

HUMAN RIGHTS

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1. Orthodox and Political Conceptions

Over the past decade or so, after a long period of comparative neglect, philosophers have increasingly turned their attention to human rights. Such rights are generally construed in normative rather than positive terms. They are not the standards actually enshrined in what we call the “human rights” texts and practices of law and politics, but independent moral standards that such texts and practices are characteristically intended to recognize and implement. Of course, when philosophers attend to any subject matter, it is usually in the mode of disagreement. But human rights provoke disagreements well beyond the philosophy seminar room, and these are not confined to the familiar legal-political disputes about their identification, implications or enforcement. There are also deep divisions among historians regarding the origins of our concept of a human right. In a recent book, Samuel Moyn contends that the concept only emerged as a significant historical force in the 1970s, some decades after the Universal Declaration of Human Rights of 1948 (UDHR) (Moyn 2010). At the other extreme, Brian Tierney interprets our concept of human rights as strongly continuous with the natural rights tradition—a tradition that, he contends, originates in the humanistic jurisprudence of the twelfth century (Tierney 1997).

Other historians reject Tierney’s thesis, associating the birth of natural rights with late medieval or early modern thinkers such as Ockham, Grotius and Locke. Nevertheless, the orthodox view about the concept of a human right, at least among philosophers, has long been that it is broadly equivalent to that of a natural right. First, they are both moral rights possessed by all human beings simply in virtue of their humanity. Moral rights are here to be understood primarily as claim rights, associated with duties on others that are owed to the right-holder. Duties, in turn, are moral reasons for action that apply to their bearers independently of how the latter are motivated and which enjoy a special force or weight as against some countervailing reasons. Their violation, without justification or excuse, properly renders one subject to blame and sometimes punishment. Human rights are distinguished from other moral rights because we possess them not due to any personal achievement, social status or transaction, nor because they are conferred upon us by a positive legal order, but simply in virtue of our standing as human beings. And the second dimension along which human rights resemble natural rights is that we discover these rights by the use of ordinary moral reasoning, or “natural reason” in a venerable locution, rather than through “artificial” (e.g., legal) reasoning or divine revelation (exponents of the orthodox view include O’Neill 1996; Griffin 2008; Wolterstorff 2008; Finnis 2011. See also Tasioulas 2011).

On this orthodox conception, human rights are universal moral rights. This is perfectly compatible with their having important political implications, e.g., for the legitimacy of states or the permissibility of international intervention. Indeed, it may even be the case that certain of these political implications are necessary truths. Given the nature of states and the nature of human rights, for example, it may be a necessary truth that states should respect human rights. However, the orthodox conception does not explain the essential nature of human rights—what one needs to grasp in order to have an adequate mastery of the concept of a human right—in terms of any such political role, beyond perhaps the rather minimalist idea that human rights are the subset of universal moral rights that may be, in principle, socially (or, more substantively, legally) enforced.

That human rights are universal moral rights does not entail that they are possessed by all human beings throughout human history. Instead, a proponent of the orthodox view may coherently refer to the “human rights” possessed only by all human beings within a certain historical period, such as that of modernity (Tasioulas 2007). This is one way to read the UDHR, which includes many rights (e.g., the rights to nationality, a fair trial, an adequate standard of living) that cannot easily be ascribed to humans, such as Stone Age cave-dwellers, who inhabited epochs in which the fulfillment of the counterpart duties was unfeasible given limitations in available institutional capacities, material resources or technological capabilities. To this extent, human rights are not to be identified with “natural rights,” if this means moral rights that are meaningfully possessed even in a state of nature (Beitz 2009, ch. III). But this is just one historically formative, but hardly canonical, strand within the natural rights tradition (Tierney 1997: 70).

What other reasons might historians such as Moyn have for treating human rights as discontinuous with natural rights? One reason is that they regard human rights as norms that justify subjecting states to certain constraints with an international institutional dimension, an idea whose prevalence they take to be of recent vintage. This sort of rationale has been recently elaborated by philosophers, mostly influenced by John Rawls, who advance what might be called a political conception of human rights. Its adherents claim that the first limb of the orthodox conception, according to which human rights are universal moral rights, ignores the political functions that are integral to the concept of a human right and which distinguish such rights from natural rights. Different advocates of the political conception specify these political functions in diverse ways and in varying combinations.

One idea is that human rights are primarily claims on states or political institutions that assert a right to rule backed up by the threat of coercion (Pogge 2002: ch. 7, subsequently recanted in the second, 2007 edition; possibly also Beitz 2009). On one version of this view, a “human rights” violation only exists when some failure on the part of officials is present. Hence, we cannot automatically infer from the fact that A has tortured B simply for the pleasure that the former derives from doing so that B’s human rights have been violated. A may well have violated a right of B’s not to be tortured, even a universal moral right. But the act of torture will only be a *human rights* violation if A is an official of the state or his conduct is suitably connected to a coercive institutional order inhabited by A and B. One form of connection, stressed by Thomas Pogge (2002), emerges from an affirmative answer to the question of whether the act of torture is a foreseeable and reasonably avoidable upshot of the imposition of that order. However, many will question whether it is worth countenancing a dualism of human rights and

universal moral rights of this sort unless the former notion is given some additional, and more specific, political dimension.

