished) study entitled *Freedom, Control and Influence: An Analysis* (1963),

¹² Carl J. Friedrich, *Middle Road to Freedom* (1959); Pedro Munoz-Amato, *Introduccion a la administracion publica* (1954-57).

¹³ Cf. Gerhard Anschütz, *Die Verfassung des Deutschen Reiches . . . ein Kommentar*, 14th ed. 1933, esp. pp. 505 ff. and the literature there cited.

Looked at in this perspective of the individual, rights appear to be either self-preserving, self-asserting or self-developing. Looked at in the perspective of the political order of the community, such rights are either rights apart from this political order of the community, rights directed toward the political order, or rights depending upon the political order (Rights A, B, and C). These classes of rights are not sharply delimited and cannot be precisely separated from each other. Consider, *e.g.*, the right of property which has undergone such a remarkable evolution in the course of the last 150 years.¹⁵ It may be seen as either of the three rights: to be protected from government interference (no taxation without representation) (Right A); to serve as the basis of voting (Right B); or for small business to be protected against unfair competition by big business (Right C). It is evident that the right to one's property, to the *sum* of the famous Roman triad, is a basic right, but property may involve anyone of the three kinds of rights. As a consequence, it is even in some Communist political orders beginning to be recognized as such.¹⁶

Another reflection will serve to reinforce the insight into this interconnectedness of the three kinds of rights. A right may be legally recognized and deeply felt by the person deprived of it; yet the deprivation may be caused by a non-governmental power-holder and -wielder. In this case, what appears at first to be a right apart from the political order may turn out to be a right depending upon the political order. This is typically the situation of underprivileged minorities, such as the Negroes in the United States. Still another facet of this interconnectedness may be seen in the early recognition of the right to education, at a time when generally prevalent thought dwelt on natural

rights of independence. Thus we find John Adams writing that "liberty cannot be preserved without a general knowledge among the people, who have a right, from the frame of their nature, to knowledge." This right to education, now generally included among the economic and social rights, and surely a right depending upon the political order, was even then by this conservative New Englander described as an "inherent and essential right," a right, that is, which was established "even before parliament existed."¹⁷

Often the rank order of and the distinction between the different rights is relative to the status of the particular person in the social order. Thus, the inherent right to an education is for a wealthy person a right *apart from* the political order, while for the poor one it is a right *depending upon* the political order. Thus a right to education may be recognized and yet not be effective in a community where much of the best education is offered in universities with very high tuition charges, unless scholarship funds are made readily available for underprivileged persons without discrimination. Much of the present struggle over desegregated educational opportunities for Negroes is similarly related to the neighborhoods in which Negroes live and where facilities are inferior to standards maintained elsewhere.

Thus the problem of Negro education is first of all one of equal facilities. Although rapid progress has been achieved toward the "closing of the gap," a great deal remains to be done, and it is a problem by no means restricted to the South. The issue transcends, however, that of facilities. To recall, the Supreme Court unanimously held "separate educational facilities are inherently unequal," because "to separate them [Negro children] from others of similar age and qualification solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be overcome."¹⁸ Not only in providing facilities

esp. ch. 1, III. Cassinelli retains, however, the trichotomy and does not develop the notion that self-realization comprehends the other two. Quite contrary to these prevailing views Isaiah Berlin, *Two Concepts of Liberty* (1958), p. 25 ff., would restrict "self-realization" to the concept of freedom of the idealist philosophers—it is really a form of the doctrine of self-perfection.

¹⁵ Cf. Gottfried Dietze, *In Defense of Property* (1963), argues for the return to an earlier conception.

¹⁶ Yugoslav Constitution, arts. 23, 25. Cf. also the commentary by Edvard Kardelj, "On the Principles of the Preliminary Draft of the New Constitution of Socialist Yugoslavia," in *The New Yugoslav Law* (1962), esp. pp. 16–17. In order to justify this, a distinction is being drawn between private and personal property.

¹⁷ Cf. Page Smith, *John Adams* (1963), vol. I, p. 79.

¹⁸ *Brown v. Board of Education of Topeka*, 347 U. S. 483 (1954), over-ruling the decision of *Plessy v. Ferguson* (1896), which had established the principle of equal but separate education. The situation existing under that principle is admirably analyzed and put into context by Gunnar Myrdal (with Richard Sterner and Arnold Rose), *An American Dilemma* (1944), ch. 41. Cf. also the discussion in *The Report of the United States Commission on Civil Rights* (1959), and the helpful abridgment entitled *With Liberty and Justice*

but in securing equal access to all schools, the government may have exacting responsibilities in enforcing the rights of the weaker against the stronger.

