

Human Rights, Seminar Notes

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Human Rights

Week 1: Introduction and Orthodox Conceptions of Human Rights

ALEX SILK & MERTEN REGLITZ

Course Structure

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- **Part I:** topics 1-4: four philosophical approaches to human rights
- **Part II:** topics 5-9: controversial human rights and philosophical debates about them
- **Part III:** topics 10-11: human rights and humanitarian intervention; the future of human rights

Today

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- Brief history of human rights discourse
- Human rights as moral rights
- Philosophical questions about human rights
- Griffin's orthodox/moral approach to human rights

1. History of Human Rights discourse

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What are we talking about?

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Very rough first approximation: human rights are norms regarding seriously important human goods, protections, and freedoms (social, legal, political)

Prototypical examples: right not to be tortured, right not to be enslaved

Controversial! Not definitional

- What distinguishes them from other rights? Relation to morality and law? Universal? Inalienable? ...

Westphalian Peace Treaty (1648)

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Westphalian Peace Treaty (1648)

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- Ended the 30 Years War in the Holy Roman Empire and the 80 Years War between Spain and the Dutch Republic
- Ended (for the most part) religious wars in Europe
- → International principle of state sovereignty
 - States recognised each other's right to non-interference in domestic affairs



Münster Town Hall

Second World War

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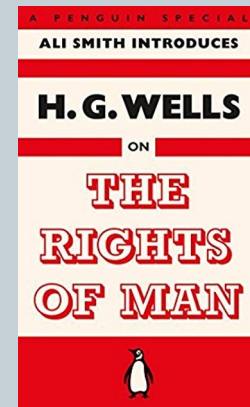
- Nazi Germany committed different forms of genocide against parts of its own population and those in occupied territories, along with other war crimes, human experiments, terror bombings.
- Could some of this have been avoided if there had been an explicit global way of identifying and sanctioning human rights violations in Nazi Germany?
- → Constraining absolute state sovereignty over domestic affairs



During WWII

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- **Roosevelt and Churchill:** Atlantic Charter (1941): post-war order in which everyone would enjoy rights such as rights of self-government, labour standards, social security, freedom from want and fear.
- “Declaration of the United Nations” (1942).
- H.G. Wells’ *The Rights of Man* as blueprint for the Universal Declaration of Human Rights.



Aftermath of the War and the birth of the United Nations

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- **United Nations Charter:** (San Francisco, 1945) committed the organisation and its members to cooperate to promote the respect “for human rights and for fundamental freedoms.”
- No explicit content or steps to enforce, or a declaration/treaty of human rights
- Also, the Charter denied that UN has authority “to intervene in matters which are essentially within the domestic jurisdiction of any state.”
- Disagreement about an **enforceable** bill of rights.



The Progression

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Committee appointed to create an international declaration of human rights; several noteworthy members:

- Eleanor Roosevelt (US)– Social Activist and Chairman of Committee
- Charles Malik (Lebanon) – Philosopher and Academic
- Rene Cassin (France) – Law Professor, Jurist and Pacifist Campaigner
- Hansa Mehta (India) – Legislator and Anti-Colonialist Campaigner
- Peng-chun Chang (China) – Philosopher and Academic

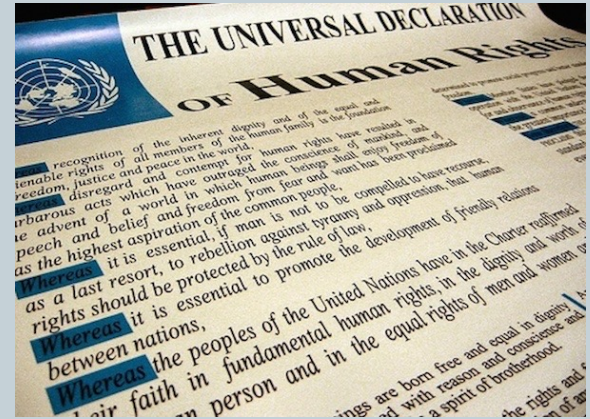


Eleanor Roosevelt

The Universal Declaration of Human Rights (UDHR)

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- December 1948: The UN General Assembly makes a non-binding declaration:
Universal Declaration of Human Rights.
- One of the most important Human Rights documents: short preamble and 30 articles
- Preamble:
 - Emphasizes **inherent dignity** of **all members** of the human family as a ground for **inalienable** rights
 - Emphasizes the importance of respect for human rights in order to promote peace between nations and prevent commission of “barbarous” acts (clear reference to WWII)
 - (Q: Instrumental value of human rights discourse, independent of one’s views on philosophical nuances?)



Group Exercise:

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How many rights from the UNDHR 1948 can you identify?

Tip: 30 Articles does not mean 30 rights!

Table 1.1 The Universal Declaration's Rights

Security Rights

- Life, liberty, and security of person (article 3)
- No torture or cruel punishments (article 5)

Due Process Rights

- Right to an effective remedy for violations of rights (article 8) and to a social and international order in which human rights can be enjoyed (article 28)
- No arbitrary arrest, detention, or exile (article 9)
- Right to a trial in criminal cases (article 10)
- Presumption of innocence in criminal cases (article 11)
- No retroactive criminal laws or penalties (article 11)
- No arbitrary deprivation of nationality (article 15)
- No arbitrary deprivation of property (article 17.2)
- Protection of moral and material interests resulting from any scientific, literary, or artistic production of which one is the author (article 27.2)

Basic Liberties

- No slavery or servitude (article 4)
- No arbitrary interference with one's privacy, family, home, or correspondence (article 12)
- Freedom of movement and residence (article 13)
- Freedom to leave and return to one's country (article 13)
- Freedom to seek and enjoy in other countries asylum from persecution (article 14)
- No marriage without full and free consent of the intending spouses (article 16.2)
- Freedom to own property individually and collectively (article 17.1)
- Freedom of thought, conscience, and religion (article 18)
- Freedom of opinion and expression (article 19)
- Freedom of peaceful assembly and association (article 20)
- Freedom to form and join trade unions (article 23.4)
- Freedom of parents to choose the kind of education that shall be given to their children (article 26)
- Freedom to participate in cultural life (article 27)

Rights of Political Participation

- Freedom to participate in government, directly or through freely chosen representatives (article 21.1)
- Equal access to public service (article 21.2)
- Opportunities to vote in periodic and genuine elections (article 21.3)

Equality Rights

- Equality of fundamental rights and freedoms (article 2)
- Legal personality (article 6) and equality before the law (article 7)
- Freedom from discrimination (articles 2, 7)
- Equal rights in marriage and family (article 16)
- Equal pay for equal work (article 22)
- Equal social protection for children born out of wedlock (article 25.2)

Economic and Social Rights

- Social security (article 22)
- Just and favorable remuneration for workers (article 23.3)
- Rest and leisure (article 24)
- Adequate standard of living for health and well-being (article 25)
- Health care (article 25)
- Special care during motherhood and childhood (article 25.1)
- The right to educational opportunities (article 26)

Next Steps

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- The next stage was to create binding international treaties on the basis of the 1948 declaration.
- Genocide convention (1948). Cold war intervened.
- 1966: **International Covenant on Civil and Political Rights (ICCPR)**: 168 parties, entered into force 1976.
- 1966: **International Covenant on Economic, Social and Cultural Rights (ICESCR)**: 164 parties, entered into force 1976.
- The state agrees to respect and implement the rights which the treaty covers and to accept and respond to international scrutiny and criticism.
- ICCPR monitored by the Human Rights Committee, ICESCR by Committee on Economic, Social, and Cultural rights.
- Committee studies and critically comments on HR reports submitted by participating countries and hears reports from NGOs.
- No legally binding recommendations. Encourages compliance, but fairly toothless in terms of enforcement.

Additional specific binding treaties:

- Convention on the Elimination of All Forms of Racial Discrimination (1966)
- Elimination of All Forms of Racial Discrimination Against Women (1979)
- Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1984)
- Convention on Rights of the Child (1989)

Regional agreements:

- Council of Europe: European Convention on Human Rights (1953)
- Organisation of American States: Convention on Human Rights (1969[1978])
- Organisation of African Unity (now African Union): African Charter of Human and Peoples' Rights (1981[1986])

Enforcement mechanisms:

- In some cases, countries not only agree to respect and implement the rights, but also to an extra-national system of investigation, mediation, and adjudication of human rights complaints.
- European Court of Human Rights in Strasbourg (Initially: 1959. Permanently: 1998).
- Inter-American (i) Commission and (i) Court of Human Rights (1959 and 1979)
- African Court of Human and Peoples' Rights (2006)
- Limited interventional mechanisms: International Criminal Court (1998). UN Security Council (Mandate under Art. 24 of UN Charter to maintain international peace and security. Can be interpreted to include intervention to protect HR)

Precursors to the UDHR:

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Earlier 20th Century Precedent:

- In the Nuremberg trials, Nazis complained that a court cannot condemn a person for a crime if the act wasn't made illegal in the law before the act was committed (the 'nullum crimen sine lege' principle).
- The London Charter – which established rules for the Nuremberg trials, and set out the main charges such as “crimes against humanity” – was completed only in 1945.
- The court responded that human rights were already implicitly recognized by international law, on the basis of customary law extracted from previous conventions, practices, etc. (e.g., League of Nations 1919).



Earlier precedents (?):

- French Declaration of the Rights of Man and of the Citizen (1789) and the United States Bill of Rights (1791)? However, these don't defend universal rights or economic/social rights.
- Enlightenment tradition of natural rights: Grotius (1583-1645) Locke (1632-1704), Pufendorf (1632-1694).
- Medieval origins? (Gratian C.1150, William of Ockham 1285-1347)

2. Human Rights as Moral Rights

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Legal Rights and Human Rights

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- Human rights are written into international law, which is monitored and enforced (more or less).
- In this sense, human rights are legal rights.
- However, in this module, we are interested in human rights as **moral rights**. (cf. prominent tradition of “natural” rights (Griffin))
- Universal Declaration talks about *recognition* (rather than creation) of human rights and their protection in law.
- The set of (moral) human rights needn’t map directly onto the set of rights encoded in UDHR. International law may not recognize all human rights; and it may ascribe legal rights that aren’t human rights.
 - Cf. Griffin: Right to paid leave from work (Article 24)!
 - (NB: possible complications depending on one’s views about the relation between law and morality)

Human Rights as Moral Rights

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- When talking about human rights as moral rights, we're *not* simply talking about rights that happen to be accepted by some/all social moral codes.
- Rather, we're talking about true human rights – human rights implied by the correct moral view.
- For our purposes we will largely bracket metaethical issues about what makes it the case that the moral facts are as they are. (e.g., how moral facts depend on individual/group attitudes)
- What's relevant is the idea that some/all societies may get the moral facts about human rights wrong; and that the set of true human rights may not map directly onto the set of rights recognized by domestic/international legal sources or by the moral norms of one's society.
- This is a nontrivial assumption! We'll come back to objections to this view later.
- But what are moral rights?