We should therefore turn to two other political roles in terms of which human rights have been characterized. Internally, human rights are interpreted as at least necessary conditions for the legitimacy of a state or comparable institution, constraining its right to rule. Unless a state complies with them, its laws will not impose obligations of obedience on its putative subjects. Externally, human rights operate as standards whose violation, if extensive and persistent, triggers a defeasible case for some form of international action (e.g., military intervention, economic sanctions, etc.) against the guilty state.

The characterization of human rights as *both* conditions of internal legitimacy and limitations on immunity from external interference is a prominent theme in the work of John Rawls and Joshua Cohen (Rawls 1999; Cohen 2004, 2006). This dual political function is taken to distinguish human rights both from universal moral rights and from the more expansive set of rights properly upheld in liberal democratic societies. But this analysis of human rights confronts the objection that it is internally conflicted. There appears to be a discrepancy between the conditions of internal legitimacy and those of international intervention, such that the self-same list of rights is incapable of discharging both functions. Whether a state possesses legitimacy depends on the morality of its actions in relation to its putative subjects. But whether it is liable, even in principle, to external interference depends on other considerations, including the value of political self-determination and facts about the geopolitical environment, such as the incidence of predatory behavior among states. In consequence, the mere fact that a state acts beyond the scope of its legitimate authority does not give rise to a reason, in any circumstances, for interference by other states, just as not every personal wrongdoing is justifiably prevented or punished by others (Raz 2010a: 330).

Subscribers to the dual-function view might respond by specifying more precisely how human rights operate as *defeasible* triggers for external intervention, rather than all-things-considered justifications. But there remains a problem with characterizing human rights *either* in terms of legitimacy or intervention, which is that both analyses threaten to issue in a severely truncated list of human rights. This threat is notoriously realized by Rawls's theory, which results in the following parsimonious list:

[the] right to life (to the means of subsistence and security); to liberty (to freedom from slavery, serfdom, and forced occupation, and to a sufficient measure of liberty of conscience to ensure freedom of religion and thought); to property (personal property); and to formal equality as expressed by the rules of natural justice (that is, that similar cases be treated similarly).

(Rawls 1999: 65)

Notable omissions from Rawls's list that figure in standard international human rights documents include: rights to nondiscrimination on the grounds of sex, race and religion; rights to freedom of opinion, speech, movement and political participation; rights to education, work and an adequate standard of living; and so on. Indeed, Rawls asserts that only articles 3 to 18 of the UDHR contain human rights proper; the rest are only "liberal aspirations" (Rawls 1999: 80, n. 23).

Now, this heavily revisionist upshot is a major drawback of Rawls's account for anyone who takes it to be a key desideratum of a theory of human rights that it makes (charitable) sense of existing human rights practice. A determined Rawlsian might reply that

such fidelity to existing practice is not an important metatheoretical desideratum, as compared with spelling out the implications of Rawls's political liberalism for the foreign policy of liberal societies. Or that even if it is, Rawls's meager schedule of human rights reflects how fidelity must be compromised in light of a competing metatheoretical desideratum of great weight, i.e., the need to arrive at a conception of human rights that is suitably nonparochial, so that human rights are not simply liberal constitutional rights projected globally.

However, a more moderate line is taken by advocates of the political conception who diagnose the problem of fidelity with Rawls's theory as stemming from the specific kind of international response that he makes criterial for human rights. In effect, Rawls holds that a human right is distinguished by its capacity to justify *military* intervention when violated gravely and extensively. Naturally, there are other ways of implementing human rights short of military intervention, such as economic sanctions or diplomatic censure. But for Rawls it seems to be their ability to sustain a pro tanto case for military intervention that distinguishes human rights from other rights. However, a more generous list can be secured if we broaden the criterial notion of intervention to include nonmilitary and noncoercive forms of international response otherwise prohibited by norms of state sovereignty (see Raz 2010a). Or, alternatively, if we conceptually tie human rights not exclusively to intervention, but to the wider remedial response of "international concern," of which the multifarious forms of intervention are just one species (see Beitz 2009: 33–42).

It is not obvious that either maneuver meets the concern about fidelity. (For an alternative approach that focuses on human rights as conditions of legitimacy, see Dworkin 2011, discussed in section 2). Core norms appealed to in the wider human rights culture, such as those prohibiting discrimination on the grounds of sex or affirming a right to an adequate standard of living, might still face an uphill struggle (see Beitz 2009, ch. 7). But supposing this worry could be allayed, one might still be puzzled by the more general idea, implicit in the political conception, that human rights are "revisionist appurtenances of a global political order composed of independent states" (Beitz 2009: 197). Consider anarchists, who reject the state in all its forms, or advocates of cosmopolitan government, who wish to transcend the state system altogether in favor of a unitary world government. Both routinely appeal to human rights to justify their positions, but this would hardly be a coherent strategy if human rights are inherently bound up with the state or the state system. Even if anarchism and cosmopolitanism are not, in the end, compelling doctrines, it seems extremely uncharitable to portray their advocates as victims of a conceptual confusion about human rights.

The line of thought so far recommends adopting the first limb of the orthodox conception, leaving it as a further, substantive question to what extent human rights have any specifically political functions. Such a view is not very remote from forms of the political conception that treat human rights as a proper subset of the universal moral rights picked out by the orthodox conception (e.g., Raz 2010a and b). However, a deeper disagreement would persist with versions of the political conception that resist the subset approach, regarding human rights as *sui generis* with respect to the broader category of (universal) moral rights. But this *sui generis* approach seems incapable of adequately capturing the characteristic *moral* significance of human rights. Charles Beitz (2009), for example, describes human rights as norms protecting certain "urgent interests" against standard threats posed to them by one's government. But even the most urgent interests can be impaired in all sorts of ways without any moral wrongdoing, and it is questionable

whether the distinctive significance of these interests in human rights discourse can be grasped without introducing the idea that they are protected by individual rights that impose obligations on others.