Such an active role of the government (state) is also recognized as needed in the economic sphere. The neo-liberals in Europe,¹⁹ like the progressives in the United States, have been stressing the importance of firm government action to cope with the threats to freedom and man's rights resulting from monopoly power. Beyond that, the government must be able to assert its authority when facing the interest groups that press upon it from all sides. Yet in granting the government this position of a powerful arbiter mediating the conflicts of interest, neo-liberals are not prepared to abandon their basically critical attitude toward it. Order and rule are needed to maintain freedom, but vigorous restraints are needed to contain the rulers within the bounds of a constitutional order which protects human rights.

Neoliberalism, by stressing the role of the government in the maintenance of freedom, contributes its share to an understanding of the fact that all rights are political in the sense of depending upon the political order for their maintenance and enforcement. They are political in the further sense of depending upon the values and beliefs of the political community which the order serves. Many of the newer rights are evidently the corollary of fairly recent developments; thus the right to work was only generally recognized when industrialization created large-scale unemployment. Still, it would be a mistake to make this the ground for asserting that this right only came into being at that point. Rather, the assertion of the right is rooted in the belief that it is part of man's nature to work and that therefore any situation which deprives him of fulfilling this natural propensity ought to be corrected.²⁰

This reflection reinforces the important insight already mentioned, that rights are characteristically normative in the sense that they reflect a tension between what is and what

ought to be. From this vantage point, it can be seen that a right is related to an aspect of human nature which is being inhibited or thwarted. Such tension may be felt by those who are the victims of such torts or they may not. But as already mentioned, whether they are or not, is not determinative. Established rights which have become conventional are often shrouded in forgetfulness until some dramatic issue projects them into the full glare of publicity. A recent case will illustrate the point. The Massachusetts Supreme Judicial Court held illegal and unconstitutional a practice connected with special taxes on liquor and consisting in the state police stopping cars and searching them for various items of merchandise. This practice, justified in the name of law enforcement, was a flagrant violation of the right of privacy, more especially the right to be protected against searches and seizures without judicial warrant. The court in its opinion added that a warrant must be specific, name the person and specify the grounds of reasonable suspicion in the particular case. For many people, it was news and good news that they possessed this right.²¹

The failure of men everywhere to appreciate the rights which they possess, or indeed to know about them, creates great obstacles to their enforcement. For unless complaint is made and insisted upon, the law enforcement authorities are likely to let sleeping dogs lie. It has been argued, as to conditions in the United States, that "individuals have less and less recourse to any corrective remedy against those who hold positions of power."²² Such a view probably exaggerates the sound point that serious injustice may develop and continue to prevail because of the ignorance and indifference of the underprivileged. A poll in Puerto Rico disclosed that only a small percentage of the people knew what were their rights; similar conditions have been found to exist in India, Germany and elsewhere.²³ Likewise, many other Americans, but more especially Negroes, do not appreciate the rights which they possess and could rightfully claim. For many generations since the civil war Negroes in many states

for *All* (1959), esp. Part III, pp. 101-137. The rapid progress which is being made in equalizing facilities can be gleaned from SERS, *Southern Schools: Progress and Problems* (1959), especially the valuable statistical material; cf. also the special issue of the *Harvard Educational Review*, Summer 1960, entitled "Negro Education in the United States."

¹⁹ For this movement and its literature see my article, "The Political Thought of Neoliberalism," in this *REVIEW*, Vol. 49 (1955), pp. 509ff.

²⁰ See footnote 9 above.

²¹ *Commonwealth v. Michael C. McCleary*, Nov. 29, 1962.

²² Justice William O. Douglas in *op. cit.* (Cahn ed.), p. 149.

²³ See *Comite del Gobernador para el Estudio de los Derechos Civiles en Puerto Rico, Informe al Honorable Gobernador del Estado Libro Asociado de Puerto Rico* (1959). The lack of knowledge in the United States is affirmed by Douglas in the paper just cited, p. 155.

have, for example, been prevented from exercising their right to vote. The hostile white authorities interfered with their registering. Since in a democratic society political representatives are in the habit of acting in response to their constituency, non-registration of Negroes proved the most effective method of silencing them. The ruthless and violent ways in which this deprivation was accomplished have been described many times;²⁴ the silent deprivation through ignorance and desuetude went more commonly unnoticed. By these means, the constitutional amendment forbidding all discrimination was blandly nullified.²⁵ The power resources of those Negroes who wished to insist upon their rights were not sufficiently developed to secure their enforcement. Recently, their organizations have been gaining sufficient strength to assert their right to vote as well as other rights with increasing determination. As a result, the United States government now finds itself obliged to enforce rights which it might, theoretically, have enforced long ago.