Moral rights

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- As noted before, not everything we might consider to be a moral right is recognized as a legal right (e.g. access to internet); and for most moral rights it required a lot of struggle for them to become legally recognized (women's right to vote, US Civil Rights movement).
- Joseph Raz's on moral rights:
"It would appear that we have a [moral] right only if the right entails that the value of having it, or our need for it, is of a kind sufficient to impose duties on [...] at least one other."
("Human Rights in the Emerging World Order," 36)
- E.g., I have a right to life because my interest in being alive is important enough to put others under a duty not to take it away from me.
 - (How strong of a condition is this?)
- But: do I have a right to be loved? Do children have a right to be loved by their parents?
- Do employees have a right to paid annual leave? Do we have a right to have friends?



Wesley Hohfeld's classification of Rights (1919)

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The Hohfeldian system: identifies four types of elemental rights, which can be combined into complex “compound” rights:

1. Claim Rights
2. Liberty Rights
3. Powers
4. Immunities



Hohfeld's Classification

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1. Claim rights (most commonly considered)

- If A has a *right* to x, someone else has a *duty* to ensure that A has x (e.g., by providing A with x (“positive claim rights”) or not intervening with A’s enjoyment of x (“negative claim rights”))
 - E.g., if A has a (negative) claim-right to decide what to do with her body, everyone else has a duty not to interfere with it without her consent.
 - E.g., if A has a (positive) claim-right to fast and cheap internet, someone (e.g., A’s government) owes it to A to provide it (or the opportunity to purchase it)
- So, claim-rights and duties are correlative: there’s a **right-holder** (who has the right), **addressees** (who have the duty), and a **scope** (content of the right).

Hohfeld's Classification

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2. Liberty rights (or “privileges”)

- If A has a liberty-*right* to x, A is permitted to x
 - ✦ If I have a liberty-right to paint my house yellow, I have no duty not to.

3. Powers

- If A has a *power* (power-right) regarding x, she can change rights and duties regarding x
 - ✦ E.g., I have a power to sell my phone; a judge has a power to sentence people.

4. Immunities

- If A has an *immunity* (immunity-right) regarding x, no one else can change her rights and duties regarding x.
 - ✦ E.g., citizens have immunity from testifying against themselves in court

Rights as Compounds – example: property rights

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Many rights are *complex* in the sense of involving many of these elemental rights (or “incidents”)

Property rights plausibly involve each of them:

- **Claim**-rights: Nobody can play or take my guitar without my consent
- **Liberty**-rights: I can play or not play my guitar
- **Powers**: I can sell or give my guitar to someone else, thus transferring my liberties and claims to her. Or I can abandon it, giving up my claim to it.
- **Immunities**: Other people lack the power to sell my guitar

Positive and Negative Rights

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Another common distinction is between “positive” vs. “negative” (claim) rights.

- **Negative** rights give other people duties **not to interfere** with you (e.g., kill you, steal your property).
- **Positive** rights give other people duties **to do** things for you (e.g., to provide certain social services).
- Common idea: negative rights are more fundamental or important, and less costly to protect (requiring only forbearance). Positive duties are more costly and harder to justify (requiring action and provision).
- **Q:** Really? How clear-cut is this distinction? More on this later with Shue’s challenge...

Having (a moral) right vs. being/acting right

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- ‘right’ (n.) ≠ ‘right’ (adj.)
- The fact that A has a right to do x doesn’t imply that A’s doing x is morally right, best, or praiseworthy.
 - I may have the right to spend my leisure time counting blades of grass, but my doing so might not be praiseworthy.
 - I may have the right to keep my place in line even if there’s a family with a crying, sick baby behind me; but exercising that right may be morally blameworthy. (cf. Waldron on “a right to do wrong”)
- On the flip side, the fact that it would be morally right for me to give x to A doesn’t imply that A has a right to x.
 - “duty of beneficence” (cf. previous example)

Having (a moral) right vs. being/acting right

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Upshot: Rights are only a part of morality.

- Cf. Griffin “Human rights do not exhaust the whole moral domain; they do not exhaust even the whole domain of justice and fairness.”

The Role of Rights

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Joel Feinberg: Rights are something that we can demand as our due:

- ❑ “A right is something that [one] can stand on, something that can be demanded or insisted upon without embarrassment or shame.” (*Social Philosophy*, 1973)
- ❑ → Rights vs. charity (consider: no gratitude required in case of right).

H.L.A Hart: Rights may ground legitimate coercion:

- ❑ “The concept of a right belongs to that branch of morality which is specifically concerned to determine when one person’s freedom may be limited by another’s and so to determine what actions may appropriately be made the subject of coercive legal rules.” (“Are There Any Natural Rights?”, 1955)

The Role of Rights

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Ronald Dworkin: Rights are like trump cards that constrain the pursuit of individual/collective goals and interests. (e.g. “Taking Rights Seriously,” 1977)

- ❑ It might be better overall if I took ten homeless people into my house; however, my property rights mean that I can veto any such project. It would be wrong to force me, even though the outcome would be better.

Robert Nozick: Rights function as side-constraints. (*Anarchy, State, and Utopia*, 1974)

- ❑ We can't violate rights simply in order to minimize rights-violations. (e.g. killing X so that M won't kill A, B, C)
- ❑ This needn't imply rights are absolute. We can *wrong someone* without *acting wrongly*.

Judith Jarvis Thomson: Even when rights are justifiably overridden, they leave a moral “trace” or “residue”. (*Rights, Restitution, and Risk*, 1986)

- ❑ One might justifiably demand compensation for a violation of one's rights even if they are infringed permissibly. (e.g. if stranded hikers broke into your empty cabin and burned your furniture to stay alive)

3. Philosophical Questions about Human Rights



**ALL HUMAN BEINGS
ARE BORN FREE AND EQUAL
IN DIGNITY AND RIGHTS.**

Which rights?

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Not all moral rights are human rights. Human rights are a subset of moral rights more generally.

Question: What distinguishes human rights from other moral rights?

Human Rights

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The Universal Declaration's list consists of six broad families:

1. Security rights (e.g. murder, torture)
2. Due process rights (e.g. fair trial)
3. Fundamental liberty rights (e.g. belief, movement)
4. Political rights (e.g. assembly, voting)
5. Equality rights (e.g. discrimination)
6. Economic and social rights (e.g. education, health care)

Why?

Human Rights

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First pass: Human rights are distinguished in virtue of what we have them: being human (compare: being a citizen, being in a special relationship, etc.)

- Rights that protect universal human interests?
- Rights that protect especially weighty or important interests?
- Rights against specific kinds of threats? Threats posed by one's government?
- Rights that all societies accept?
- Rights that are compatible with all comprehensive worldviews?
- Rights that specify specific duty holders? (one's co-nationals? one's state? other states? the international community? all other human beings?)
- Rights that provide international standards of evaluation?
- Rights that legitimate international interference or intervention?

4 Philosophical Questions about Human Rights

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1. Nature: If there are human rights, what are they? What characteristics do they (essentially) share?
2. Ground: What would make it the case that there are human rights? What makes it the case that a given candidate right is a human right?
3. Epistemology/Justification: How might we justify specific human rights claims?
4. Existence: Are there human rights at all? Or should we endorse the skeptical view that there are no genuine human rights?

A (brief and contestable) Map of the Terrain

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What are HRs? And what, fundamentally, explains their existence and content?

Moral/Naturalistic/Orthodox Views: HRs are a subclass of “ordinary” moral rights, justifiable in terms of ‘ordinary’ pre-political moral reasoning/argument.

Political/Practical Views: HRs are *sui generis*, justifiable in terms of their role in international political practice.

Instrumental Views:
HRs protect certain human interests

Status views: HRs reflect, or are constitutive of, our status (Kamm, Nagel)

HRs form part of the **conditions of membership in a just/ideal society of states** and the rules that govern such a society. Failure to respect HRs opens a state up to interference (Rawls)

As **evidenced by real world policy and practice**, HRs limit internal autonomy of states and provide grounds for legitimate interference (Beitz/Raz)

Agency
(Griffin)

Capabilities for minimal human flourishing
(Nussbaum, Sen)

Basic Human Needs
(Renzo)

4. Orthodox Views of Human Rights

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Example: Griffin's account of Human Rights

“In what should we say that human rights are grounded? Well, primarily in personhood” (*On Human Rights*, p. 33).

- Rough: human rights are rights that protect people's ability to form, revise, and pursue conceptions of a worthwhile life.



Griffin's Approach: Methodology

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Avoids “Top Down” approaches that start with a general formal principle or decision procedure, and try to derive specific human rights from that (e.g., CI, best consequences, contractual position)

- Issue: how to distinguish human rights from other moral norms?

Instead, Griffin prefers a “Bottom Up” approach: start with specific paradigm rights (e.g., from the UDHR), and try to come up with a more general principle or set of principles that best explains, justifies, unifies them.

- In starting with a vaguely demarcated set of rights, perhaps we might be in a better position to clarify the concept of human rights and justify our practices.
 - What could justify these right **in particular**? What might be able to **unify** them?

Both approaches will plausibly be necessary at some stage of theorizing. (cf. reflective equilibrium)

(**Question:** How clear-cut or useful is this distinction?)

Griffin's Approach: Natural rights tradition

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Important change in (roughly!) mid-13th Century: shift from treating rights as a property of states of affairs (e.g., social coherence with the common good, fairness, God's will, natural harmony) to treating rights as a property of persons.

- Basic idea: Humans are morally special in some respect. (takes off with later thinkers, e.g. Hobbes, Locke, Grotius)
- One has rights in virtue of some property that morally distinguishes us in the natural world (e.g., reason, free will, being made in God's image, dignity).
- persons as moral agents, with standing to make claims on others

Griffin's Proposal (first pass)

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What is it about us as humans that makes it the case that we have these rights?

- What distinguishes us from other animals (as far as we know) is that we “**can form and pursue conceptions of a worthwhile life.**”
- Acts of pursuing worthwhile life as we see it — “deliberating, assessing, choosing, and acting to make what we see as a good life for ourselves” — are grounded in our **agency**. (32)
- **Human rights** are moral norms that protect this personhood/normative agency, the ground of our moral standing (qualified by some minimal “practicalities”; more on this shortly)
 - NB: “all that a person needs in order to *have* human rights is these capacities, but what human rights *protect* is something more: their exercise as well” (47).