There is another, more subterranean explanation for Moyn's thesis of a discontinuity between natural and human rights thought. It seems to be part of a commonly accepted ideal of professional objectivity that historians' explanations should not turn on the truth or falsity of moral propositions. This prevents them from seriously entertaining the hypothesis that the rise and gathering momentum of the human rights movement is to be explained in part by the fact that it is inspired by fundamentally correct moral principles. But this dislodges an important motivation for treating human rights as continuous with natural rights: namely, the belief that both terms have been used to designate some objective truths of human morality, truths which have been formulated and implemented in different ways, and with varying degrees of insight and success, in diverse historical epochs.

Now, this arms-length relation to the moral truth also finds a parallel in contemporary philosophy. John Rawls, again, has led the way in arguing that human rights are categorically distinct from natural rights because, contrary to the second limb of the orthodox conception, they are not grounded in ordinary moral reasoning (Rawls 1999). For Rawls, people inevitably disagree about whether and how moral truth is discerned and about which moral propositions are true. But human rights, with their claim to regulate coercive intervention across international boundaries, must be justifiable to others despite their persistent ideological disagreements. So, Rawls claims, unlike natural rights, they must be grounded in a form of "public reason" that is discontinuous with ordinary moral reasoning, levitating above the fray of interminable philosophical and religious quarrels about morality, human nature and divinity:

[Human rights] do not depend on any particular comprehensive religious doctrine or philosophical doctrine about human nature. The Law of Peoples does not say, for example, that human beings are moral persons and have equal worth in the eyes of God; or that they have certain moral and intellectual powers that entitle them to those rights. To argue in these ways would involve religious or philosophical doctrines that many decent hierarchical peoples might reject as liberal or democratic, or as in some way distinctive of Western political tradition and prejudicial to other cultures. Still, the Law of Peoples does not deny these doctrines.

(Rawls 1999: 68)

This is a deeper sense in which one might hold a "political" view of human rights: they are political not only in their defining subject matter (e.g., political legitimacy, international intervention), but in the genre of reasoning that grounds them. For Rawls, the justification of human rights is modeled by a social contract at two levels. At the first level, liberal democratic societies agree to principles to govern their relations—a Law of Peoples, including its truncated list of human rights. At the second level, "decent" hierarchical societies are shown to be able to endorse the same principles from their own, nonliberal outlook. The fact that they can attract the allegiance of nonliberal societies is supposed to exonerate those principles from the charge of parochialism.

But how can the charge of parochialism be avoided unless human rights are grounded in ordinary moral reasoning, itself understood to embody an aspiration to objective

correctness, i.e., correctness that is independent of the beliefs and attitudes that prevail in any given society? The alternative is to rely on standards that, in some sense, people actually share. So, for example, Rawls's starting point in deriving human rights is the values implicit in liberal democratic culture. But that leaves us with the problem of what to say to those who do not share those values, including "outlaw states" that would be the potential targets of military intervention in a Rawlsian global dispensation. Of course, Rawls stresses that some nonliberal, but decent, societies may endorse, for their own moral reasons, his schedule of human rights. But that very schedule is only a candidate for their endorsement because it has been previously validated within an exclusively liberal perspective, one from which decent societies receive the backhanded compliment of being "not fully unreasonable" (Rawls 1999: 74). And even for members of liberal societies, is it enough to say that human rights flow from values deeply embedded in their political culture, absent an independent vindication of those values? Without an objective grounding the human rights project risks becoming just another fundamentalist commitment, as so many of its critics allege (Tasioulas 2010a: 107–8).

There are doubtless other ways of elaborating the idea of public reason, in opposition to ordinary moral reasoning, that do not lapse into parochialism of Rawlsian proportions. One line of thought begins not from public reason understood as ideas implicit in liberal democratic culture, but rather from a global public reason (see Cohen 2004, 2006; Nussbaum 2000, ch. 1; Sen 2009, part IV). These views, however, remain at a fairly embryonic stage of development. Pending their fuller elaboration, the default position may be to accept the second limb of the orthodox conception and embark on the task of discovering which moral rights are indeed possessed by all human beings simply in virtue of their humanity. Of course, once these rights have been identified, it would not automatically follow that they should be enshrined in international law or enforced by international action (see section 3, below). Nor would it necessarily follow that there is a single best institutional model, whether American or European in inspiration, for implementing those rights. To this extent, legitimate concerns about parochialism and intolerance can be addressed without abandoning the orthodox idea that human rights need to be grounded in ordinary, truth-oriented, moral reasoning.

2. Human Dignity and the Foundations of Human Rights

What form should an objective justification of human rights assume? Jacques Maritain famously remarked about the UDHR, "We agree about the human rights, provided no one asks us why." Today, however, many people answer the "why" question by appealing to the value of human dignity. Indeed, the link between human rights and human dignity already surfaces in the UDHR, although only in the 1966 Covenants on Civil and Political Rights and Economic, Social and Cultural Rights is it explicitly stated that "these rights derive from the inherent dignity of the human person." The basis of human rights in human dignity was powerfully reaffirmed by the UN General Assembly in 1986 (GA Res 41/120), and the concept has become a near-ubiquitous presence in both international and regional human rights instruments (see McCrudden 2008). But is the rather amorphous notion of human dignity doing any real justificatory work, or is it just a placeholder for a justification that the speaker vaguely implies exists but has done nothing to specify?