The consequences of ignorance and intimidation are even more serious, where all of the established government is violating or participating in the violation of human rights. Totalitarian governments apart, in many countries where rights, liberties and freedoms have only recently become constitutionally recognized, they have remained largely paper declarations. It might be invidious to mention particular instances, but not one of the countries which have adopted constitutions since the second

World War has a satisfactory record of enforcement of its constitutional bill of rights. Rare are the instances where the public has been ready to take a vigorous stand. The Spiegel affair in the German Federal Republic was significant primarily on this account. The public reacted so sharply against the infringement of the freedom of the press that the government had to drop the minister primarily responsible. The public's vigorous protest testified to the growing strength of constitutionalism in that country. The government's plea of the requirements of security, reminiscent of Milton's "necessity, the tyrant's plea," remained without a public echo, because of the lack of convincing evidence. No "clear and present danger" became apparent in what the government had to say.

A special aspect of this range of problems is the question of "states' rights" under federal systems. In these systems, the question of human rights, whether of broad or limited scope, is often argued in terms of a juxtaposition to states' rights. Especially in the United States, but also in relation to the United Nations *Declaration*, it is argued that the rights of individual men must yield to the rights of collectivities. There seems to be good ground for such an assertion, in so far as history has shown and daily experience confirms considerable variations in what are believed to be basic rights. Rights, we have seen, are closely linked to the conception of man in particular communities and it is for each political community to determine them in range and rank. But this argument is rather superficial. It fails to take into account the fact that any particular local manifestation of such rights is embedded in the broader and more basic conception of these rights as belonging to human beings as such. Thus the United Nations *Declaration* aspires to stating what is now universally recognized as part of the rights of all men, and the same may be said of the European Declaration for all Europeans. The argument applies *a priori* to all Americans who together constitute one political community. Local variations may be admissible within the broad context of such rights as flow from the freedom of expression, but they may not take the form of a denial of the right. In other words, states' rights cannot be pleaded against human rights within a federal system, except where the constitution explicitly permits local diversity. In case of doubt, the presumption must be in favor of the human right, because in the United States man is considered more important than the state.

But there are, of course, limitations to any right, especially that of possible hurt to an-

²⁴ This was perhaps never more vividly and movingly done than by Howard Fast in his historical novel, *Freedom Road*. Cf. also Paul H. Buck, *Road to Reunion* (1937), pp. 67ff.; 276ff.

²⁵ For a descriptive account, see V. O. Key, Jr., *Southern Politics* (1949), ch. 26. Amendment XIV, in the second sentence states: "No State shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States; . . ." Yet in spite of the imperative form of the language, such privileges and immunities (rights) have been abridged continually, and the efforts to secure a remedy through the courts and legislatures have been successful only to a very limited extent. The inherent difficulties have been analyzed rather persuasively by Jack W. Peltason, *Fifty-eight Lonely Men* (1962). Cf. also the judgment of Edmond Cahn that "... the Court . . . could have won much greater gains for human freedom . . ." *op. cit.* p. 8. The recently advanced claim that the XIV Amendment is invalid, because of the way it was voted is, to say the least, untenable, Cf. David Lawrence on Aug. 17, 1963.

other. As the United Nations *Declaration* puts it: "In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others . . ." ²⁶ Had the *Declaration* left it at that, there could have been little objection. Freedom has traditionally been seen as limited by regard for the rights of others. ²⁷ But actually, the *Declaration* adds another limitation which might and surely could nullify all effective rights. It goes on to say that the exercise of such rights is limited by "the purpose of meeting the just requirements of morality, public order and the general welfare in a democratic society." In view of the different conceptions of democracy, ranging from Swiss constitutional democracy to the totalitarian system of Mao's China, it is evident that such terms as public order and general welfare, not to mention morality, are so vague in their implications as to enable the rulers to justify any limitation they see fit to impose. Indeed, such vague limitations are apt to render rights nugatory. Bills of rights, under such regimes as the popular democracies, become purely declaratory and unenforceable; they constitute essentially declarations of the principles and goals which the regime wishes the world at large to believe them to be dedicated to. ²⁸ It is difficult to see what is to be the

²⁶ United Nations *Declaration*, Art. 29.

²⁷ Kant's formula is perhaps the most widely known, but it is also found in Locke and many others in similar forms; perhaps Kant's owes its fame to the explicitly imperative form: "Act so that . . ." *Die Metaphysik der Sitten* (Immanuel Kant's *Werke*, ed. E. Cassirer, vol. vii, Pt. I, Rechtslehre, Einleitung, p. 17.) Cf. also the comprehensive review by Mortimer Adler, cited above fn. 13. As a result, all attempts at stating the idea of freedom merely in terms of absence of restraints, impediments or interferences by others have always foundered upon the rock of a moral injection: freedom ought not be equated with license. However, unless the abuse of freedom is included, freedom is at the mercy of anyone's self-proclaimed notions on right use. This is the basic dialectic difficulty which Felix E. Oppenheim, *Dimensions of Freedom* (1961), seeks to deal with, as does Cassinelli in the work referred to above, fn. 13.