Griffin's Proposal (first pass)

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Strategy: human rights \Rightarrow_1 personhood \Rightarrow_2 agency \Rightarrow_3
autonomy, minimum provision, liberty (cf. 33)

1. Human rights are “protections of our human standing or, as I shall put it, our **personhood**.”
2. “[O]ne can break down the notion of personhood [...] by breaking down the notion of **agency**.”
 - Relevant sense of agency: “the agency involved in living a worthwhile life.” Call it *normative agency*. (cf. 45–48)

...

Griffin's Proposal (first pass)

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3. Normative agency requires:

- i. **Autonomy:** “not be[ing] dominated or controlled by someone or something else”; necessary so that one can “choose one’s own path through life”
- ii. **Minimum provision:** minimum provision of resources and capabilities (education, information); necessary for one’s choice to be “real” and acted on
- iii. **Liberty:** not being forcibly stopped by others; necessary so that one’s action of pursuing one’s conception of a worthwhile life isn’t blocked

The “high value [attached] to our individual personhood” generates special moral protections of it and what’s necessary for it. **Human rights** are these moral protections.

Worry

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Some human rights might be explained simply by our personhood (perhaps, e.g., a right not to be tortured). But can all?

- Suppose my undergoing a kidney extraction wouldn't undermine my agency in the sense of "prevent[ing] me from living a recognizably human life". How, then, to capture my apparent human right to security of person if a health authority wants to use one of my kidneys to save someone's life?
- "Indeterminacy": "personhood [...] is often not up to fixing anything approaching a determinate enough line for practice" (37)
 - **Question:** What exactly is the worry here?
 - **Assumption:** a theory of human rights must yield rights with sufficiently determinate content for the theory to be applied effectively in practice. (cf. 38)
 - ✦ **Q:** What exactly does "protecting" the conditions for normative agency amount to? E.g., how much harm would be allowed? (cf. pp. 42, 46–48)

Revision: Personhood + Practicalities

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Refinement: human rights are grounded in **personhood and practicalities**

- “Practicalities”: facts about human nature and the nature of human societies

Claim: practicalities, thus understood, and the value of personhood ground the existence of human rights, or moral norms, with sufficiently determinate content to make “effective, socially manageable claim[s] on others.”

- How exactly do practicalities figure in determining the specific content of human rights?

More on this next time...



Human Rights

Week 2: Moral vs. Political Conceptions of Human Rights

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Today

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- Recap
- Griffin / moral theories of human rights (round 2)
- Beitz / political theories of human rights

Recap

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What are we talking about?

- “Human rights”
 - First (inadequate) approximation: certain norms regarding seriously important human goods, protections, freedoms (e.g., a right not to be tortured, a right to security of person)
 - A subset of moral rights (bracket issues about their legal status)
 - ✦ E.g., “claim-rights”: properties of individuals that impose duties on someone or some group. (the right holder(s)? the duty holder(s)? and content of the duty?)
 - ✦ “liberty-rights”
 - Which subset?
 - ✦ “human”?: What demarcates the set of possible right-holders? (biology? personhood? certain capacities? relations?)
 - ✦ ...

Recap

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- Some (not all) questions for a theory of human rights
 - **NATURE:** What demarcates the subset of moral rights that are human rights? (i.e., what is the nature of human rights?)
 - **GROUND:** What grounds the existence and content of human rights? What facts fundamentally determine the existence and content of human rights?
 - ✦ General, existence: What needs to be the case for there to be human rights at all?
 - ✦ Particular, existence: What needs to be the case for a given norm to be a human right?
 - ✦ Content: What makes it the case that human rights have the specific content that they have?

- Call the collection of facts that fundamentally determine the existence and content of human rights the **grounding facts**.

Griffin

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Griffin: the grounding facts = facts about the value of personhood + practicalities

- The existence and content of human rights are determined, fundamentally, by facts about the value of personhood, understood as normative agency – and the conditions necessary for preserving and exercising it – along with certain universal nonnormative facts about human nature and the nature of society.
 - “Normative agency”: the agency involved in living a worthwhile life
 - Conditions for normative agency: Autonomy, Liberty, Minimum provision
 - Practicalities: facts about human nature and the nature of society

Clarification

- The fact that personhood+practicalities are what grounds a human right to X leaves open whether there may be other factors grounding a right to X or norm about X.
 - Torture example (cf. 52–53)
 - ✦ Why, fundamentally, is there a human right not to be tortured? Because of how torture undermines one's normative agency
 - ✦ Why, fundamentally, shouldn't one torture people? Because torture inflicts great pain, ...
 - Facts about what protects/undermines people's normative agency may often go hand-in-hand with facts about other morally relevant factors. E.g., acts that inflict great pain often undermine normative agency. But facts about pleasure/pain aren't *fundamentally* what makes it the case that there are human rights.

Griffin: Practicalities?

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Why practicalities?

- Griffin claims that facts about personhood are insufficient to yield rights with sufficiently determinate content for the theory to be applied effectively in practice.
 - What norms are actually needed protect our personhood?
- So he revises the theory to include “practicalities” – facts about human nature and the nature of society – in the grounds of human rights.
 - “Personhood initially generates the rights; practicalities give them, where needed, a sufficiently determinate shape.”
 - (Question: How would practicalities help with the kidney extraction case? (p 37))

The “high value [attached] to our individual personhood” generates special moral protections of it and what’s necessary for it. Human rights are these moral protections.

Griffin: Practicalities?

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Practicalities in the *grounds* of human rights?

- One way of thinking about Griffin's personhood and practicalities components:
 - The value of personhood generates a general norm like "Do whatever is needed to protect normative agency!".
 - ✦ ⇒ a set of conditional norms of the form "If the world is like P₁, then Y₁!", "If the world is like P₂, then Y₂!", etc.
 - Practicalities are the relevant nonnormative facts P that determine which norms are in force in the actual world.

Griffin: Practicalities?

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Practicalities in the grounds of human rights?

- Whether practicalities are in the grounds of human rights, then, depends on the structure of the norms: Are human rights norms conditional norms like “If the practicalities are P_n , $Y_n!$ ”, or norms like “ $Y_n!$ ”?
 - If the latter: practicalities are included in the grounding facts.
 - If the former: practicalities aren't included in the grounding facts; the grounding facts just include the facts about the value of personhood; practicalities figure in determining what we're actually to do.

Griffin: Practicalities?

10

Does it matter? Bookkeeping?

- Compare the question of whether human rights are “universal”
- We already know that circumstances sometimes affect whether a given human right is relevant to someone’s actions. E.g., a right to free internet would be irrelevant in a society without internet. (cf. p. 50 on “basic” vs “derived/applied” rights)
- Treat practicalities as (universal) circumstantial facts like this?
 - If not, then are local circumstantial facts also in the grounds of human rights?
 - ✖ If not, then why the theoretical division between the two kinds of nonnormative facts?
 - ✖ If so, then human rights are largely not universal.
 - If so, ...

Griffin: Practicalities?

11

- **Grounding facts: facts about the value of personhood**
 - ⇒ Human rights norms: “If the practicalities are P1, then: if circumstances C1 apply, X1!; if circumstances C2 apply, X2!; ...”, “If the practicalities are P2, then: if circumstances C3 apply, X3!; if circumstances C4 apply, X4!; ...”, etc.
- + practicalities P, which tell you what world you’re in (specifically, what human nature and the nature of society are actually like)
- + local circumstances C, which tell you where/when you are in the world
- ⇒ what specific set of acts X is enjoined for you, so as to satisfy human rights norms
 - (e.g., if P is the actual practicalities, and C is a circumstance like ours where there’s easy internet, X would include actions/practices ensuring freed internet)
 - (NB: some circumstances C may be trivial. Limiting case)

Griffin: Practicalities?

12

- Human rights would be “universal” in the sense that, given the actual practicalities P, the same (possibly conditional) norms are in force for all people. What specific actions are enjoined may differ, depending on the local circumstances C.

Exercise:

How can we derive specific HRs from Griffin's account?

Are some on the UD list more difficult to explain than others?

Table 1.1 The Universal Declaration's Rights

Security Rights

- Life, liberty, and security of person (article 3)
- No torture or cruel punishments (article 5)

Due Process Rights

- Right to an effective remedy for violations of rights (article 8) and to a social and international order in which human rights can be enjoyed (article 28)
- No arbitrary arrest, detention, or exile (article 9)
- Right to a trial in criminal cases (article 10)
- Presumption of innocence in criminal cases (article 11)
- No retroactive criminal laws or penalties (article 11)
- No arbitrary deprivation of nationality (article 15)
- No arbitrary deprivation of property (article 17.2)
- Protection of moral and material interests resulting from any scientific, literary, or artistic production of which one is the author (article 27.2)

Basic Liberties

- No slavery or servitude (article 4)
- No arbitrary interference with one's privacy, family, home, or correspondence (article 12)
- Freedom of movement and residence (article 13)
- Freedom to leave and return to one's country (article 13)
- Freedom to seek and enjoy in other countries asylum from persecution (article 14)
- No marriage without full and free consent of the intending spouses (article 16.2)
- Freedom to own property individually and collectively (article 17.1)
- Freedom of thought, conscience, and religion (article 18)
- Freedom of opinion and expression (article 19)
- Freedom of peaceful assembly and association (article 20)
- Freedom to form and join trade unions (article 23.4)
- Freedom of parents to choose the kind of education that shall be given to their children (article 26)
- Freedom to participate in cultural life (article 27)

Rights of Political Participation

- Freedom to participate in government, directly or through freely chosen representatives (article 21.1)
- Equal access to public service (article 21.2)
- Opportunities to vote in periodic and genuine elections (article 21.3)

Equality Rights

- Equality of fundamental rights and freedoms (article 2)
- Legal personality (article 6) and equality before the law (article 7)
- Freedom from discrimination (articles 2, 7)
- Equal rights in marriage and family (article 16)
- Equal pay for equal work (article 22)
- Equal social protection for children born out of wedlock (article 25.2)

Economic and Social Rights

- Social security (article 22)
- Just and favorable remuneration for workers (article 23.3)
- Rest and leisure (article 24)
- Adequate standard of living for health and well-being (article 25)
- Health care (article 25)
- Special care during motherhood and childhood (article 25.1)
- The right to educational opportunities (article 26)

Challenges

14

- What if there is a right on the list of human rights that cannot be explained by Griffin's account?
 - Human rights to leisure, nationality, socio-economic rights?
 - Bite the bullet? (deny that they're rights, treat them as other kinds of rights, treat them as objects of other types of normative concern)
- What delimits the set of right-holders?
 - Do all humans have normative agency? If not, do some humans not have human rights? (children? permanently ill persons?) If so, might there be pragmatic reasons for generally proceeding as if they do?
 - Do some non-human animals have normative agency? If so, then how should we extend our theorizing and practice?
- Are the duty-holders anyone? Or are they in the first instance states?

A (brief and contestable) Map of the Terrain

15

What are HRs? And what, fundamentally, explains their existence and content?