As one might expect, approaches to the justification of human rights span pretty much the entire gamut of orientations in moral philosophy, including natural law

theory (e.g., Finnis 2011), Kantian deontology (e.g., Gewirth 1996) and consequentialism (e.g., Talbott 2005), all the way through to withering skepticism about the availability of any such justification (MacIntyre 2007: 69). However, a notable trend in recent years has been the tendency of philosophers to reflect the broader human rights culture by invoking (human) dignity as the master grounding value. In this section, we shall critically survey two important accounts of this kind elaborated by Ronald Dworkin and James Griffin (Dworkin 2011; Griffin 2008; see also Habermas 2010 and Kateb 2010).

Ronald Dworkin's is a political view of human rights that abandons the first, but not the second, tenet of orthodoxy. Human rights are construed as belonging to the more general class of political rights, i.e., claims-primarily against one's own political community that confer on their individual holders trumps over what would otherwise be adequate justifications for government action. Justice in general demands that a government respect the dignity of all its members—their fundamental right to equal concern and respect. Dignity, so construed, has two components. First, a community must treat its members' fates as equally objectively important; second, it must respect their personal responsibility for defining what counts as success in their own lives. This fundamental right is the source of other, more specific political rights.

Human rights, however, are picked out within the class of political rights by reference to an even more abstract and fundamental right, one that bears on the legitimacy (and not only on the justice) of a government's rule. This is the basic human right to a certain *attitude* of good faith on the part of one's political community: "a right to be treated as a human being whose dignity fundamentally matters" (Dworkin 2011: 333). Although governments inevitably make *mistakes* regarding what dignity requires, and to that extent act unjustly, human rights violations are committed only when these mistakes manifest *contempt* for the dignity of some or all of its members. The touchstone of good faith, and so of the absence of contempt, is one of *intelligibility* rather than correctness. Human rights are respected "only when a government's overall behavior is defensible under an intelligible, even if unconvincing, conception of what [the] two principles of dignity require" (ibid.: 335–36).

Dworkin admits that drawing the line between error and contempt can be controversial in individual cases; it is an "interpretative" matter, one not settled by a government's (sincere) protestations of good faith. But some cases he takes to be obvious human rights violations. The first principle of dignity, for example, is violated in this way when a political community acts out of the belief that some of its members, e.g., infidels, Semites, blacks, are of "inferior stock" or "condones humiliation or torture for amusement" (ibid.: 336). Policies that are human rights violations under the second principle, according to Dworkin, include those that forbid the exercise of any religion other than the officially approved one, or that punish heresy or blasphemy, or that deny, in principle, freedom of speech and the press.

Some may doubt that mere good faith always suffices to underwrite the legitimacy of a government's rule. If a government wields coercion in the service of a deeply flawed, albeit intelligible, conception of dignity, why should its laws morally bind its subjects? But let us focus on the problems with this test as a criterion for identifying human rights rather than legitimate rule. One set of problems comes under the heading of fidelity, a consideration Dworkin himself invokes against interventionist accounts of human rights. First of all, the theory appears seriously to compromise the presumed universality of human rights. This is because it requires that interpretative judgments as to the

existence of “good faith” be sensitive to variations in local political, economic and cultural conditions. As a result, a “health or education policy that would show good faith effort in a poor country would show contempt in a rich one” (ibid.: 338). This threatens seriously to dilute the idea that human rights require access to the self-same object—e.g., a substantive level of health care—for all human beings. It leaves open the disquieting possibility that IVF treatment, or even some forms of cosmetic surgery, are human rights entitlements in developed societies, while people in poor countries are only entitled to rudimentary levels of health care. Given that legitimacy essentially consists in the obtaining of a certain kind of relationship between a particular government and members of a particular political community, any theory that makes compliance with human rights anything like a sufficient condition of legitimacy will arguably confront similar difficulties in capturing their universality.

Quite apart from this concern about universality, the “good faith” test is rather indeterminate, given the difficulty in identifying just when the flouting of dignity crosses over into contempt. But to the extent that it constitutes a determinate standard, it seems overly lax. For it looks as if many political ideologies that sponsor paradigmatic human rights violations are plausibly interpreted as offering *intelligible* conceptions of equal concern and respect. For example, Dworkin rather optimistically asserts that “in our age, laws that forbid property, profession, or political power to women cannot be reconciled with women’s responsibility for their own decisions” (ibid.: 337). Yet it is hardly obvious that deep-rooted ideologies that exclude women from certain public or religious offices, on the basis of a supposedly divinely ordained division of labor among the sexes, fail to embody even *intelligible* (as opposed to just radically mistaken) conceptions of women’s dignity. If this were so, we should be hard pressed to explain the persistence of such ideologies in the present age, even among members of Western societies.

