

Human Rights and Civil Rights, a small perspective:

By Dane McAfee

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Human rights vs Civil rights. It might not seem it, given how easily these two have been conjoined and conflated, but they are in direct conflict with each other. The concept of "rights" itself might seem really impossible to tie down, to touch and sense — but only if we let the conflation remain. It always pays to attack these sorts of cloudy and fog-smattered notions from a concise angle. If we start from above and move downwards—i.e. being deductive—we lose the invaluable grounding of starting from the bottom up—this is inductive. The question which separates human rights from civil rights much more clearly comes down to this: Do we fly down from Heaven, from beyond earth, or do we build up from earth with what we find and what we have inherited here? Let's chart a little mind-map journey to start the thinking.

There's an extraordinarily layered and provoking painting by the great Italian Renaissance artist Raphael which, I think, could be an interesting angle to begin from. "Layered" because it's one of those masterful works of art where you can palpably sense the artist thinking in several tiers at once, and "provoking" because its essence ties directly into our purpose here. Raphael's *The School of Athens* shows a range of great Classical philosophers, each engaging in some kind of activity which points to their philosophical focus. Most pointed, though, is the center ground where the two greatest ancient philosophers, Plato and Aristotle, seem to be in conscious engagement with each other. It's very fair to say that almost the entirety of Western thought, and indeed global thought, finally settles into one of these camps: Platonic or Aristotelian.

On the left side, Plato motions at Aristotle and points upwards toward the heavens. This represents Plato's fundamental notion that the answers are to be found outside earth — that is to say, that there is a **capital-G "Good"** extrinsic of humanity and from which all purpose comes; that the highest stature mankind can reach is to be of that select few who are essentially beamed the doings and wishes of that "greater Good."

Aristotle, however, plainly disagrees. He is shown to the right of Plato, holding a large book of knowledge in his hand, and pointing downwards to the ground, or rather to the earth. This represents his fundamental notion that our purpose is like roots from a soil; that meaning is gathered as we live and go along — **a basket of lower-case "good."** He is saying that life and the meaning of life is what we can trust and verify with our senses, our intuition, and our accumulated

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wisdom. Put more concisely in his own words: “The sole judge of a meal is not the cook, but the eater.”

This ties right back to the core conflict between human rights and civil rights, and we can mark our little mind-map here.

The last half-century has shown with increasing clarity, I think, that **Human Rights are a catch-all umbrella that actively tries to blind us to reality**. The only reason they can be so large (and are so delicious for international lawyers) is because **they are wholly rootless and claim to be outside the nation and thereby are too important to be tied down (i.e. grounded on earth) by a specific historical tradition**. They claim ultimate higher significance. They are derived from what Plato was pointing at, the capital-G Good outside and beyond our mere earthly tangible reality. They are the bricks which pave the rising road of progress and fraternity and equality and Justice. And yet... for all these high claims, I have a little George Carlin in my ear irreverently demanding the logic of it all — “*But what really is capital-G Good?! What does it mean? Can any of us really define it for us all, everywhere, to be happy enough to get along?*” Let’s keep George there, because those questions drive a stake through the whole problem, and do that thing it cannot stand: **tying it down**. Any country trial lawyer worth his or her salt will tell you the thing they have to do is **tie the defendant or the plaintiff down on tangible, demonstrable, on-the-ground, in-real-time facts**. Right now, we’re not here to argue about the **Justice** of the murder, or whether it was part of some greater ‘Good’. We want to know: **‘are these your fingerprints on the gun, or not? Yes or no.’** We are Aristotle, pointing to the ground; keeping things here on earth — the only place we actually live — and saying engage here, exist here.