Moral/Normative/Orthodox Views: HRs are a subclass of ordinary moral rights, explainable in terms of pre-political moral/evaluative facts.

Political/Practical Views: HRs can only be explained in terms of their role in international political practice.

Instrumental Views:
HRs protect certain human interests

Status views: HRs reflect, or are constitutive of, our status (Kamm, Nagel)

HRs form part of the **conditions of membership in a just/ideal society of states** and the rules that govern such a society. Failure to respect HRs opens a state up to interference (Rawls)

As **evidenced by real world policy and practice**, HRs limit internal autonomy of states and provide grounds for legitimate interference (Beitz/Raz)

Agency
(Griffin)

Capabilities for minimal human flourishing
(Nussbaum, Sen)

Basic Human Needs
(Renzo)

Political Theories of Human Rights

16

- Recall the distinction between the moral vs. legal status of human rights. It's an open question whether all and only human rights are legally recognized as such.
- How to adjudicate debates about questionable cases?
 - Cf. Griffin's worry about "human rights inflation"
 - Fair pay, paid holidays, internet, etc. may be (very) important, but are they human rights?
 - If so, then someone else has a duty to ensure that you have them!

Political Theories: in order to properly identify human rights, we have to consider the role that they play in (international) political practice

Orthodox vs. Political Theories of Human Rights

17

- **Orthodox (normative) theories vs. Political theories: Are international political facts among the grounding facts?**
 - I.e., do facts about international politics help fundamentally explain the existence and content of human rights?
 - I.e., if you wanted to know whether there are human rights and what they are, would you absolutely have to make sure to look at international political facts?
- **Orthodox (normative) theories: No**
 - Rather: general facts about morality, value, rationality (different theories, different such facts)
 - ✦ E.g., “We have human rights solely in virtue of features of our humanity, not because of any social status or relation” (Griffin)
- **Political theories: Yes**
 - Which political facts?
 - Rawls, Beitz, Raz

Political Theories of Human Rights

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Example: Beitz's account of Human Rights

“Those interested in the theory of human rights are not at liberty to interpret this idea in whatever way best suits their philosophical commitments. Human rights is a public enterprise and those who would interpret its principles must hold themselves accountable to its public aims and character.” (xii)

“Human rights are requirements whose object is to protect urgent individual interests against certain predictable dangers (‘standard threats’) to which they are vulnerable under typical circumstances of life in a modern world order composed of states.” (109)



Beitz: a fresh start

19

- A philosophical theory of HRs should conform to, and help us make sense of, the current international practice of HRs as we know it.
 - Orthodox theories: try to derive the role of HRs in political practice from their basic normative properties
 - Beitz: no; *start* with the role of HRs in political practice



“There is no assumption of a prior or independent layer of fundamental rights whose nature and content can be discovered independently of a consideration of the place of human rights in the international realm and its normative discourse and then used to interpret and criticize international doctrine...

Instead, we **take the functional role of human rights in international discourse and practice as basic**: it constrains our conception of a human right from the start.” (102–3; cf. 99)

Beitz: A Practical Conception

20

A “**practical conception**” of human rights

- Want to know what human rights are? Look at the essential role that the concept of human rights plays in practical reasoning about the conduct of global political life; consider what, if anything, fulfils that role.
 - Adapting a point from David Lewis (“General Semantics”) in an unrelated context: “In order to say what a [human right] *is*, we may first ask what a [human right] *does*, and then find something that does that.”
 - “The role of human rights in practical reasoning about the conduct of global political life... defines the concept of a human right” (99)
 - E.g., consider “what an ordinary competent participant in the practice in the discourse of human rights would understand herself to be committed to if she were to say that a human right to such-and-such exists” (11). Identify human rights in terms of the normative implications of accepting that something is a human right.

Beitz: A Practical Conception

- How? By reading and observing international texts, reporting and monitoring mechanisms, critical public discourse, public culture, prominent political actions justified by human rights, etc. (107, ch. 2)
- Some key public political roles (cf. 101; more on this shortly)
 - Human rights are “**matters of international concern** in the sense that a society’s failure to respect its people’s human rights on a sufficiently large scale may provide a reason for outside agents to do something.” (105–6; cf. 115)
 - Human rights are the sort of thing such that “appeals to human rights... can **provide reasons for the world community or its agents to act** in ways aimed at reducing infringements or contributing to the satisfaction of the rights in societies where they are insecure.” (106)

Beitz: two-level model

22

Two Levels: States & International community

1. **States:** bearers of the primary responsibilities to respect and protect human rights, as in constitutions, laws, public policies. (cf. 114ff)

Must:

- (a) Respect HRs of citizens
- (b) Protect HRs of citizens from non-state violators under the state's jurisdiction and control
- (c) Aid those citizens who are nonvoluntary victims of deprivation

2. **International community** and those acting as its agents: guarantors of states' first-level responsibilities.

May have a reason to act in three types of cases:

- (a) Holding states accountable for meeting their HRs
- (b) Assisting states in meeting their HR responsibilities
- (c) Interfering in an individual state to protect HRs when the state fails through a lack of will to do so (with 'interference' broadly construed, p. 116)

- ✦ NB: the strength of the reasons may vary (117)

Beitz: two-level model

23

“**Human rights** are requirements whose object is to protect **urgent individual interests** against certain **predictable dangers** (‘standard threats’) ... in a **modern world order** composed of states.” (109; cf. 110ff)

Constraints on what can be a human right:

- HRs protect **urgent** individual interests: interests recognizable as important across a wide range of typical lives — e.g., “personal security and liberty, adequate nutrition, and some degree of protection against the arbitrary use of state power”
 - NB: urgent \neq universal
- HRs protect against **standard threats**: threats that would otherwise likely be endangered by domestic institutions
- There are **permissible, not unreasonably burdensome means of international action** that would make the endangerment of HRs less likely.

Exercise:

How can we derive specific HRs from Beitz's model?

What means of responding to human rights violations are available to the international community?

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Challenges

25

What if the role of the concept of human rights changes?

- E.g., what if human rights practice starts recognizing rights to non-urgent interests (e.g., a right to internet access)? Would Beitz's account undermine itself?

What if the international community jettisons the concept of human rights, and practical practices stop appealing to human rights? Would there be no human rights?

- “Rigidify”: ground human rights in our current actual practices.
 - Why treat our current actual practices as (metaphysically, normatively, politically) privileged?
 - Lose the account's sensitivity of human rights to its “public aims and character” (xii)?
- Bite the bullet: there are no human rights; we may have other normative reasons to change our practices and thereby make it the case that there are again human rights

Challenges

26

Whether there are HRs seems to depend on contingent, seemingly irrelevant facts about the environment.

- E.g., in order for there to be a human right, it must be the case that (among other things): there are permissible, not unreasonably burdensome means of international action which, if carried out, would make the interest protected by the right less likely to be endangered.
 - Perhaps certain rights – e.g., a right to democracy – fail to be genuine rights if there happen to be no feasible means to promote democracy in other countries. But are all human rights like this? (e.g., freedom from torture?)
 - Do human rights become problematically hostage to existing power relations?

Challenges

Is Beitz's "practical conception" incompatible with normative conceptions?

- Beitz is keen to distinguish the conceptual question ("what are HRs?") from normative questions ("which HRs, if any, are justified?"). The practical conception addresses the first, and perhaps helps frame the second. (cf. 126ff)
- But when considering whether certain rights are justified, won't we need to appeal to substantive normative considerations? Won't this involve appealing to the sorts of considerations assumed in orthodox/moral views?
 - E.g., which interests are "urgent" interests? (given that they aren't just interests that are universal, p. 110)
- Room for a hybrid overall theory? – i.e., treating political facts as being in the fundamental grounds of human rights (unlike traditional orthodox/moral views), along with certain substantive normative facts? (cf. Liao & Etinson 2012)



Human Rights

Week 3: Human Rights and Human Flourishing: The Capabilities Approach

ALEX SILK & MERTEN REGLITZ

Today

2

- Recap
- The Capabilities Approach: Background
- Human Rights and Capabilities

1. Recap: some philosophical questions about human rights

3

- Some (not all) questions for a theory of human rights
 - **NATURE:** What demarcates the subset of moral rights that are human rights? (i.e., what is the nature of human rights?)
 - **GROUND:** What grounds the existence and content of human rights? What facts fundamentally determine the existence and content of human rights?
 - ✦ General, existence: What needs to be the case for there to be human rights at all?
 - ✦ Particular, existence: What needs to be the case for a given norm to be a human right?
 - ✦ Content: What makes it the case that human rights have the specific content that they have?
- the “grounding facts”: the collection of facts that fundamentally determine the existence and content of human rights

Recap: Griffin's normative theory

4

Griffin: the grounding facts = facts about the value of personhood + practicalities

- The existence and content of human rights are determined, fundamentally, by facts about the value of personhood, understood as normative agency – and the conditions necessary for preserving and exercising it – along with certain universal nonnormative facts about human nature and the nature of society.
 - “Normative agency”: the agency involved in living a worthwhile life
 - Conditions for normative agency: Autonomy, Liberty, Minimum provision
 - Practicalities: facts about human nature and the nature of society

Human rights are moral norms protecting the distinctive value of individual personhood and what's necessary for it. Human rights protect the capacity to pursue one's conception of a worthwhile life and the basic exercise of this capacity, given facts about human nature and society.

Recap: Beitz's political theory

5

Political Theories of Human Rights: Human rights are grounded fundamentally in facts about international discourse and practice.

Strategy: a “practical conception” of human rights

- Human rights are grounded in facts about the essential functional role of the concept of human rights in practical reasoning about the conduct of global political life.
- Identify human rights in terms of the normative implications of accepting that something is a human right.

Specifically: “Human rights are requirements whose object is to **protect urgent individual interests** against certain predictable dangers (“**standard threats**”) to which they are vulnerable under typical circumstances of life in a **modern world order** composed of states.” (109)

Recap: Beitz's political theory

6

Conceptual constraints on human rights:

- HRs protect **urgent** individual interests: interests recognizable as important across a wide range of typical lives — e.g., “personal security and liberty, adequate nutrition, and some degree of protection against the arbitrary use of state power”
 - NB: urgent \nRightarrow universal
- HRs protect against **standard threats**: threats that would otherwise likely be endangered by domestic institutions
- There are **permissible, not unreasonably burdensome means of international action** that would make the endangerment of HRs less likely.