²⁸ Karl Loewenstein, *Verfassungslehre* (1959), pp. 153ff. has developed the notion of a semantic constitution; in analogy one could speak of "semantic" human rights. Cf. Giovanni Sartori, "Constitutionalism: A Preliminary Discussion," this REVIEW, Vol. 56 (December 1962), pp. 853-865 argues for the term "façade" constitution.

real meaning of a statement found in typical Soviet utterances such as the following: "The Soviet Constitution serves as the most important instrument of safeguarding the rights and interests of the Soviet citizens from any encroachment on the part of individual state agencies, officials, or citizens." ²⁹ This statement is immediately followed by an assertion of the function of the Soviet political order: to provide "the material conditions necessary for the realization of these rights." It is in keeping with this intermingling of state functions and personal rights that the plural is used in speaking of the citizen. Even more important is the stress upon combatting administrative abuses. The citizens presumably are thus believed to be protected against arbitrary and prejudicial actions of officers, rather than against the state itself. *Vis-à-vis* this state, the Soviet citizen can have no rights. In this sense, Soviet totalitarianism is the culmination of a trend of politics which found its most powerful expression in the philosophy of Thomas Hobbes. The impotence of the citizen in the Leviathan state—and is it not a misnomer even to call him a citizen rather than a subject?—is most manifest in his isolation, perpetuated in his inability to organize autonomously for any purpose whatsoever.

Hobbes is generally credited with having first made explicitly clear the difference between natural law and natural right. In a famous proposition, he argued against those who "confound *Jus*, and *Lex*, *Right* and *Law*." He pointed out "that they ought to be distinguished; because *Right*, consisteth in the liberty to do, or to forbear; Whereas *Law*, determineth, and bindeth to one of them ³⁰ . . ." Man's right to all things, even the dominion over his fellow men, is, however, limited by his lack of power, and he enters a political order, a commonwealth in order to have security and peace by "conferring all his power" upon one man or an assembly of men, unconditionally and without the retention of any rights, except that of life in the sense of physical survival; if that is threatened by the sovereign, man returns to his prior condition and presumably reacquires all his rights. Rights, then, in Hobbes's proper understanding do not exist, once the commonwealth has come into being and a sovereign

²⁹ A. I. Lepyoshkin (Moscow) "The Notion of the Constitution: Role and Significance of the Constitution of the USSR for the Political Life of Society," unpubl. paper prepared for IPSA conference at Freudenstadt, 1962, p. 15.

³⁰ Thomas Hobbes, *Leviathan* ch. xiv. Cf. also ch. xxxxi, where we are told that God's "rights of nature" are "derived from his irresistible power" and hence without limits.

exists. And yet, if one merely takes his original definition as a starting point, then in a constitutional order the rights appear as "liberties" defined by law, especially the constitution. Indeed, the Hobbesian starting point provides a suitable basis, an arguable common ground for the underlying similarity of rights, liberties and freedoms, as they historically have evolved. Absolute rights, that is rights independent of any political order, can only be possessed by an all-powerful being; even the sovereign has only those powers which are conferred upon him by agreement of the subjects among themselves,³¹ war and peace legislation, adjudication and so forth. More particularly, property is understood as the outcome of laws made by the sovereign and hence as politically established. But Hobbes, having defined a *natural* right as "the liberty each man hath, to use his own power, as he will himself, for the preservation of his own nature," forbids himself to consider anything a natural right except the right of self-preservation, once men have entered the communal political order he calls a commonwealth.

Very differently John Locke. He, too, would start with the right of self-preservation. In a famous passage in the *Second Treatise*, he argues that man cannot be supposed to have given up "what he does not have the power to part with," and therefore men have a right to preserve "this fundamental, sacred and unalterable law of self-preservation."³² Superficially, Locke's position seems no different from Hobbes's, but actually there is a great difference, and it lies in the different conception of the *self*. While in Hobbes this self is nothing but the bodily existence which man's fear of violent death is concerned with, Locke conceives the self as possessed also of a spiritual existence, manifest in his liberty and the property which includes all man's works. Hence the right of self-preservation ramifies into all those rights which the Bill of Rights of 1689 specifies, and the *constitution* becomes the bulwark of these rights, because it defines the powers of government and none of the established powers have any "manner of authority, beyond what is by positive grant and commission delegated to