But perhaps the deepest problem with Dworkin’s theory is the heavy emphasis it places on equality and freedom to generate a recognizably complete schedule of human rights, a problem it shares with James Griffin’s structurally similar dignity-based theory. Griffin subscribes to both limbs of the orthodox conception, and grounds human rights in the value of possessing, and being able reasonably effectively to exercise, the capacity for personhood or normative agency. Personhood distinguishes us from nonhuman animals, and Griffin offers it as a salient and historically resonant interpretation of human dignity (Griffin 2008: 36). The idea of personhood is broken down into three components. The first is autonomy, which involves choosing one’s conception of a worthwhile life from a range of eligible alternatives without being dominated or controlled by others. The second is liberty, which is the ability to pursue one’s choices free from the forcible interference of others. And finally, there is minimum provision, since one can make real choices, and effectively pursue them, only if one has certain minimum resources and capabilities. (ibid.: 32–33). In addition to personhood, Griffin also appeals to a norm of basic human equality—one that encompasses all human beings above a certain threshold of normative agency—but he regards equality as at the root of interpersonal morality in general, and so not a distinctive ground of human rights.

For Griffin, the values of personhood are teleological: they are components of human well-being, so that “the exercise of personhood is an end the realization of which enhances the value of life” (ibid.: 57). This contrasts with Dworkin’s interpretation of the second principle of dignity as a moral constraint. Griffin recognizes other human interests besides autonomy and liberty, such as enjoyment, achievement and deep personal relations. However, it is only the values of personhood that play a direct role in

grounding human rights; the other values have at best an indirect significance, insofar as they influence our assessments of what counts as a worthwhile conception of a good life that is an intelligible object of autonomous choice. Personhood values play this grounding role in conjunction with “practicalities,” which are a diverse set of historically invariant facts relating to human nature and social life. By giving substance to the maxim “ought’ implies ‘can,” practicalities enable personhood values to generate “effective, socially manageable claim[s] on others” (ibid.: 38). Indeed, Griffin believes that the personhood theory is able to “generate most of the conventional list of human rights” (ibid.: 33).

Now, one might suppose that Griffin’s personhood theory endows human dignity with a richer rights-generative content than its Dworkinian cousin, and that it does so precisely by construing it as an element of human well-being. But there is a serious question about whether the personhood theory remains unduly restrictive, still not going far enough in giving well-being its full role in the grounds of human rights. One manifestation of this is that the theory issues in needlessly roundabout and precarious justifications of paradigmatic human rights. For example, Griffin contends that torture is a human rights violation because of the way it attacks our capacity to reach a decision or stick to it (ibid.: 52). Certainly, this must be part of the story. But there are many other ways of subverting people’s wills, such as injecting them with mind-altering drugs. Part of what makes torture a graver human rights violation is that it achieves its purpose through the infliction of severe pain, and the avoidance of severe pain is surely another universal interest, along with the interest in normative agency. The human right not to be tortured appears to draw its force from a number of interests that are impaired by torture, not just personhood. This point generalizes to other familiar human rights, e.g., the rights to education, work and leisure, which are most naturally taken to reflect the importance of knowledge, achievement and play, respectively, in addition to personhood.

However, Griffin believes that the pluralist grounding of human rights just bruted connives at the “debasement” of human rights discourse, exacerbating the very problem of the radical indeterminacy of sense of the phrase “human right” that his theory is designed to address. Now, even someone who doesn’t share Griffin’s scathing assessment of contemporary human rights discourse as having rendered the notion of a “human right” “nearly criterionless” (ibid.: 52) should resonate to his call for determinacy. But why suppose that the pluralist approach, which invokes human interests in addition to those of personhood, is incapable of securing it? It does not license us to say that there is a human right to *X* wherever we find a universal human interest in *X*, no more than Griffin is committed to the existence of a human right whenever personhood values are at stake. Instead, we have to ask whether, for each and every human being, that interest generates a duty with the same content, and in asking that question we must surmount the obstacles on the way from dignity and interests to universal moral rights. If these obstacles, which Griffin refers to as “practicalities,” can suitably discharge this role in the case of rights generated by personhood values, what prevents them from doing the same for the rights-generative significance of other elements of the human good?

The objectivity and universality of the underlying grounding values, the constraints imposed by the threshold requirements, and the necessity for the self-same duty to be owed to each and every human being may be enough to instill the requisite intellectual discipline in human rights discourse. If so, there will be no need for an additional *ex ante* restriction on the kinds of interests that may ground human rights. Indeed, it is not clear

that Griffin himself always abides by his self-imposed restriction, given the way that non-personhood goods are seemingly implicated in some of his arguments for particular human rights, such as his case for a human right to same-sex marriage, which turns in part on the value of deep personal relations (for criticism of Griffin's theory along these general lines, see Tasioulas 2010b: 658–66. For more pluralistic accounts of the grounds of human rights, see Finnis 2011, ch. 8; Nickel 2007, chs. 4–5; Buchanan 2010, part I).

The line of thought pursued so far is that claims about the foundational role of human dignity—whether construed in Dworkin's or Griffin's terms—are over-ambitious. We need to appeal to more in our grounding of human rights than human equality and the significance of freedom, whether the latter is construed as a moral principle or a component of well-being or both. This pluralistic approach to the grounds of human rights encourages us to shift our attention to the threshold question of the conditions under which the plurality of individualistic considerations—equality, dignity and universal interests—generate universal moral rights. As we have seen, Dworkin's appeal to a “good faith” as a threshold faces serious problems of infidelity and indeterminacy. But as Dworkin himself points out, Griffin's invocation of “practicalities” is overly sketchy. It is plausible, however, that there are at least two obstacles that have to be surmounted on the road, from considerations of dignity (equality and/or freedom) and interests, on the one hand, to the derivation of duties with broadly identical content owed to all human beings.