Recap: Beitz's political theory

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Must:

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 - Perhaps certain rights – e.g., a right to democracy – fail to be genuine rights if there happen to be no feasible means to promote democracy in other countries. But are all human rights like this? (e.g., freedom from torture?)
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Challenges

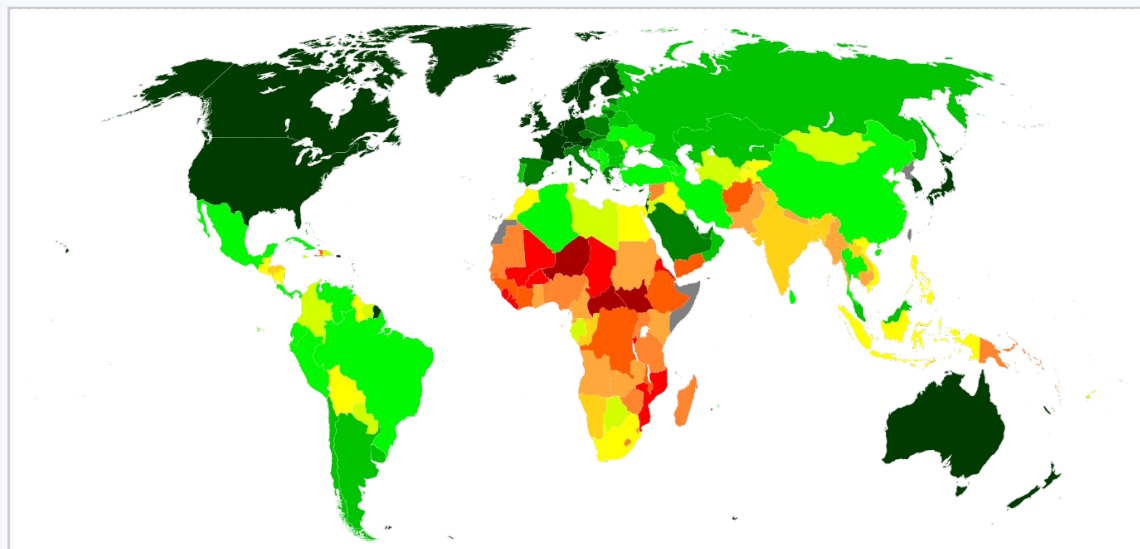
10

Is Beitz's "practical conception" incompatible with normative conceptions?

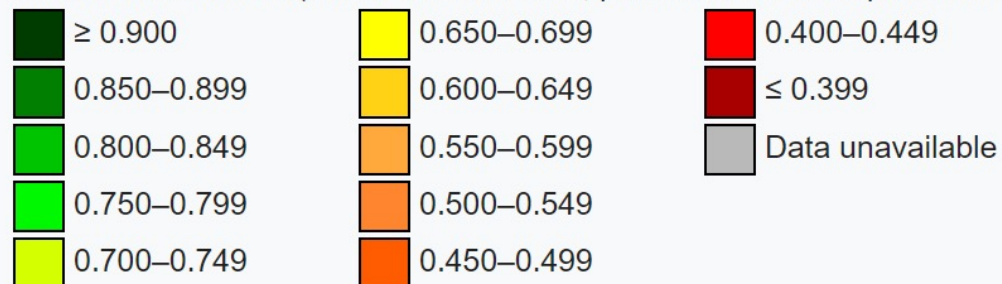
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Today: Human Rights and Capabilities

11



World map of countries by Human Development Index categories in increments of 0.050 (based on 2017 data, published on 14 September 2018). 



A (brief and contestable) Map of the Terrain

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What are HRs? And what, fundamentally, explains their existence and content?

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Agency
(Griffin)

Capabilities for minimal human flourishing
(Nussbaum, Sen)

Basic Human Needs
(Renzo)

2. The Capabilities Approach: Early years

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Backstory

14

Our focus has been on the nature of grounds of human rights.

The **Capability Approach** (CA) was originally developed in view of other normative questions in fields such as development studies, economics, and political philosophy.

- What is the proper goal of government/development programs?
- How can we make comparisons of how well individuals and societies are doing?
- What is the “quality of life” or “standard of living” within a country?
- What is the relevant type of equality that we should consider in political planning?

Key ideas: well-being is grounded in capabilities and functionings – what one can do and be, and thus what kind of life what can lead; the freedom to achieve well-being, thus understood, is crucially morally important.

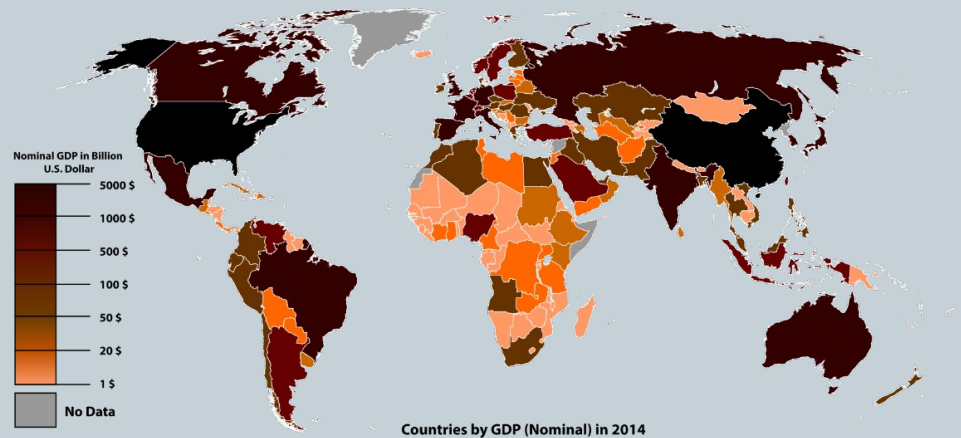
The capability approach has been very influential in practice. The UN Development Program and Human Development Index uses a version of capabilities as its metric.

Challenges for measuring (social) well-being?

15

Level of income (say, GNP per capita)

- Pro: Relatively easy to measure.
- Con: Ignores inequality (it's distribution insensitive)
- Con: Income is inadequate without education, health care, life expectancy, etc.
- Con: Average income doesn't always correlate with other important factors (political liberties, health, non-discrimination).



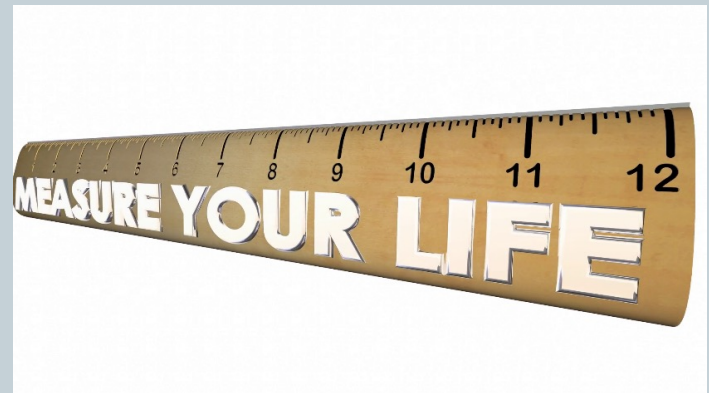
Not all dimensions of Quality of Life (QoL) can be subsumed under income.

Challenges for measuring (social) well-being?

16

Utility qua Desire satisfaction

- Pro: Focuses on people and how satisfied they are given their resources
- Con: Again seemingly distribution insensitive (“separateness of persons” objection)
- Con: Worry with “**adaptive preferences**”: reinforces discrimination and oppression
- Con: Undervalues freedom. Focuses on the **current state** one is in, rather than one’s **options**.



(NB: There are more sophisticated desire-satisfaction theories of the nature of well-being (e.g. invoking idealization or informed desires). Less empirically tractable)

Challenges for measuring (social) well-being?

17

Shares of resources that are useful for various life plans (Rawls, Dworkin)

- Pro: may be distribution-sensitive: say that a society does better the more equally it distributes resources.
- Con: Individuals vary in their needs of resources and their ability to convert resources to goods. E.g., minorities or oppressed individuals may need additional resources (education, health, etc.) to achieve the same level of well-being as (say) white men.
- Con: Again, may mask oppression and disadvantage
- Con: Again, may ignore other important factors (political liberties, religious freedom, etc).



An alternative: Capabilities

18

Rather than looking at how much stuff people have, or how it's distributed, or whether people get what they want, CA asks: “What are people able to do and be?”

- **Capabilities:** actions and states one can achieve if one chooses – “abilities to do and to be certain things deemed valuable” (e.g., going to school, travelling, voting, being well-nourished, etc.).
- **Functionings:** realized capabilities
 - Capabilities aren't an achievement or functioning (one can have capability for X without exercising it or achieving X)
 - Nor are they merely formal opportunities (e.g. absence of legal constraints). One could be legally free to X, but prevented from Xing because of discrimination, lack of education, lack of health care, etc.
 - Capabilities can thus provide a measure of an individual's substantive freedoms – what functionings one can achieve given certain resources and public goods

Capabilities

19

- **Capability:** an ability to choose which functionings, if any, you realize.
- Such capabilities are plausibly intrinsically valuable. They are also instrumentally valuable for other things we may plan to do, individually and collectively. (286)
 - Having them is part of what makes a life fully human
 - They support our practical reason and choice.
 - People with different conceptions of a good life may agree on them.

Capabilities

20

One's well-being (or "advantage") is grounded in terms of one's capabilities and/or functionings

Choice points:

- Delimiting the class of capabilities/functionings?
 - Is *any* action or state one has realized a functioning? (e.g., being depressed, killing oneself)
 - Is *any* ability to act or be a capability? (e.g., an ability to have one's livelihood destroyed by a tornado)
 - If not, which ones are? How to restrict the set of capabilities/functionings without begging the question (e.g., presupposing an independent theory of well-being)?
- How exactly is one's level of well-being determined by one's capabilities and/or functionings?
 - E.g., is well-being determined solely by one's functionings? Or can unrealized capabilities fundamentally affect one's well-being too? (e.g., am I better off for being able to vote, even if I don't?)
 - One's answers here will plausibly depend on one's views on the nature of capabilities/functionings. (E.g., one could treat capabilities/functionings as unrestricted, and treat one's well-being as being determined by a certain subset.)

3. Human Rights and Capabilities

21



Extending the Capabilities Approach

22

Nussbaum: The capabilities approach can not only help provide a measure of well-being/quality of life; it can also illuminate theories of human rights. (What are HRs? What HRs do we have? What grounds them?)

