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## *The Philosophical Foundations of Human Rights: An Overview*

### **Introduction**

Human rights are the distinctive legal, moral and political concept of the last sixty years. The Universal Declaration of Human Rights was adopted by the Third United Nations General Assembly in December 1948, and became a model for the constitutions of many countries and domestic and international nongovernmental organizations (NGOs).<sup>1</sup> Following the Universal Declaration, human rights slowly entered international law through, among others, the European (1950) and American (1969) Conventions and the International Covenants (1966).

Of course the idea of rights held by all in virtue of their humanity can be found long before 1948, for example in the 1776 American Declaration of Independence and the 1789 French Declaration of the Rights of Man and the Citizen. In the guise of ‘natural rights’ – rights held by people as a matter of natural law – the idea can be found in the influential seventeenth and eighteenth century work of Grotius, Pufendorf, Locke and Kant.<sup>2</sup> Indeed, recent scholarship claims that this idea of natural rights first originated much earlier, either in early medieval thought or before.<sup>3</sup> However, it is worth noticing that whether contemporary human rights are the same as, or are at least a modernized, secularized form of natural rights, is highly controversial.

The specific phrase ‘human rights’ only became common in English usage in the 1970s.<sup>4</sup> The concept has grown in institutional and rhetorical importance during the last two decades – witness, for example, the embedding of the European Convention on Human Rights in UK law (1998) and the frequent framing of measures to resist terrorism as involving a ‘balancing’ of the human rights of suspects and potential victims. The concept’s centrality has been matched by a significant volume of important empirically oriented sociological work and doctrinally oriented legal work. By contrast, with some exceptions (notably, the work of Maurice Cranston and James Nickel), philosophers in the past were

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<sup>1</sup> Johannes Morsink, *Inherent Human Rights: Philosophical Roots of the Universal Declaration* (Philadelphia: University of Pennsylvania Press, 2009), p. 1.

<sup>2</sup> Hugo Grotius, *The Rights of War and Peace* (1625), Samuel Pufendorf, *On the Law of Nature and of Nations* (1672), John Locke, *Two Treatises of Government* (1689), Immanuel Kant, *The Metaphysics of Morals* (1797). Note that Thomas Hobbes’s use of the idea of a ‘right of nature’ in *Leviathan* (1651) is idiosyncratic: for Hobbes, unlike the other thinkers, a person’s ‘right of nature’ is not a right entailing duties that others must fulfil, but consists rather in the person’s liberty, in the state of nature without government, to do whatever she wishes to others in order to preserve her own life (*Leviathan*, Part 1, Chs. 13-14).

<sup>3</sup> For discussion of the importance of Gratian’s *Decretum* (c. 1140) and of Ockham (1287-1347) and Gerson (1363-1429) in relation to the notion of natural rights, including accounts of the Franciscan debates about property rights, see Brian Tierney, *The Idea of Natural Rights* (Grand Rapids: Emory University Press, 1997) and Annabel Brett, *Liberty, Right and Nature: Individual Rights in Later Scholastic Thought* (Cambridge: Cambridge University Press, 1997). Tertullian’s translators find the following from the late Second or early Third century CE: ‘it is a basic human right that everyone should be free to worship according to his own convictions. No one is either harmed or helped by another man’s religion’ (Maurice Wiles and Mark Santer (eds.), *Documents in Early Christian Thought* (Cambridge: Cambridge University Press, 1975), p. 227); Larry Siedentop writes ‘Here we may find one of the earliest assertions of a basic right, a rightful power claimed for humans as such’ (*Inventing the Individual: The Origins of Western Liberalism* (London: Allen Lane, 2014), p. 78). For a wide-ranging history of the roots of human rights thinking, including the roots of ethical universalism in diverse ancient religions, see Micheline R. Ishay, *The History of Human Rights: From Ancient Times to the Globalization Era* (Berkeley and Los Angeles: University of California Press, 2004).

<sup>4</sup> See Samuel Moyn’s graph of usage of the phrase ‘human rights’ in Anglo-American news; Moyn, *The Last Utopia: Human Rights in History* (Cambridge, Mass.: Harvard University Press, 2010), p. 231.

slow to examine human rights as they are conceived in international law and politics.<sup>5</sup> There was growing philosophical work on basic moral or natural rights,<sup>6</sup> and also on the very nature of rights,<sup>7</sup> but much less on the human rights of the emerging human rights movement.