At the first threshold, we ask whether, in the case of all human beings, it is possible to secure the underlying values (dignity and interests) through a duty with the proposed content. Sometimes the impossibility is *logical*: there can be no duty to ensure both one's existence and nonexistence twenty years after one's birth. Other impossibilities are *metaphysical or physical*: there can be no right of all human beings, including males, to give birth. Some are mundanely *contingent*: there is no human right to a Rodeo Drive lifestyle given the lack of resources, now and in any realistically attainable future, to secure such a lavish standard of material resources for everyone on the face of the earth.

Some failures to cross the first threshold are rather more subtle, involving what might be called directly *evaluative* impossibilities. Who can deny, for example, that romantic love is one of the most life-enhancing aspects of human existence? But does it follow from this that anyone is under a duty to love anyone else, that there is a right to be loved romantically? Such a right seems to be ruled out at the first threshold: the very nature of romantic love is at odds with the existence of a positive duty to love others in this way. It is not merely that romantic feelings are not suitably under the control of their subjects. After all, a modern-day equivalent of Puck's potion in *A Midsummer Night's Dream* might be invented. Rather, the idea is that the way romantic love enhances our lives is inconsistent with anyone bearing a duty to give it. Romantic love is valuable as a freely bestowed gift, a spontaneous expression of the lover's own deepest desires, rather than something one is obligated to deliver and blamable for failing to do so. In making love an object of duty, violence is done to its nature: the supposed right-holder stands to receive only the pitiful simulacra of such love rather than the genuine article.

But even if the right to love passes this first threshold, it surely comes to grief at a second threshold, one relating to *burdensomeness*. Here we register the costs imposed by the putative right on the bearers of the counterpart duty and on our ability to realize other values that have a normative claim on us, including other human rights. Even if, *contra* the argument just rehearsed, conferring romantic love could in principle be a

matter of duty, we may reasonably conclude that no such duty exists, because the burden it imposes on potential duty-bearers in terms of autonomy, spontaneity and the strains of psychological self-policing are excessive.

The putative human right to romantic love is admittedly an exotic case; but, arguably the same line of argument that rules it out also invalidates the claims of some items in leading human rights instruments to reflect genuine requirements of human rights morality. For example, on any literal interpretation, the right to the highest attainable standard of health (article 25, UDHR), fails to cross both thresholds. First, it is not possible for the highest attainable standard of health to be an object of duty. One's level of health depends upon one's own decisions in a way that prevents it from being a duty of others to secure for you. But even if we adjusted the right's content so that it refers to the provision of the highest attainable standard of health *care*, rather than health itself, it would likely stumble at the threshold of burdensomeness, since it would entail excessive costs, including unacceptable sacrifices in our capacity to fulfill other human rights (see Raz 2010b: 44–46 and Nickel 2007, chs. 4–5).

So far we have been considering a moderate line of criticism of dignity-based accounts of human rights, according to which human dignity does not exhaust the foundations of human rights. A more radical objection, however, denies it any foundational role. This objection is inspired by a certain literal reading of the first limb of the orthodox conception, i.e., the idea that human rights are moral rights possessed by all human beings simply in virtue of their humanity. But not all human beings, i.e., members of the species *Homo sapiens*, possess the capacity for rational self-determination that is central to Dworkin's account of responsibility and Griffin's account of personhood. Nonetheless, many would regard it as a flagrant human rights violation to torture someone in the advanced stages of senile dementia simply for the sadistic pleasure one derives from doing so. Considerations such as these motivate Nicholas Wolterstorff's theistic justification of human rights (2008). Of course, some theistic accounts of human rights are also dignitarian: they interpret the dignity of human beings as consisting in some quality—free will, rationality, etc.—whereby they resemble God (*imago Dei*). But these accounts face the same problem of restricted scope that affects their secular counterparts. By contrast, Wolterstorff's claim is that all human beings possess all human rights not because of some special value inhering in them, but because they are the objects of God's love. Moreover, since God loves us all equally, even the most disabled human being has exactly the same human rights as the most gifted members of the species.

Leaving aside the nontrivial matter of the assumption of God's existence, by Wolterstorff's own reckoning this argument vindicates so few human rights—even fewer than Rawls's theory—that there is a real question about whether he is even addressing the same subject as the mainstream human rights culture. And then there is a version of the familiar difficulty that plagues theistic accounts of moral concepts: doesn't God need a reason to make humans, and not earthworms, the special object of his love, for otherwise his love would be entirely capricious? And surely this reason must relate to valuable qualities possessed by humans but not earthworms. In which case, why can't those qualities directly ground human rights, without reference to God's love? Perhaps the answer is that they are not sufficiently impressive, by themselves, to confer the great protection afforded by human rights. But then there is a deeper question about whether this is a justification of the right kind. Human rights are supposed to pay tribute to the value of each individual human being, but on this account, they are ultimately ways of respecting God. Human beings are, in consequence, radically decentered within human rights morality.