- **Human Rights: especially urgent and morally justified claims** that a person has simply in virtue of being a human adult (independent of membership in a particular nation, social class, ethnic or religious or sexual group, etc.). (292)
- Grounded in **capabilities** which are “of **central importance in any human life**, whatever else that person pursues or chooses” (286)
 - Appeal to Dignity: “the Capabilities Approach... focuses on the protection of areas of freedom so central that their removal makes a life not worthy of human dignity” (*Creating Capabilities*, 31; cf. “Capabilities and Human Rights,” 292)
 - (**Question:** What makes it the case that a certain capability are “of central importance in any human life” and thus determines a human right?)
- These central capabilities determine a minimal standard that any decent society should protect.
 - (NB: not simply a conceptual analysis of the concept of a human right (cf. 294–295; contrast Beitz))

Nussbaum's (current) list of Central Capabilities

23

1. **Life** (normal length)
2. **Bodily health** (including reproductive health, adequate nourishment and shelter)
3. **Bodily integrity** (moving freely, security against assault, opportunities for sexual satisfaction, reproductive choice).
4. **Senses, imagination, and thought** (freedom of expression, artistic freedom, having pleasure and avoiding nonbeneficial pain).
5. **Emotions** (attachments, love, grieving, justified anger, avoiding crippling fear and anxiety)
6. **Practical reason** (forming a conception of a good life, planning, religion)
7. **Affiliation** (friendship, freedom of assembly and political speech, social bases of respect and non-humiliation, non-discrimination).
8. **Other species** (living with a concern for)
9. **Play**
10. **Control over environment** (political and material)

(287–288; also *Frontiers of Justice*, 76–78)

Capabilities and Functionings

24

Why ground human rights in **capabilities** rather than functionings?
(cf. 288–289)

- Functionings are perhaps central in determining well-being.
- But capability (i.e. freedom), rather than functioning (i.e. achievement), is the political goal.
 - Consider nourishment. If the functioning was the political aim, then the state might be compelled to force-feed someone on a hunger strike. This plausibly violates rights.
 - So we need to provide capabilities of both having adequate nourishment and fasting.
- Citizens are free to determine the course of their lives given the capabilities. People can choose not to realize possibilities open to them by their rights and resources. (Strong anti-paternalism)

Types of capabilities

25

Nussbaum distinguishes three types of capabilities (289–290):

1. **Basic capabilities:** the innate equipment of individuals that is necessary for developing more advanced capabilities (e.g. practical reason, imagination; not much one can do about this)
2. **Internal capabilities:** “states of the person that are... sufficient conditions for the exercise of the requisite functions” (e.g. speech)
3. **Combined capabilities:** “internal capabilities combined with suitable external conditions” for realizing the requisite functions (e.g. work, education, political participation)
 - (Question: what do you think of these formulations? Are basic/internal capabilities genuine capabilities?)

Public policy aims at producing Combined Capabilities – i.e., “promoting the states of the person by providing the necessary education and care, as well as preparing the environment so that it is favorable for the exercise of practical reason and the other major functions.” (290)

Exercise:

How might we derive specific HRs from Nussbaum's central capabilities?

Are some on the UD list more difficult to explain than others?

Table 1.1 The Universal Declaration's Rights

Security Rights

- Life, liberty, and security of person (article 3)
- No torture or cruel punishments (article 5)

Due Process Rights

- Right to an effective remedy for violations of rights (article 8) and to a social and international order in which human rights can be enjoyed (article 28)
- No arbitrary arrest, detention, or exile (article 9)
- Right to a trial in criminal cases (article 10)
- Presumption of innocence in criminal cases (article 11)
- No retroactive criminal laws or penalties (article 11)
- No arbitrary deprivation of nationality (article 15)
- No arbitrary deprivation of property (article 17.2)
- Protection of moral and material interests resulting from any scientific, literary, or artistic production of which one is the author (article 27.2)

Basic Liberties

- No slavery or servitude (article 4)
- No arbitrary interference with one's privacy, family, home, or correspondence (article 12)
- Freedom of movement and residence (article 13)
- Freedom to leave and return to one's country (article 13)
- Freedom to seek and enjoy in other countries asylum from persecution (article 14)
- No marriage without full and free consent of the intending spouses (article 16.2)
- Freedom to own property individually and collectively (article 17.1)
- Freedom of thought, conscience, and religion (article 18)
- Freedom of opinion and expression (article 19)
- Freedom of peaceful assembly and association (article 20)
- Freedom to form and join trade unions (article 23.4)
- Freedom of parents to choose the kind of education that shall be given to their children (article 26)
- Freedom to participate in cultural life (article 27)

Rights of Political Participation

- Freedom to participate in government, directly or through freely chosen representatives (article 21.1)
- Equal access to public service (article 21.2)
- Opportunities to vote in periodic and genuine elections (article 21.3)

Equality Rights

- Equality of fundamental rights and freedoms (article 2)
- Legal personality (article 6) and equality before the law (article 7)
- Freedom from discrimination (articles 2, 7)
- Equal rights in marriage and family (article 16)
- Equal pay for equal work (article 22)
- Equal social protection for children born out of wedlock (article 25.2)

Economic and Social Rights

- Social security (article 22)
- Just and favorable remuneration for workers (article 23.3)
- Rest and leisure (article 24)
- Adequate standard of living for health and well-being (article 25)
- Health care (article 25)
- Special care during motherhood and childhood (article 25.1)
- The right to educational opportunities (article 26)

Features of the Capabilities Approach

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- Captures how human rights **aren't mere formal requirements** (e.g. formal equality of opportunity, right to vote). Human rights require **substantive** provisions and protections to ensure real opportunities. (cf. 293–295)
- Details **what human rights protect** (specific capabilities)
- Captures how **equal rights may require different treatments** of people depending on their internal and external circumstances (e.g. rights to means of subsistence, welfare rights).

Challenges for the Capabilities Approach

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Does CA correctly delineate the set of rights holders?

- What about individuals who would be unable to exercise the relevant functionings, or have limited possible capabilities?

CA may be natural for explaining rights such as health, religious freedom, political participation. But can all human rights be explained in terms of capabilities?

- Are some children's rights rights to functionings (achievements) rather than simply opportunities? (cf. 291, 292)
- Can it explain "status" rights – e.g., legal personhood, recognition before the law, freedom from arbitrary arrest, not being presumed guilty? Or are such rights best explained in terms of functioning? (cf. Liao 2015)

Some questions

29

- What are some advantages/costs of attempting to explain human rights fundamentally in terms of capabilities?
 - What's an example of a capability that would plausibly determine a human right?
 - What's a human right that seems hard to explain in terms of capabilities?
- How does the approach compare with Griffins's and Beitz's? Are the approaches incompatible? Or could there be a sort of hybrid account?
- Is the capabilities approach helpful for understanding children's well-being or rights?
- How does the capabilities approach fare regarding potential "borderline cases"? (e.g., infants, certain nonhuman animals, etc.)



Human Rights

Week 4: Human Rights as Protections of Minimally Good Lives

ALEX SILK & MERTEN REGLITZ

Today

2

- Assignment options and guidelines
- Recap
- Liao's Fundamental Conditions Approach

Heads up: Assignment options

3

2 options:

- Option 1 (default): 1 4000-word paper
- Option 2: 2 2000-word papers

Topics

4

Three topics (the gist):

- A. Theory of human rights (“What grounds human rights?”)
 - B. A particular human right (“Do we have a right to ___?”)
 - C. Your choice (run it by us for approval by end week 10)
-
- If you’re doing the 1-paper option:
 - pick 1 from (A), (B), or (C)
 - If you’re doing the 2-paper option:
 - Paper 1: (A)
 - Paper 2: (B) or (C)

Topics (A)

5

Topic A: “What grounds human rights?”

- (NB: obligatory for 1st paper if doing the 2-paper option)

To do:

- Explain in a more-or-less theory-neutral way what human rights are.
- Explain one (or two) theories of what justifies human rights, so understood. (You may consider the theories discussed in weeks 1-4, but you can also consider others.)
- Critically evaluate that theory (or those theories) of human rights. Do they adequately explain the existence and content of human rights – i.e., how there can be human rights and what they are? Why or why not?

Topics (B)

6

Topic B: “Do we have a right to ___?”

- (Fill in the blank with a human right of your choice from the module guide or UN Declaration of Human Rights, e.g. health, democracy, privacy, Internet access, minimum welfare, freedom from torture, freedom of expression, freedom of religion, etc.)
- (optional for 2nd paper if doing the 2-paper option)

To do:

- i. Explain what the right would be. (Who has the right? What is the scope of the right, and when is it violated? What duties are there to secure the right, and who has those duties?)
- ii. Select a theory of human rights (e.g. from weeks 1-4), and explain how that theory would explain the existence and content of the right.
- iii. Explain and evaluate what you think is the most pressing objection (or objections) to the account discussed in (ii).

Topics (C)

7

Topic C: Make your own

- (optional for 2nd paper if doing the 2-paper option)
- must get the topic approved by the end of Week 10

Some possible topics (not exhaustive):

- Who has human rights and in virtue of what?
- Can human rights be derogated in emergencies?
- Can individuals violate human rights?
- Can human rights be waived, alienated, or forfeited?
- Are human rights universal?
- Can human rights conflict and how should conflicts between human rights be resolved?
- Objections to human rights discourse

Guidelines

8

Some general points to keep in mind

- Writing
 - Use plain, simple language.
 - ✦ Don't use unnecessary jargon. Explain any technical terms in your own words.
 - ✦ Use short sentences.
 - ✦ Avoid filler material. (compare: 'It will be my contention in this paper that' vs. 'I will argue that')
 - Proofread. Check for grammatical mistakes (run-on sentences, incomplete sentences, incorrect punctuation, etc.).
 - Be Clear, Precise, and Concise
 - Write as if for someone who is lazy, uninitiated, and uncharitable.

Guidelines

9

- Structure
 - Introduction
 - ✦ Briefly introduce the topic/question. State your main conclusion. Outline how the paper will defend it. (“This paper argues that... First, ... Next, ...”)
 - Body
 - ✦ Stick to one main point per paragraph
 - ✦ Argue methodically for your conclusion
 - ✦ Use signposts and transitions to indicate the structure
 - ✦ Consider possible objections and replies
 - Conclusion
 - ✦ Brief wrap up. Avoid introducing new arguments.
 - ✦ Clarify the scope of the conclusion
 - ✦ (The concluding section in this week’s Liao chapter is a good model.)

Guidelines

10

- Exposition / Arguments
 - Explain any key terms
 - Use examples
 - Interpret others charitably and accurately. Avoid being dismissive. Engage with what you think is the strongest way of reconstructing their view, even if you'll ultimately disagree.
 - Quotes: Use quotes for longer passages that you will closely analyze, or when the precise wording is essential. Otherwise paraphrase (and include in-text citations where appropriate). Explain any quotes that you do include in your own words.

Guidelines

11

- Exposition / Arguments
 - Don't just report what others have said. Take a stand and argue for something specific.
 - Be explicit about how your arguments and conclusions are situated in the literature, and how what you're saying builds on existing discussions.
 - Consider one or more objections to the view you're defending, and respond.
 - Be thorough. It's often better to introduce fewer arguments and develop them in depth, than to cycle through a laundry list.
 - Be explicit about any limitations in the scope of your arguments or conclusion. Don't overstate your case.