Two recent trends reversed this. First, Rawls put the notion of human rights on the map of contemporary political philosophy by giving them a specific role and definition in *The Law of Peoples* (1999), anticipated first in his Amnesty Lecture of the same title (1993).<sup>8</sup> Some of the ensuing philosophical discussion was primarily about the role of human rights within broader debates about poverty<sup>9</sup>, the justification of humanitarian intervention<sup>10</sup>, and other issues of international justice.<sup>11</sup> More recently this debate has become more sophisticated and has expanded to cover a number of other important issues, such as international trade.<sup>12</sup>

Secondly, at the same time influential papers by James Griffin and Charles Beitz were appearing that directly address the question of the nature and justification of human rights.<sup>13</sup> They were followed by a number of other papers, which culminated in the publication of two important books: Griffin's *On Human Rights* (2008) and Beitz's *The Idea of Human Rights*.<sup>14</sup> These books, together with the second edition of James Nickel's path-breaking earlier volume, *Making Sense of Human Rights*, and further work by Jack Donnelly and Carl

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<sup>5</sup> Cranston, *What Are Human Rights?* (London: Bodley Head, 1973), James W. Nickel, *Making Sense of Human Rights*, First Edition (Berkeley and Los Angeles: University of California Press, 1987). See also Jack Donnelly, *Universal Human Rights in Theory and Practice*, First Edition (Ithaca: Cornell University Press, 1989).

<sup>6</sup> H. L. A. Hart, 'Are There Any Natural Rights?', *Philosophical Review* LXIV(1955), 175-91; Alan Gewirth, *Reason and Morality* (Chicago: University of Chicago, 1978) and *Human Rights: Essays on Justification and Application* (Chicago: University of Chicago, 1982), John Finnis, *Natural Law and Natural Rights* (Oxford: Clarendon, 1980), Joel Feinberg, *Rights, Justice, and the Bounds of Liberty* (Princeton: Princeton University Press, 1980), Henry Shue, *Basic Rights: Subsistence, Affluence, and U.S. Foreign Policy*, First Edition (Princeton: Princeton University Press, 1980), Judith Jarvis Thomson, *The Realm of Rights* (Cambridge, Mass.: Harvard University Press, 1990), Hillel Steiner, *An Essay on Rights* (Oxford: Blackwell, 1994).

<sup>7</sup> See the essays in J. Waldron (ed.), *Theories of Rights* (Oxford: Oxford University Press, 1984) and Matthew H. Kramer, N. E. Simmonds and Hillel Steiner, *A Debate Over Rights* (Oxford: Clarendon Press, 1998). See also D.N. MacCormick, *Legal Right and Social Democracy* (Oxford: Oxford University Press, 1982), Rex Martin, *A System of Rights* (Oxford: Oxford University Press, 1993), Joseph Raz, *The Morality of Freedom* (Oxford: Clarendon Press, 1986), L. W. Sumner, *The Moral Foundations of Rights* (Oxford: Clarendon Press, 1987), Carl Wellman, *A Theory of Rights: Persons under Laws, Institutions, and Morals* (Totowa, NJ.: Rowman and Allanheld, 1985), Alan R. White, *Rights* (Oxford: Clarendon Press, 1984). For the current state of debates on the nature of rights, and the rival 'interest' and 'will' theories, see the introduction and essays by Cruft, Wenar, Steiner, Kramer and Hayward in the symposium, 'Rights and the Direction of Duties', *Ethics* 123 (2013).

<sup>8</sup> John Rawls, *The Law of Peoples with "The Idea of Public Reason Revisited"* (Cambridge, Mass.: Harvard University Press, 1999); 'The Law of Peoples' in S. Shute and S. Hurley (eds.), *On Human Rights: The Oxford Amnesty Lectures 1993* (New York: Basic Books, 1993), 41-82..

<sup>9</sup> See, e.g., Onora O'Neill, *Towards justice and virtue: A constructive account of practical reasoning* (Cambridge: Cambridge University Press, 1996), Ch. 5; Thomas Pogge, *World Poverty and Human Rights*, First Edition (Cambridge: Polity, 2002), Thomas Pogge (ed.), *Freedom from Poverty as a Human Right: Who owes what to the very poor?* (Oxford: Oxford University Press / UNESCO: 2007).

<sup>10</sup> Allen Buchanan, *Justice, Legitimacy, and Self-Determination: Moral Foundations for International Law*, esp. Ch. 3 (Oxford: Oxford University Press, 2004); see also Buchanan's more recent work including *Human Rights, Legitimacy, and the Use of Force* (Oxford: Oxford University Press, 2010).