The dangerous intangibility of Human Rights was noticed by scholars of the Common Law on both sides of the Atlantic when the **UN Declaration on Human Rights** started to enter into real law. The best example of this is all the way back in the 1950s, when the British Labour Lord Chancellor, Lord William Jowitt, told his colleagues that **the human rights laws steadily being added to international cases left the field utterly exposed to judges writing whatever they wanted into the margins**. To show the depth of the fall Jowitt feared, a former international legalist and influential Common Law scholar, Lord Tom Bingham, said with apparent triumph to a gathering of international lawyers in Australia just over a decade ago that **Human Rights law** was by definition **“anti-democratic and counter-majoritarian.”** Bingham went even further to say that the very purpose of this kind of law is the protection of minorities against the majority, and even the subversion of the majority in favor of minorities by legalistic means—even against the results of the ballot box. And here we are today, **when the majority view is called “populism” and put into a little box to be sneered at; when the expressed wishes of the majority are countermanded by unelected judges; when so many nations across the West are hamstrung by interconnected international law obligations, each of them claiming supremacy by virtue**

of their appeal to — you guessed it — **the outside-and-beyond-us-all capital-G greater Good: Human Rights.**

So, what's the other side of the conflict? The other side is the ground itself, and it's what Aristotle is pointing to, and what he's holding in his hand: us; **our accumulated wisdom and our inherited history. There's no surer grounding.** This, fundamentally, is what **civil rights** root themselves in. The markedly different thing, right from the start, is that Americans (and the Anglo-world more broadly) could probably point to a few core ones quickly enough. So quickly, in fact, that they signify the deeper instincts in us. Carlin slides back in to interrogate us, and he's more annoyed than ever, but luckily, I think we can answer him more confidently this time. "Civil rights, huh? So... what do they mean?" Off the bat: maybe **the right to participate in our own government. The right to speak freely. The right to worship freely. The right to due process under law.** There are several more, I'm sure, we could name and broadly agree on.

George looks smugly satisfied but still skeptical. "**Can any of us really define them for us all, everywhere, to be happy enough with to get along?** I mean, it helps the credibility along **if we can point to it**, ya know... **if we can see it, sense it, touch it and feel it.**" Well, we actually can point to them in the *Constitution*. But, infinitely more than this or any one piece of paper, **we can point to the centuries of evolution and political development behind that document that underwrite it, that ground it and tether it to us intrinsically.** We can say with cast-iron sureness, for instance, **that we have the right to participate in our government because we've been participating in local juries since the reign of Henry II eight centuries ago.** (Fun trivia — all law in the English-speaking world, right down to [insert your small-town USA], doesn't stretch back beyond his reign because it's only definable from that point; this is where we derive the legal notion of time immemorial from.) "But" says George, "does it work everywhere for everyone?" No, it doesn't work "everywhere" because *everywhere* doesn't necessarily share the same history or evolution. It doesn't denude or detract from them; it's just a statement of reality: **people and places are different.** And "everyone?" It didn't even work for *everyone* for most of our long history.

Indeed, **for most of the historical record the majority were shut out.** And yet... time is a great thickener of things. What was set in motion centuries ago kept moving and stayed alive: **local jury participation in the High Middle Ages in England evolved into more participation in national government — or Parliament.** The strongest English kings realized that they were stronger the more they worked *with* Parliament, which in turn steadily expanded who could be elected to represent the local community, eventually to free landowners. **Our ancestors in America branched off into thirteen mini-English parliaments and came to demand, win and reaffirm their right to participate in their own self-government.** This was cohesive enough to form an enduring national government that weathered a civil war fought over the extending of

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constitutional liberties and freeing slaves who'd lived here for generations; it weathered Two World Wars; and eventually recognized its duty to millions who had been denied their obligations from it in the 1960s. (Consider what the first Civil Rights campaigners demanded, not what their co-opters have morphed into through the years: it was not the tearing down of the national government, but the rightful participation in it as guaranteed to them by the Constitution, and the history which underwrote it.) **While other constitutions across the world broke over and over, ours held.** Was it perfect? Is it perfect? *Will it ever be perfect?* **No, and we shouldn't want it to be.** We should want it to keep evolving, keep tinkering, and keep tilling the soil — because there's no way *not* to be grounded when you're digging in the dirt.

Anything that claims perfection should immediately make us reach for our silver.

Human Rights claim this. They must. **They're "outside" history, beyond any mere petty specific historical tradition. They exist in the ether, in the realm of the capital-G Good.** We'd be shrewder, especially with law, by not focusing everything on the beyond, where the margins are so vulnerable to bad actors, but down here; reality is here on earth — as Aristotle directs us. This, finally, is the core battle between Human Rights and Civil Rights: **the battle between those who claim some universalist authority beyond earth in order to trim reality as they want, and those of us who live on earth and deal with it as we find it, sense it, feel it, touch it and point to it.**