them." If any of them transgress this their power, they must be forcibly removed; for "in all states and conditions the true remedy of force without authority is to oppose force to it." The ground for this vigorous assertion of man's basic rights is that "the use of force without authority always puts him that uses it into a state of war as the aggressor, and renders him liable to be treated accordingly."³³ It is in this sense that rights may be said to be inviolable. Their exercise may be prevented and thus people may find themselves incapable of exercising them, but they remain their rights just the same. In this perspective it becomes clear why rights depend for their effectualization upon the marshalling of appropriate power. It is precisely such marshalling of power which, for example, the organization of labor and of deprived racial minorities seeks to accomplish. In his by now famous *Letter from a Birmingham Jail*, the Rev. Martin Luther King, Jr. pointed out: "We have not made a single gain in civil rights without determined legal and nonviolent pressure. . . . We know through painful experience that freedom is never voluntarily given by the oppressor; it must be demanded by the oppressed."³⁴ Such demands are futile and ineffectual, unless they are organized demands; the power of the many lies in the capacity to organize. Although significant remedial measures may also be possible as a result of invoking the intervention of higher powers, these possibilities are limited even in the United States. When the federal government is being mobilized against state governments which fail to implement federally guaranteed rights, it is not always sufficiently powerful to be able to cope with the situation. In Europe, a court and commission have commenced to enforce human rights which particular governments may be inclined to disregard; it is of course, only a beginning.³⁵ It had been the expectation of some, that the United Nations' *Universal Declaration* would similarly by covenant be given effective enforcement machinery, but such hopes have been disappointed up to the present

³³ *Ibid.*, para. 155.

³⁴ The Letter of Rev. Martin Luther King, Jr. has been reprinted in various journals; I have used the reprint in *The New Leader*, July, 1963. There is a remarkable similarity between this letter and some of the arguments in James Baldwin's *Nobody knows my Name* (1954), esp. Pt. I, sections 3-6.

³⁵ D. P. Myers, "The European Commission on Human Rights," *American Journal of International Law*, Vol. 50 (1956); A. H. Robertson, "The European Court of Human Rights," *International and Comparative Law Quarterly* (1959).

³¹ *Leviathan*, xvii. Hobbes defines these powers by paraphrasing the traditional *jura majestatis*.

³² John Locke, *Two Treatises*, second Tr. para. 149. Cf. also my paraphrase in *Constitutional Government and Democracy* (1950), p. 130, where the issue of an "inherent" right is transformed by relating it to the constituent power. Leo Strauss, *Natural Right and History* (1953), obscures the sharp difference, because he identifies the self in Hobbes and Locke; they are quite different.

time.³⁶ In most cases, therefore, the fuller implementation of recognized rights depends upon the power individuals can marshal through organization, whether for the display of coercive power as in strikes, for the purpose of effective pleading before courts, for exerting pressure for needed legislation, or for securing remedial action in the administrative field. Hence, any political order which prevents individuals from organizing themselves for the defense of their rights *as they see them* is unlikely to provide adequate scope for the maintenance of such rights. The near impossibility of autonomously organizing groups of citizens in totalitarian orders testifies to the weakness of human rights in such states.³⁷

At this point in the analysis a re-examination of the issue of freedom would be in order, since it is the positive aspect of so many of the new rights. Time and space do not permit it here.³⁸ Suffice it, therefore, to suggest the following brief remarks about the nature of freedom. Generally speaking, the exercise of such capacities as a man has without interference from other men constitutes, to repeat, the quintessence of freedom. Such capacities may be large or small, but their exercise is intrinsic to each man's dignity. When, and to the extent that human beings, either individually or collectively, act politically, that is to say opine, prefer, and decide, create, innovate and invent things which are relevant to the political order, they may be said to be politically free to the extent to which they are able to do so without interference from other human beings. To that extent they are political persons. A man's freedom to act in relation to the political community and its order has three major dimensions. These dimensions may be called those of independence, of participation and of creation, as hinted above. As far as independence is concerned, political theory has long abandoned the earlier, seventeenth and eighteenth century notion of a "state of nature." Even as a mental construct, it has lost all appeal and man "in isolation" has become virtually unimaginable. The work of prehistory, archaeology and an-

thropology has shown man always to have lived in some kind of community, and the free man is therefore not seen as the isolated man, the Robinson Crusoe, but as the man who lives in effective interdependence with his fellow men. Freedom means to be free to share and the sphere of independence is not primary, but a corollary of participation in the community and of contribution to it through one's creativity. This profound shift in outlook and emphasis is even beginning to affect the conception of freedom for peoples and polities; while independence still dominates the oratory, every emergent nation seeks fulfillment in the voluntary and active participation in, and contribution to, mankind, even as imperfectly organized as it is in the United Nations.³⁹

All creative freedom rests upon the observed fact that human beings do not only choose between existing alternatives, do not only select and prefer what is offered and available to them. When none of the available alternatives are acceptable, a new one may be discovered or invented which solves the problem, be it political or other. There is a very great difference between choosing one of several known alternatives and discovering or inventing a new one. The latter act, symbolized by procreation, is unpredictable and shrouded in mystery, yet it is undeniably an exercise of human freedom in the highest sense. Indeed, in some of its most extraordinary manifestations it is part of man's joy at play. The playful exploration of the unknown is the finest act of human freedom.⁴⁰ It presupposes freedom from want and freedom from fear.