Guidelines

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In short:

- Write clearly, concisely, and precisely.
- Be explicit (about what's at-issue, what your conclusions are, what the structure is)
- Be thorough. (other things equal, depth is better than breadth)
- Give reasons.
- Consider possible objections and replies.

A (brief and contestable) Map of the Terrain

13

What are HRs? And what, fundamentally, explains their existence and content?

Moral/Normative/Orthodox Views: HRs are a subclass of ordinary moral rights, explainable in terms of pre-political moral/evaluative facts.

Political/Practical Views: HRs can only be explained in terms of their role in international political practice.

Instrumental Views:
HRs protect certain human interests

Status views: HRs reflect, or are constitutive of, our status (Kamm, Nagel)

Agency
(Griffin)

Capabilities
for minimal human flourishing
(Nussbaum, Sen)

Basic Human Needs/Interests
(Renzo, Liao)

HRs form part of the conditions of membership in a just/ideal society of states and the rules that govern such a society. Failure to respect HRs opens a state up to interference (Rawls)

As evidenced by real world policy and practice, HRs limit internal autonomy of states and provide grounds for legitimate interference (Beitz/Raz)

Recap: Terrain

14

“Political” theories: Human rights are determined, fundamentally, by facts about international discourse and practice.

- **Beitz:**

- Human rights are grounded in facts about the essential functional role of the concept of human rights in practical reasoning about the conduct of global political life.
- Specifically: “Human rights are requirements whose object is to protect urgent individual interests against certain predictable dangers (“standard threats”) to which they are vulnerable under typical circumstances of life in a modern world order composed of states.” (109)

Recap: Terrain

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“Naturalistic”/“Orthodox” theories: Human rights are determined, fundamentally, by certain moral or evaluative facts. Which facts?

- **Griffin:** facts about the value of personhood, understood as normative agency (along with universal non-normative facts about human nature and society). Human rights are norms that protect normative agency and the conditions necessary for it.
- **Nussbaum:** facts about the value of “central capabilities.” Human rights are claims to these central capabilities.
- **Liao:** facts about what constitutes a good (“minimally decent”) life. Human rights are norms that protect the fundamental conditions for pursuing a minimally decent life.

“Fundamental Conditions” Approach

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Liao: Human rights are claims to fundamental conditions for pursuing a minimally decent life

Key moving parts

- **“good life”**: a minimally decent life
- Necessary condition for a good life: the pursuit of certain **“basic activities”**
- ⇒ **“Fundamental conditions”** for such pursuits
- **Human rights**: norms ensuring that these fundamental conditions are met

In more detail...

Basic activities

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“A characteristically good human life... is one spent in pursuing certain valuable, **basic activities**.”

- (i) “‘Basic’ activities are activities that are important to human beings *qua* human beings’ life as a whole.”
 - Q: What does this mean? Activities that would be important to any human being? (too strong)
Activities that might be important to any human being, regardless of their idiosyncratic goals or interests?
- (ii) “If a human life did not involve the pursuit of any of them, then that life could not be a good life.”
 - Q: Are the glosses in (i)–(ii) equivalent?
 - ✦ (i) defines a condition for being a basic activity (“a basic activity is an activity that is important...”).
 - ✦ (ii) defines a condition for being the *set* of basic activities (“the set of basic activities is the minimal set of activities such that if...”).
- Examples: deep personal relationships, knowledge, active/passive pleasures

Basic activities

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NB: what's necessary for a good (minimally decent) life is the *pursuit* of some or other of the basic activities.

- **Q:** Why “pursuit”?
 - Suppose I'm starving to death or being tortured, and to distract myself I try to think about the physiology of starvation or pain. Is my life minimally decent in virtue of my pursuit of knowledge?
 - Suppose I don't pursue pleasures or deep personal relationships, but I end up experiencing them anyway. Is my life not minimally decent?

Fundamental conditions

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“Fundamental conditions”: “various goods, capacities, and options that human beings *qua* human beings need... in order to *pursue* the basic activities”

- Fundamental goods: resources necessary for human sustenance (e.g., food, water, air)
- Fundamental capacities: power/abilities necessary for human pursuits of the basic activities (e.g., a capacity to think, liberty, autonomy)
- Fundamental options: social forms/institutions necessary for human engagements in the basic activities (e.g., opportunities for social interaction)

Fundamental conditions

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Q: What is meant by ‘fundamental’?

- **Necessary?**
 - Then need the fundamental conditions “provide human beings with an **adequate range** of fundamental goods, capacities, and options” (82)? Is an adequate range of such goods, capacities, options necessary in order to pursue some or other of the basic activities?
- **Necessary given facts about human nature?**
 - Then does Liao’s argument defending equality rights go through? Is fairness/equality something that “human beings (*qua* human beings) need” (84) to pursue the basic activities? Or is it something that actual human beings typically need, given contingent facts about limited resources and possibilities for interpersonal conflicts?

Human rights

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⇒ **Human Rights:** claims to fundamental conditions

- “The ultimate goal of a given society is to devise policies that would ensure that every person has enough of these [fundamental] conditions.”
- Human rights are norms that protect “fundamental conditions for pursuing a good life,” i.e. things “that human beings (*qua* human beings) need whatever else they (*qua* individuals) might need in order to pursue the basic activities.”
- Roughly put: Human rights are rights to things that any human being might need, regardless of their idiosyncratic goals or interests, in order to pursue something that would make their life minimally decent.

Human rights

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“These fundamental conditions for pursuing a good life **ground human rights** because [(i)] having these conditions is of fundamental importance to human beings, and because [(ii)] rights can offer powerful protection to those who possess them.” (82)

- **Q:** Does the grounding claim follow? Suppose one agreed that the set of human rights includes rights to the fundamental conditions. What reasons might support going the further step of thinking that the fundamental conditions ground human rights?
- **Q:** Is (ii) part of the grounding facts?

Human rights

23

Predictions: Some, but not all, of the rights in the UN Declaration list are genuine human rights

- Yes: e.g., life, liberty, security of person, legal personhood, equality before the law, freedom from arbitrary arrest/detention/exile, a fair trial, presumption of innocence
- No: e.g., periodic paid holidays
 - NB: leaves open whether there's a human right to periodic holidays

vs. Griffin's "normative agency" theory

24

With Griffin: the set of human rights includes rights protecting normative agency

Against Griffin:

- Griffin's theory is *incorrect*: it predicts that certain things that aren't human rights are human rights. Normative agency doesn't always determine human rights.
 - Example: "Undermining an individual's agency" – e.g., by "entic[ing them] with the possibility of great pleasure" (88) in order to "get them to do what they... are... resolved not to do" (Griffin p52) – needn't violate a human right.
 - **Q**: In such an example, is the individual's agency undermined, or just compromised? Could Griffin respond by amending his characterization of what "undermining" agency amounts to?
- Griffin's theory is *incomplete*: there are human rights that the theory fails to predict. Not all human rights are determined by facts about agency.
 - Example: A right not to be tortured "just for the sake of causing extreme pain" ("Intrinsic Torture")
 - **Q**: Doesn't the torture still undermine the individual's agency? (consider: aim vs. side-effect distinction)

vs. Nussbaum's "central capabilities" theory

25

With Nussbaum: the set of human rights includes rights to certain opportunities (notably, "being able to choose to pursue the basic activities")

Against Nussbaum: the central capabilities theory is *incomplete*: it fails to explain **status rights** and many **children's rights** (e.g., education, name, nationality, freedom from economic exploitation)

- "Status rights": "rights that protect our status as persons" – e.g., rights to legal personhood, equality before the law, freedom from arbitrary arrest/detention/exile, a fair trial, presumption of innocence
- Objection: "these rights are best understood as rights to certain functionings rather than rights to certain capabilities." (93)

vs. Nussbaum's "central capabilities" theory

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- Implicit argument: Some rights are rights to functionings; therefore, they can't be grounded in capabilities.
 - Implicit assumption: having a capability for X "impl[ies] that one can sometimes choose not to" realize X (92)
 - Q: Why accept this?
 - ✦ Suppose one has a capability for X if and only if one can choose to realize X and one can choose not to realize X. What would this predict about the conditions under which one doesn't have a capability?
 - ✦ Alternative: Having a capability for X implies that one can choose to realize X (better: that one can realize X if one chooses to do so). Period.
 - Reply: Any human rights to functionings are rights to capabilities such that having the capability entails having the functioning.
 - ✦ E.g., suppose one can't choose not to be equal before the law. Then ensuring that individuals have the opportunity to be equal before the law ensures that individuals are equal before the law. So, the right to equality before the law is still grounded fundamentally in facts about capabilities.

vs. “Political” theories

27

- Certain objections that Political theorists have used to motivate their views are bad objections.
 - “Timelessness” objection: If human rights were grounded in our humanity, then human rights would be timeless (universal across time). But human rights – at least as conceived in international practice – are not timeless. So human rights aren’t grounded in our humanity.
 - Response 1: Some human rights plausibly are timeless. (e.g. freedom from torture)
 - Response 2: Reductio: If non-modernized societies in the past didn’t have human rights, then do present un-contacted tribes also not have human rights?
 - Response 3: The “aims” of human rights are timeless. The “objects” (i.e. means to achieving those aims) may not be.
 - ✦ **Q:** How might we make the aim/object distinction more precise?
 - ✦ Recall our earlier discussion about the importance of being precise about the form and specific content of human rights norms.
 - ✦ Roughly: What’s “timeless” are certain conditional norms. Some, such as perhaps norms forbidding torture, may be trivially conditional: they constrain the choices of everyone in the (actual) world at any time. Others, such as perhaps norms ensuring access to free elementary education, are not: they constrain the choices only of some people at some times.

vs. “Political” theories

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- Naturalistic and political approaches are formally compatible
 - NB: it depends on how one demarcates “naturalistic” and “political” approaches
 - “The formal features of Political Conceptions seem to be concerned with the issue of who is responsible for protecting and promoting human rights—that is, the issue of the *duty-bearers* of human rights—while the formal features of Naturalistic Conceptions seem to be concerned with what *grounds* human rights.” (97)
 - **Q:** Doesn’t Beitz also claim to be giving an account of what grounds human rights? (cf. e.g. “A fresh start” 99, 102–103)
 - Regardless, what’s compatible: treating human rights as (partly) grounded in moral/evaluative facts and treating human rights as (partly) grounded in facts about political practice. That is, the grounding facts – the set of basic facts that determine the existence and content of human rights – may include facts about political practice and certain moral/evaluative facts (the value of agency, what constitutes a good life, etc.).

vs. “Political” theories

29

- Political theories, as they stand, are incomplete.
 - They provide a “formal” but not a “substantive” account of human rights.
 - ✦ “Formal” account: a filter
 - ✦ “Substantive” account: a specific set
 - Facts about political practice may constrain what sort of thing can be a human right.
 - But they aren’t sufficient to determine a specific set of human rights, with specific content.
 - To provide a complete theory, political theories need to include certain moral/evaluative facts among the grounding facts.
 - Recall Beitz: In order for something to be a human right, it must be something that protects “urgent” interests. But what delimits the class of urgent interests? Possible answers: facts about normative agency, capabilities, fundamental conditions, etc.
 - **Q:** What if international political practices implicitly assumed certain substantive moral/evaluative claims? Would political theories that treat human rights as (fully) grounded fundamentally in facts about international political practice still be incomplete?