<sup>11</sup> An exception is the wide range of essays in David Reidy and Rex Martin (eds.), *Rawls's Law of Peoples: A Realistic Utopia?* (Oxford: Blackwell, 2006).

<sup>12</sup> See, e.g., Leif Wenar, 'Clean Trade in Natural Resources', *Ethics and International Affairs* 25 (2011), 27-39.

<sup>13</sup> James Griffin, 'Discrepancies between the Best Philosophical Account of Human Rights and the International Law of Human Rights', *Proceedings of the Aristotelian Society* 101 (2001), 1-28; James Griffin, 'First Steps in an Account of Human Rights', *European Journal of Philosophy* 9 (2001), 306-27; Charles Beitz, 'Human Rights as a Common Concern', *American Political Science Review* 95 (2001), 269-82.

<sup>14</sup> James Griffin, *On Human Rights* (Oxford: Oxford University Press, 2008); Charles R. Beitz, *The Idea of Human Rights* (Oxford: New York: Oxford University Press, 2009).

Wellman,<sup>15</sup> have given significant impulse to the creation of a self-standing debate on the “philosophical foundations of human rights”, i.e. a debate in which human rights are not discussed simply as part of wider, more established, debates in political and legal philosophy (for example, on global distributive justice or on humanitarian intervention). More recently, John Tasioulas’s writings have played an important role in promoting this debate.<sup>16</sup>

Parallel to these developments, a separate literature has emerged on what has come to be called the ‘capabilities approach’ to global justice. This debate has its own conceptual framework, developed in the work of Martha Nussbaum and Amartya Sen, but has often overlapped with, and to some extent drawn attention to, issues that have become central in the debate on the philosophical foundations of human rights, such as the idea of a list of minimal goods/opportunities required for a minimally decent life, and the related notion of “human functioning”.<sup>17</sup>

This volume is the first to survey the growing field of the philosophical foundations of human rights. In this Introduction, we aim to provide a state-of-the-art discussion of the central topics. We discuss four main questions.

1. If there are human rights, what are they? Are they a subset of moral rights? Are they legal rights? Call this the Nature of Human Rights question.
2. What grounds or justifies human rights? Call this the Ground of Human Rights question.
3. Which proposed human rights are real human rights? Should we dismiss some classes of human rights claims as morally, legally or conceptually questionable?
4. Are there human rights at all, or should we embrace the sceptical conclusion that there are no genuine human rights?

We shall examine each in turn, and it will become clear that there is a diversity of positions on each question, with no prevailing philosophical view even on fundamental issues like what a human right is. In our view, there is great value in this diversity: the nature, ground, contents and existence of human rights are not matters of universally accepted, unchallenged dogma. They are, rather, subjects on which there is a range of competing well-developed positions and this, we suggest, is a sign of the intellectual, cultural and political fertility of the notion of human rights. Following our discussion of the four central topics, we end with a brief overview of the essays in the volume.

## **The Nature of Human Rights**

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<sup>15</sup> James W. Nickel, *Making Sense of Human Rights*, Second Edition (Malden, MA; Oxford: Blackwell Pub., 2007); Jack Donnelly, *Universal Human Rights in Theory and Practice*, Second Edition (Ithaca: Cornell University Press, 2003); Carl Wellman, *The Moral Dimensions of Human Rights* (Oxford: Oxford University Press, 2011).

<sup>16</sup> John Tasioulas, ‘The Moral Reality of Human Rights’, in Pogge (ed.), *Freedom from Poverty as a Human Right* (Oxford: Oxford University Press/UNESCO, 2007), pp. 75-102; ‘Towards a Philosophy of Human Rights’, *Current Legal Problems* 65 (2012), 1-30; ‘On the Nature of Human Rights’, in Ernst and Heilinger (eds.), *The Philosophy of Human Rights* (Berlin: de Gruyter, 2012), pp. 17-60; ‘Human Rights, Legitimacy, and International Law,’ *The American Journal of Jurisprudence* 58, no. 1 (June 1, 2013): 1–25

<sup>17</sup> See, e.g., Martha Nussbaum, *Creating Capabilities: The Human Development Approach* (Cambridge, Mass.: Harvard University Press, 2011); Martha Nussbaum, *Women and Human Development: the Capabilities Approach* (Cambridge: Cambridge University Press, 2001); Amartya Sen, ‘Rights and Capabilities’, in *Resources, Values and Development* (Cambridge: Cambridge University Press, 1984); ‘Elements of a Theory of Human Rights’, *Philosophy and Public Affairs* 32 (2004), 315-56. Carol Gould’s work is in some ways akin to the ‘capabilities approach’ with its stress on the importance of positive freedom as self-development; see Carol C. Gould, *Rethinking Democracy* (Cambridge: Cambridge University Press, 1989) and *Globalizing Democracy and Human Rights* (Cambridge: Cambridge University Press, 2004).