It may be objected here that want and fear have been powerful stimulants of great works of art and literature and there is no gainsaying this observation. But every one of these instances is exceptional in personal terms, while for most human beings neither fear nor want beyond a low limit are stimulating; they are paralyzing. If therefore these two freedoms are accepted, not only as prevalent beliefs, but also as genuinely related to the overall freedom of

³⁶ A. H. Holcombe, *Human Rights in the Modern World* (1948); H. Lauterpacht, as cited above fn. 3.

³⁷ C. J. Friedrich and Z. K. Brzezinski, *Totalitarian Dictatorship and Autocracy* (1956), ch. 20 and the literature here cited. There have been claims that freedom of association is increasing in some of the totalitarian states, notably Poland, but the evidence is scanty and unconvincing.

³⁸ See C. J. Friedrich, *Man and His Government* (1963), chs. 20 and 21 for more extended treatment.

³⁹ Isaiah Berlin, among others, in the study cited above fn. 13 has suggested that such "collective" efforts at securing freedom ought to be excluded from a consideration of freedom, or be considered a "hybrid form." But this position seems questionable; it is interesting in this connection that Locke justified the state of nature by reference to sovereignty, para. 14.

⁴⁰ Johan Huizinga, *Homo Ludens* (1938), especially the sections on myths as a phase of culture as play, and section 9 on philosophy as a form of play.

self-realization, it becomes a major problem of any contemporary political order how to combine them with the rights which had been recognized earlier. This question is no more answerable in general terms than the question as to which dimension of freedom is to be preferred. Quantitative and qualitative issues are intermingled here and only a soundly organized democratic process can hope to give satisfactory results. Hence likewise the assertion of greater rights entails the assumption of greater responsibilities.

It is this problem of the ordering of rights, and more particularly the effective integration of the rights flowing from the desired freedom from want and fear which demonstrates the dependence of all rights upon the political order. Indeed, they themselves constitute, in their range and sophistication, major inventions of the kind which human ingenuity and creativity have contributed to the evolution of the political order. Nor is the end in sight by any means. The older constitutional systems are particularly in need of revision and radical innovation. Advance is needed, and it is more likely to be achieved at the polls or constitutional conventions than in courts; it is part of the *political* process to achieve them. The American bill of rights, so called, is no longer adequate. Not only has there been a certain attenuation of older rights which need to be reaffirmed and strengthened,⁴¹ but some of the new rights urgently require constitutional sanction. Thus the right to an adequate education, guaranteed in a number of the newer constitutions as well as the United Nations' *Declaration*, ought to be positively affirmed in the United States constitution. It would provide the courts with the necessary ground for coping with certain grave abuses, such as the withholding of education from broad classes of citizens, because of local dissatisfaction with the standards (desegregation) demanded under the constitution. The right to be educated is possibly an even more important right than the right to be admitted to a particular school. Similarly, the right to work, while promoted by much federal legislation, may be denied by state and local authorities, when only their jurisdiction is involved. The problem presents itself in particularly poignant form in connection with the right to vote. The denial of that right through the handling of registration (discussed

above) appears to be an abuse, because the general right of participation in politics, of which the right to vote is an important part, is today universally acknowledged to be basic to a free community; how that right is being exercised, whether, for example, through proportional or majoritarian representation, whether by people over 21 or over 18, and such like questions, may, on the other hand, well be left to local determination. Anyone comparing the traditional bill of rights derived from eighteenth and nineteenth centuries with the modern bills of rights, making full allowance for social rights, will appreciate the need for radical revision.

But even when every effort is being made to reshape the constitutionally guaranteed rights in accordance with a wider and more adequate conception of human freedom, the problem remains of how to combine the several rights, liberties and freedoms into a balanced and harmonious whole. This problem cannot be solved by arranging these rights, liberties and freedoms into a rank list of simple priorities. The problem is not one-dimensional and static, but multi-dimensional and dynamic. It can only be solved in approximation and through adequate procedures for its solution in response to specific situations and particular circumstances.

The problem of the rank order of various rights has, in American law as well as other legal orders, been partially answered in terms of the sequence in which such rights occur. Thus, the first amendment has very generally been claimed to be the foremost and to contain those rights which are preeminent.⁴² This assertion must be considered dubious, in spite of the prevailing view, if for no other reason than because a number of important rights are scattered throughout the original constitution, including such crucial ones as *Habeas corpus*. In any case, giving the first amendment pre-eminence does not eliminate the problem of rank order, because the first amendment itself contains a number of rights which may readily conflict with each other. For example, regulatory provisions protecting the individual's freedom of expression (speech) over the air may interfere with the private property rights of the owner of the broadcasting facilities. Not only property rights, but other rights, may be in

⁴¹ Mr. Justice Douglas in *op. cit.* (ed. Edmond Cahn), pp. 146ff. The legislation on civil rights now before Congress seeks to accomplish just that.