Human Rights

Week 5: Basic Rights and the Demandingness of Human Rights

ALEX SILK & MERTEN REGLITZ

Course Structure

2

- **Part I:** topics 1-4: four philosophical approaches to human rights
- **Part II:** topics 5-9: several controversial human rights and philosophical debates about them
- **Part III:** topics 10-11: human rights and norms for intervention

Today

3

- Henry Shue on basic rights
- Elizabeth Ashford on positive and negative rights

Human Rights as Basic Rights

4

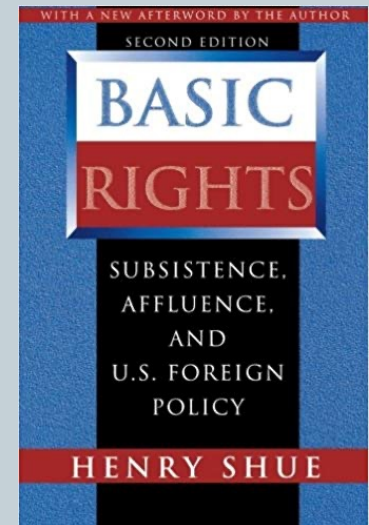
Shue, *Basic Rights* (1980)

Basic rights: preconditions for fulfilment of other rights.

Main theses:

- The distinction between negative vs. positive rights isn't sharp, consistent, or tenable.
- Negative rights aren't more important or less expensive to secure than positive rights.
- All basic rights correlate with 3 kinds of duties.

Shue's work is very influential for understanding human rights (and rights in general).



Context: Negative vs. Positive Rights

5

- Common idea:
 - Negative rights are **more fundamental** or important + **less costly to protect** (require only forbearance).
 - Positive duties harder to justify (require action and provision).
 - NB: Violation of negative human rights (mass murder, torture, imprisonment) often leads to more international action than mass violations of positive (subsistence) rights. There's more absolute poverty than mass murder.
- **Negative** rights give others duties **not to interfere** with you (e.g., kill you)
- **Positive** rights give others duties **to do things for you** (e.g., my government has the duty to provide certain social services for me)
- **Q:** Need the distinction between positive vs. negative rights be understood as a distinction between acting and refraining from acting" (37)? Or could it be characterized as a distinction between types of actions?

Shue's target

6

The **argument for the primacy of negative rights**:

Premise 1. The distinction between subsistence rights and security rights is (a) clear-cut and (b) significant.

- (Shue thinks this is incorrect, but he doesn't focus directly on this premise.)

Premise 2. The distinction between positive and negative rights is (a) clear-cut and (b) significant.

- Shue: no, since both kinds of rights entail the same kinds of duties.

Premise 3. Subsistence rights are positive.

- Shue: no, since subsistence rights entail duties to avoid doing certain things.

Premise 4. Security rights are negative.

- Shue: no, since security rights entail duties to supply certain provisions.



On “negative” rights

7

Characteristic negative rights don't simply require forbearance.

- Securing rights to non-interference requires various provisions, e.g. social institutions such as police, lawyers, guards, etc.
- Characterizing the rights as “negative” ignores social institutions necessary for protecting them.
- So, guaranteeing characteristic negative rights isn't generally less expensive than guaranteeing characteristic positive rights.
- Rather, “it is a demand for positive action, or ... a demand for social guarantees against at least the standard threats” (39)



On “positive” rights

8

Characteristic positive rights often require not only provision but non-interference. This is particularly evident with large-scale economic systems.

- Measures needed to secure subsistence rights may or may not be more costly than the measures needed to secure security rights. (e.g., gov’t programs)
- Securing subsistence rights may involve non-interference (e.g., self-supporting opportunities), or the same sorts of protections from outside destructive influence as with security rights.
 - “Black bean farmer turned flower producer” example
 - Example of macro-economic policy leading to deprivation: working class typically suffers most
 - ✦ e.g. increased unemployment, lower wages to improve economic competitiveness
 - ✦ less social spending due to tax cuts to promote investor confidence

On “positive” rights

- “Many people’s lack of the substance of their subsistence rights ... is a deprivation **caused by standard kinds of threats that could be controlled by some combination of the mere restraint of second parties and the maintenance of protective institutions by first and third parties**, just as the standard threats that deprive people of their physical security could be controlled by restraint and protection against non-restraint.” (41)
- “the honoring of subsistence rights may often in no way involve transferring commodities to people, but may instead involve **preventing people’s being deprived of the commodities or the means to grow, make, or buy the commodities**. Preventing such deprivations will indeed require what can be called **positive actions**, especially protective and self-protective actions. But such **protection against the deprivation of subsistence is in all major respects like protection against deprivations of physical security** or of other rights that are placed on the negative side of the conventional negative/positive dichotomy. I believe the whole notion that there is a morally significant dichotomy between negative rights and positive rights is intellectually bankrupt.” (51)

Upshot

10

Conclusion: the distinction between positive/negative duties isn't sharp enough to warrant prioritizing negative rights.

Rights to X entail duties to ensure that right-holders have X.

- Sometimes, ensuring this may be more costly or require more deliberate activity; other times, less.
- But the spectrum of costliness/activity doesn't neatly divide into two interesting groups; and it doesn't generally map onto degrees of importance or priority.

Freedom to seek and enjoy asylum in other countries

11

All basic rights entail **3 kinds of duties**:

1. Duties to ***avoid*** depriving

- e.g., of a person's security, or of a person's only available means of subsistence

2. Duties to ***protect*** from deprivation

- e.g., of security or the only available means of subsistence by other people

→ importance of establishing and maintaining required institutions.

3. Duties to ***aid*** the deprived

- e.g., to provide for the security or subsistence of those who can't provide for their own,

Rights typically involve multiple duties. Only these duties can in general be clearly distinguished.

- Primary addressee of these duties is one's own government (cf. Beitz)
- Rights as social guarantees against standard threats (cf. Beitz)



Exercise

12

On Shue's model, what "negative" and "positive" duties might be required to secure the following human rights?

- Freedom of movement and residence
- Freedom from arbitrary confiscation of private property
- Freedom to form and join trade unions
- Equality before the law
- Freedom of thought, religion, and conscience
- Freedom to seek and enjoy asylum in other countries

Ashford's case for positive rights

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- Ashford: negative rights aren't in general more stringent than or interestingly distinctive from positive rights
- Target: Onora O'Neill's approach to (human) rights. O'Neill thinks that positive (subsistence) rights aren't real enforceable rights because there isn't an identifiable duty-bearer for them.
 - This would seem to be a problem, since much of the worst suffering results from people lacking basic means of subsistence.
 - If O'Neill is right, these deprivations wouldn't be human rights violations!



O'Neill: negative vs. positive duties

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Negative duties	Positive duties
Have an identifiable duty-bearer	Lack an identifiable duty-bearer; are too costly for individuals to fulfil for everyone
So, needn't require existing institutions	So, require institutions as duty-bearers
Have clearly identifiable content	Lack clearly identifiable content
Leave no discretion in how to satisfy them (perfect duties)	Leave discretion in how to satisfy them (imperfect duties)
Can be enforced/are claimable	Can't be enforced/aren't claimable

- Duties of justice must be enforceable since otherwise they would be (to some extent) optional. (Ashford agrees.)
- She thinks that since positive duties can't be enforced, positive (subsistence) rights are merely "manifesto" rights, or aspirational goals.



Moral rights require duty-bearers

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Recall Raz on moral rights:

“We have a [moral] right only if the right entails that the value of having it, or our need for it, is of a kind sufficient to **impose duties on** ... on at least one other.”

(“Human Rights in the Emerging World Order”)



- On O’Neill’s view, **positive subsistence rights lack an identifiable duty-bearer** in the absence of appropriate social institutions.
- Many subsistence rights deprivations occur in countries that lack the resources to guarantee them for their citizens.
- There’s no global state or administration that would be a suitable duty-bearer for subsistence rights of the global poor.
- So, the global poor just have to hope that the affluent fulfil their duties to aid them, but these duties cannot be enforced.

Ashford's argument

16

Ashford agrees with Shue that there isn't a clear-cut distinction between positive and negative rights.

Argument: Characteristic negative rights often share various of the allegedly problematic features characteristic of positive rights – e.g., negative rights often:

- Lack clearly identifiable duty-bearers/perpetrators (e.g. with aggregative or multiplicative harms)
- Lack clearly identifiable content (in case institutions have to be created or reformed)
- Don't always correlate with perfect duties (in case people can't stop all of their wrongdoing)
- Don't always have individuals as duty-bearers/perpetrators (but groups of people)
- Don't always involve direct rights violations (but participation in indirect harm)
- Often require institutions to protect rights and identify duty-bearers

Positive duties and identifiable duty-bearers

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Many violations of negative rights lack one or more clearly identifiable perpetrators. Rather, the causal chain of the harm caused is complex.

Aggregative harms:

- Parfit's "torturers union"
- Climate change



Multiplicatory harms:

- Polluting factory case
- Pogge's argument for the global economic order



The importance of institutions

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Ashford points out that social institutions are often crucial for securing many negative rights, as they are for positive rights.

- Institutions often need to be reformed to stop negative rights violations.
- Institutions link **groups of participating perpetrators** with **groups of victims**.



People participating in harmful institutions have an **indirect moral responsibility** for the harm caused, but they often aren't in a position to reform all of them. Their duties to push for reform:

- have nonspecific content,
- leave leeway as to how they are fulfilled
- are thus imperfect duties



Exercise

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What common institutions may be implicated in violating the negative rights of other (groups of) people?

Ashford's conclusion

20

Ashford also argues, with Shue, that **negative and positive human rights both entail negative and positive duties**. And both types of rights may require **institutions** for addressing human rights violations.

- If negative rights correlate with claimable enforceable duties of justice, then positive rights do too.
- The distinction between characteristic negative vs. characteristic positive rights doesn't have general implications regarding the stringency or urgency of human rights.



Questions

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- Which theory of human rights did you find most puzzling and why?
- Which theory of human rights did you find most convincing and why?
- For each theory we looked at, what does it do a good job explaining? What does it explain less well?
- What properties are fundamental for explaining human rights? Are any of the theories we examined sufficient to explain the existence and content of human rights?
- Are there new questions about human rights that are on your radar as a result of the previous readings?