We may tentatively conclude that an adequate justification of paradigmatic human rights will dispense with the literal interpretation of the first limb of the orthodox conception, whereby all human rights are possessed by all human beings, where a “human being” is any member of the species *Homo sapiens*. However, accounts of the grounding of human rights that do not exclusively appeal to dignity may be better equipped to accord at least some human rights to human beings that are not normative agents, thereby addressing some of the worries of under-inclusiveness that motivated Wolterstorff’s theistic account (for Griffin’s attempt to address the problem posed by nonnormative agents, see Griffin 2008, ch. 4).

3. From Human Rights Morality to Human Rights Law

Even if we have established to our satisfaction the existence of a schedule of human rights, i.e., universal moral rights that are in principle eligible for social or legal enforcement, it is a further question to what extent, if any, they should be established as legal rights conferred on all human beings. The relationship that should obtain at any given time between the morality and law of human rights will seldom if ever resolve into a simple, one-to-one isomorphism. Sometimes there are conclusive reasons for not incorporating into law a norm with matching content, as when doing so would be counterproductive. Conversely, there can be conclusive reasons for establishing a legal human right that does not correspond to an independent moral human right. For example, perhaps there is no human right not to be subject to the death penalty under any circumstances. However, given the susceptibility to grave error and abuse endemic to the institution of capital punishment, there may be a decisive case for creating such a right in law. The reasons for doing so will consist in the ways in which the legal right serves various other values, including moral human rights to life and against unjust punishment, that do not match it in content.

Now, human rights morality may find expression in domestic, regional and international legal orders. In this section, I shall focus on international human rights law (IHRL). An essential feature of a legal order is the claim to legitimate authority it asserts over a group of putative subjects. It claims to impose a moral obligation of obedience on them quite apart from whatever independent reasons they already had to do what the law requires. Although the nature and justification of legal authority is the subject of a voluminous jurisprudential literature in recent years, philosophers have only recently started to give serious attention to the special problems arising for the legitimacy of international law, including its human rights component (see Buchanan 2010, parts I–II; Besson and Tasioulas 2010, chs. 3–6). IHRL is chiefly generated by treaties and customary international law (including *jus cogens* norms which purport to be binding on states irrespective of their consent). To what extent does such law enjoy legitimate authority over its putative subjects, which are predominantly states?

There are various accounts of the ultimate standard of legitimacy, among them consent and democratic theories. Theories of these kinds face problems in the domestic context which, if anything, are magnified when we shift our focus to international law (this is so whether we interpret them as requiring the consent or democratic participation of individuals or, less ambitiously, of states) (see Buchanan 2010, part II). However, one justly influential account of legitimate authority that seems generally applicable is the service conception of authority developed by Joseph Raz. It holds that the ultimate standard of legitimate authority is the Normal Justification Condition (NJC), accord-

ing to which: "A has legitimate authority over B if the latter would better conform with reasons that apply to him if he intends to be guided by A's directives than if he does not" (Raz 2006: 1014). In the rest of this section, some aspects of the legitimacy of IHRL are explored by reference to the NJC.

The extension of the NJC to IHRL is not straightforward because, in the international sphere, no unified legislature exists comparable to those prevalent within domestic legal systems. Nonetheless, norms governing the formation of customary international law may be thought of as constituting an institutional process whereby the activities of various agents—predominantly, but not exclusively, states—combine to produce law that lays claim to authority. The application of the NJC to treaty law is yet more problematic, since treaties are more readily subsumed under the category of promise-based obligations. However, even here the NJC retains a twofold, albeit indirect, relevance. First, it can provide individual states with some guidance as to which treaties they should ratify. Second, multilateral treaties, in particular, often play an important role in the formation of customary international law itself, so that obligations originally specified in treaties come to bind non-states parties.

One recurrent challenge to the legitimacy of IHRL is that it is not binding on all states because it embodies a parochial, distinctively Western, moral outlook that non-Western societies do not have any compelling reason to adopt. Although this objection is often advanced on the basis of a general skepticism about reasons, one that would comprehensively undermine the possibility of the NJC ever being satisfied, it is probably not best defended in this radical way. Instead, it is best seen as reflecting an underlying ethical pluralism, according to which, although the norms of IHRL may exemplify one in-principle acceptable selection and ordering of values, there are also other such selections and orderings. If so, societies subjected to purportedly universally binding norms of IHRL that reflect orderings they do not endorse might properly complain that those norms unjustifiably impose an alien perspective on them at the expense of the no-less-valuable forms of life sustained by their own cultures. To that extent, the NJC is not satisfied, at least with respect to them, because they do not better conform with the independent reasons that apply to them through obedience to IHRL (Tasioulas 2010a).

Allen Buchanan has offered the most comprehensive response to various specific manifestations of this parochialism objection, taking into consideration factors such as the content of key IHRL norms and the quality of the processes through which they are generated and implemented. He contends that, if properly designed, IHRL institutions can provide vital epistemic assistance regarding the identification of moral norms of human rights and the most effective ways of enhancing compliance with them. Among the ways they can do so are by: (a) accessing and utilizing reliable factual information crucial to the justification and/or specification of human rights norms; (b) achieving a more inclusive representation of interests and viewpoints than is available at the domestic level, thereby mitigating the risk of culturally biased assessments in determining the content of human rights norms and of the best institutional means of implementing them; and (c) providing authoritative specifications of human rights when there is a range of reasonable alternative specifications (Buchanan 2010: 91).