⁴² *Everson v. Board of Education*, 330 U. S. 1 (1947), *Cf.* also the interesting discussion of the problem of priority in particular reference to economic due process in Robert G. McCloskey, "Economic Due Process and the Supreme Court: An Exhumation and Reburial," in *The Supreme Court Review*, 1962, esp. at p. 46ff.

conflict. Freedom of the press clashes with the right of privacy, as well as the right to a fair trial and other rights. Many other examples could be adduced, especially as between the older rights which are self-preserving and the newer rights which are self-developing. The reasons are not far to seek; for the former favor the well-to-do, indeed all the *beati possidentes*, while the latter favor the poor. It is in the very nature of such rights that they cannot be ranked in a fixed order, because the more or less in each case must be taken into account. A small infringement of a right A entailing a great loss in a right C, for example, may call for one decision, while the reverse may call for the opposite. "Situation sense" on the part of judges, legislators and administrators will be required at all times; carefully elaborated procedures which make the cautious weighing of alternatives possible are the only way to secure maximum realization of all the different rights a civilized community may recognize as worthy of protection. By the way, judges are not always the most vigorous guardians of human rights, though some judges at some times have rendered outstanding service.⁴³ Nor can any authorities be relied upon for such protection, unless an alert public is constantly on the watch and ready, individually and collectively, to insist upon the enforcement of the rights it recognizes as expressing the community's values, interests and beliefs. The old saying that eternal vigilance is the price of freedom has lost none of its relevance, nor has the evangelical assertion that "the truth will make you free." That truth is not given, settled and final, but is set as a task.⁴⁴ In the ranking of rights, one cannot hope to arrive at a definitive settlement even individually and for oneself. For a political community of any size it is out of the question that more be agreed upon than what rights to include in a general bill and a procedure for

settling the issues as they arise, legislatively, judicially, administratively.

The question of rank order resembles in some respects the problem of how to balance rights against other considerations, such as those of security. As our preceding discussion has shown, these issues often are in fact conflicts over which right to give priority. Notably, in the matter of security the right of protection, which has often been taken to be the most basic right, is involved. It is, therefore, not very useful to argue that "there are 'absolutes' in our Bill of Rights, and that they were put there on purpose . . ." ⁴⁵ For the question really is not whether the rights are absolute or relative to the public interest (though admittedly the argument is often cast in these terms). The question is rather whether any among the rights are to be preferred to others, and if so which ones. What the answer can be we have just shown.

The argument about security and related problems raises another range of issues which may properly be called those of "constitutional reason of state."⁴⁶ They constitute a complex and difficult matter. It is troublesome in all constitutional democracies because of the challenge of totalitarian movements. Their camp followers and sympathizers are enemies of any and all constitutional order, and yet they are regularly employing the rights made available by the constitutional order to its loyal citizens for the purpose of destroying the constitutional order itself. For a constitutional democracy either to allow them to do so or to outlaw them may become self-destructive. If such enemies of the constitutional order were only individuals acting for themselves, one could well afford to adopt the noble stance of Jefferson who in his first inaugural said:

If there be any among us who would wish to dissolve this Union or to change its republican form, let them stand undisturbed as monuments of the safety with which error of opinion may be tolerated where reason is left free to combat it.⁴⁷

Would it were only a matter of opinion or that reason were free to combat it. Unfortunately, we have to deal with the agents of revolutionary world powers. They operate on the basis of a more deadly form of reason of state, namely

⁴³ Benjamin N. Cardozo, *The Nature of the Judicial Process* (1921); the literature on this subject is, of course, enormous.

⁴⁴ In the last analysis, only the common man himself can be the guardian of his rights, the rights common to all men. What the intellectual needs to remember, and often does not, is that he too is a common man, that is to say a communal man (as contrasted with the mass man) when he steps into the market place and participates in the affairs of the community. Cf. my *The New Belief in the Common Man* (1942), in which the destructive pessimism of Erich Fromm's *Escape from Freedom* (1941) is rejected, though the book was unknown to me at the time.

⁴⁵ Mr. Justice Black in *op. cit.* (ed. Edmond Cahn), esp. pp. 57ff.

⁴⁶ Cf. my *Constitutional Reason of State* (1957), for a more elaborate statement in the perspective of the history of political theory.

⁴⁷ Thomas Jefferson, *Writings* (1859), vol. viii.

the "reason of party" which is grounded in a presumed certainty beyond all argument, dialectical materialism. How to cope with these challenges is a problem which no sentiment expressive of the early days of the Republic will enable us to solve. But neither will it be solved by more or less desperate appeals to a comparable reason of state on our own behalf. Since the protection and elaboration of human rights is the core of the constitutional order, its very reason for existing, every infringement of such rights ought to be justified by clearly stating the overt acts which constitute a clear danger and demonstrate its presence beyond the peradventure of any serious doubt. The hysteria of the McCarthy days violated this principle in gross and indefensible fashion. An alerted citizenry will insist that such a breakdown of American tradition will not recur. What this calls for is that not only judges and legislatures, but the learned professions of political science and the law devote much more effort than they have in the past to reaffirming and strengthening public understanding.⁴⁸ More especially should we insist that our police and military forces be taught, within the broad framework of their study of the social sciences, enough political theory to acquire a full understanding of the tradition of human rights and an appreciation of the difficulties of their enforcement.⁴⁹ Americans are not born with such understanding, nor can the present state of affairs serve to give it to them. Therefore, all Americans have every reason to be grateful to our minorities, groups and individuals, for the new vigor with which they are demanding the enforcement and invigoration of our rights.

But "constitutional reason of state" cannot be content with such educational efforts, important as they are. The various methods em-

⁴⁸ See the *Report of the Commission*, cited above fn. 18, *passim*, for a broad and persuasive statement.

⁴⁹ This involves a candid appraisal of the role of the military in a free society, and a clear appreciation of the dangers of a political military force. Only a military profession strongly rooted in an understanding of the constitutional order and its theoretical moorings can provide adequate security. Germany's error ought, at all costs, to be avoided, rather than made the basis of our approach, as was done by Samuel P. Huntington, in *The Soldier and the State* (1957), esp. chs. 5 and 6. Cf. *contra* Huntington, Frederick Martin Stern, *The Citizen Army* (1957), who, for a motto, cites George Washington: "When we assumed the soldier, we did not lay aside the citizen."

ployed for coping with the problems of security and survival by administrative, legislative and judicial modes of procedure are all inadequate. No security program should be left to ordinary legislation, let alone to administrative ordinance and discretion. It should be regulated in the constitution itself. There should be clear and adequate provision for constitutionally safeguarded emergency powers; if a particular right, such as the Fifth Amendment of the American Constitution is believed to be badly stated or outmoded, a suitable amendment should be undertaken, providing maximum security not only for the state but for the individual human being. Constitutional reason of state is in the last analysis a matter of ever more effectively ordering a government according to law. What Cromwell, Spinoza and Kant knew, we have every reason to remember, since James Madison saw to it that it was embodied in our constitution, namely that the core of a man's dignity is his conviction, his belief, his faith. To make this innermost self secure is more vital to the security and survival of a constitutional order than any boundary or any secret. For any community built upon the faith in human rights, the task of survival and of security becomes that of defending the innermost self as much as defending the outermost boundary.⁵⁰

In sum, and as a conclusion, we might ask with Immanuel Kant the three basic questions: "What can we know? What should we do? What may we hope?" We know that the development of basic rights, liberties and freedoms is becoming universally recognized as part of a sound political order. We also know that such basic rights are the political manifestation of man's nature as seen by the political community, and that hence their specification varies to some extent, as self-preserving, self-asserting and self-developing manifestations of the individual are stressed. Independence, participation and creativity are all valued, but their rank order is not based on settled or absolute knowledge. Political communities will, therefore, differ in the degree to which they will leave each man alone in pursuit of his happiness, allow him to participate in communal tasks or undertake by common enterprise what is needed for man's self-development. All this we can and do know. But we also know that all political orders fall short, sometimes far short, of living up to their professions of belief and value in the sphere of right, and we as political scientists have much work yet to do to determine what are the conditions of effective reali-

⁵⁰ *Op. cit.* fn. 46, pp. 117-9.

zation of the rights proclaimed, as well as the conditions that produce their breakdown and failure.

From what we know follows what we should do, and since I am not here to deliver a sermon, I shall leave it to my readers to draw their own inferences. Let us recall William Blake's poignant remark: he who talks but acts not breeds pestilence. For myself, I know that I should work to deepen the understanding and assist in the implementation of such basic rights as are recognized, wherever possible, on the local, national and international level of government to suggest, to criticize, and to protest.

What, then, may we hope? The fact that rights are ever more universally recognized, even by those who seem least inclined to make them a reality, is the great distinguishing characteristic of our time. It justifies us in the hope

that human rights will become more broadly descriptive of the actual behavior of men and governments; that even the right to an effective international and supranational order will gradually come within man's grasp and that thereby the ultimate condition of human freedom, the freedom from the fear of war, will come to prevail. Such hopes would, however, become chiliastic utopias, unless they are accompanied by the humble recognition of man's greater responsibilities as his rights increase. Nor need such hopes be considered decisive. In facing the battle for human rights as a never-ending struggle, we might well say with dogged William of Orange, as he defied the oppressive world power of Spain more than three hundred years ago:

We need not hope in order to act, nor need we succeed in order to persevere.