Buchanan's argument is restricted to the case of "properly designed" institutions, and it is a very much open question whether real-world IHRL institutions meet that exacting specification. But, even if they do, it is important to note that the sorts of epistemic advantages described by Buchanan could not, by themselves, constitute a sufficient basis for the legitimacy of IHRL. The epistemic virtues of A can typically only establish

that A is an epistemic authority, i.e., someone whose judgment on a given topic provides others with reasons to *believe* what he says. They will not show that A is a practical authority, i.e., someone regarding whom there is an obligation to *act* in conformity with their directives, unless further conditions are satisfied. Classically, among the further conditions relevant under the NJC are considerations of *efficacy*, i.e., the power to secure compliance with one's directives. So, for example, one source of the authority of the state is its power to resolve problems of collective action in achieving a common goal by laying down standards that its putative subjects have reason to comply with because, *inter alia*, those standards are likely to be obeyed. This is why the actual traffic code in the UK has practical authority over inhabitants of that country, whereas the radically different, yet "ideal" code produced by an academic expert on traffic regulation does not.

However, some critics of the legitimacy of IHRL identify its Achilles heel precisely at this point. International law, unlike most domestic legal systems, generally lacks the capacity to deploy effective sanctions against noncompliance. And IHRL faces special efficacy-undermining burdens. Compared to many other forms of international law, it derives limited benefits from the logic of reciprocity. The failure of a state to respect human rights law in its treatment of its own people does not, of itself, harm other states, nor can the latter meaningfully retaliate by failing to respect their own citizens' rights. This leads to a serious collective-action problem for the international implementation of IHRL, one exacerbated by the difficulty of securing international consensus on which kinds and levels of human rights violations warrant which forms of international response, such as military intervention or economic sanctions.

Invoking problems of this sort, Eric Posner has claimed that the international human rights treaty regime "has either had no effect on the behavior of states or very little" (Posner 2009: 186). However, arguably the most comprehensive and rigorous recent empirical study of the consequences of human rights treaty ratification contradicts this sweeping skepticism. Beth Simmons has argued that human rights treaties play a "crucial constraining role" in shaping the behavior of the states that ratify them. The public commitment to be legally bound by human rights norms that is expressed by treaty ratification influences various agents' expectations regarding how ratifying states will behave. Subsequent shortfalls in state behavior trigger political demands for compliance, mainly from domestic constituencies, but also internationally. Simmons focuses on the role of three domestic mechanisms through which such demands are channeled: elite-initiated agendas, litigation and popular mobilization (Simmons 2010). As she rightly cautions, we cannot readily extrapolate her conclusions to nontreaty law. However, as we have already noted, treaties often play an important role in the crystallization of norms of customary international law, so to that extent her findings have an indirect bearing on the efficacy of the latter.

The legitimacy of IHRL under the NJC, therefore, is clearly hostage to geopolitical realities relating to its efficacy. We should, however, register a more principled limitation on the legitimacy of IHRL. The NJC is generally subject to an Independence Condition (IC), according to which "the matters regarding which [it] is met are such that with respect to them it is better to conform to reason than to decide for oneself, unaided by authority" (Raz 2006: 1104). Even if, for example, I would fare significantly better in my personal relationships by heeding the directives of government experts, I am not bound by their directives, because these are matters regarding which I have conclusive reasons of autonomy to arrive at my own assessment of the balance of reasons.

It is an important question to what extent IC-relevant considerations of freedom arise in the case of states. Certainly, states lack the kind of ultimate moral significance

we attribute to the individual human beings who are their members. Nonetheless, states arguably have reasons to make and pursue their own choices within certain domains, and to respect and protect the similar freedom of other states. Some of these reasons are instrumental: if a state chooses and acts freely, it may be more likely to conform with other reasons that apply to it, including reasons of human rights morality. More controversially, some of these reasons are intrinsic, grounded in the value of free choice and action, as such, independent of their consequences. Here the idea is that there is intrinsic value to the exercise of self-determination by political communities associated with states, a value that extends to some nondemocratic states. In addition, the freedom of a state may be relevant under the IC even in cases in which the state itself does not have reason to decide and act freely. This would be so, for example, if interference with the state's freedom is likely to have massively destabilizing geopolitical consequences. These considerations of freedom are what properly shape an acceptable norm of state sovereignty under international law.

If the foregoing approach is on the right lines, it suggests that the sovereignty of states may constrain the legitimacy of IHRL in complex and varying ways, depending on the content of the relevant law and its means of enforcement. In the most extreme imaginable cases, respect for sovereignty is incompatible with the exercise of any legitimate authority on a given topic. Then there is a middle range of cases in which legitimate laws may be enacted, but their content is subject to significant constraints. Finally, there are the less extreme cases in which what is ruled out is the legitimacy of enforcing otherwise legitimate laws in some particular fashion, e.g., through the use of coercive mechanisms. Whether considerations of state freedom have a trumping effect in any of these ways is a matter for substantive argument. But on the picture that has emerged, one cannot just assume that any moral human right can be established in international law without unjustifiably encroaching upon state sovereignty. Existing international law already reflects this conclusion, insofar as it confers on states a limited power to make reservations even to multilateral human rights conventions or to escape being bound by customary norms of human rights (those that are not properly accorded *jus cogens* status). To this extent, we can capture an insight that underpins some versions of the political view of human rights discussed earlier, i.e., that the orthodox view does not by itself furnish a complete normative theory of IHRL. But that is something that the proponent of the orthodox view should not only accept, but insist on: the road from human rights morality to human rights law is often long and winding.

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Further Reading

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