In addressing the question of the nature of human rights, an intuitive move has been to turn to the notion of natural rights, whose main formulation can be found in the writings of Grotius, Pufendorf and Locke.<sup>18</sup> These are rights that all human beings possess simply in virtue of their humanity and which can be identified simply by the use of ordinary moral reasoning (“natural reason”), as opposed to the sort of conventional reasons created within particular social or institutional contexts. In particular, on this naturalistic conception of the nature of human rights, they are a) moral rights that b) all human beings possess c) at all times and in all places d) simply in virtue of being human e) and the corresponding dutybearers are all able people in appropriate circumstances. Hence, John Simmons writes, “Human rights are rights possessed by all human beings (at all times and in all places), simply in virtue of their humanity.”<sup>19</sup> Or, Griffin argues that “The secularized notion [of a human right] that we were left with at the end of the Enlightenment is still our notion today . . . a right that we have simply in virtue of being human.”<sup>20</sup>

Let us examine why each of these features is deemed a necessary part of the nature of human rights.<sup>21</sup> Consider a). Why should human rights be pre-legal moral rights as opposed to, e.g., legally created rights? Presumably, the thought is that human rights should be capable of criticizing conventional, societal standards rather than just mirror these standards. As Griffin writes, “the international law of human rights aims, or should aim, at least in part, to incorporate certain extra-legal ethical standards.”<sup>22</sup> Consider b). The belief that human rights are something that all human beings possess is encapsulated in the Universal Declaration of Human Rights (1948), which states that “all human beings are born free and equal in dignity and rights.” But why should human rights in fact be something that all human beings possess? Despite their physical, social and cultural differences, human beings have often been thought fundamentally to have equal moral status.<sup>23</sup> This equality in moral status leads to the idea that all human beings should be afforded the similar kinds of protection that human rights provide, i.e., they should all possess human rights. Consider c). The idea that human rights should exist in all times and in all places stems from the observation that fundamental human nature has not changed significantly since the beginning of human existence. For instance, just as we need food and education today, the same applies to people in Ancient Rome or even to our ancestral cave dwellers. If so, it seems that if we have human rights claims to food and education, these claims should be applicable to people in Ancient Rome as well. Consider d). Why think that human rights are rights that we have simply in virtue of being human? It is a natural thought that some aspect of human nature is what gives rise to *human* rights. Otherwise, why call them *human* rights? Also, as we shall shortly see, human rights tend to protect aspects of human nature that are fundamental to human existence. Finally, consider e). Why hold the view that the corresponding duty-

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<sup>18</sup> Tasioulas, “Human Rights, Legitimacy, and International Law,”; Pogge, *World Poverty and Human Rights: Cosmopolitan Responsibilities and Reforms*, 60–5; Aryeh Neier, *The International Human Rights Movement: A History* (Princeton, N.J: Princeton University Press, 2012); A. John Simmons, *Justification and Legitimacy: Essays on Rights and Obligations* (Cambridge: Cambridge University Press, 2001). For the original texts, see the references in note 2 above.

<sup>19</sup> A. John Simmons, ‘Human Rights and World Citizenship: The Universality of Human Rights in Kant and Locke’, *Justification and Legitimacy: Essays on Rights and Obligations* (Cambridge: Cambridge University Press, 2001), 179-96., p. 185.

<sup>20</sup> James Griffin, *On Human Rights* (Oxford: Oxford University Press, 2008)., pp. 1-2.

<sup>21</sup> For an insightful similar discussion, see John Tasioulas ‘On the Nature of Human Rights’.

<sup>22</sup> Griffin, *On Human Rights*., p. 54. We discuss below (pp. \*\*) those who are critical of the view that human rights must be pre-legal moral rights.

<sup>23</sup> Of course, many – perhaps most – societies through history have not accorded human beings equal moral status (consider patriarchal and slave-holding societies), but for the thesis that a proto-commitment to equal status can be found in many religions and cultures, see Ishay, *The History of Human Rights*, Ch. 1.

bearers of human rights are all able people in appropriate circumstances? Since human rights are universal claims that are applicable at all times and places, some believe that they should place all able people in appropriate circumstances under a duty to provide and/or protect the right-holders' claims. For instance, Maurice Cranston says, "To speak of a universal right is to speak of a universal duty . . . Indeed, if this universal duty were not imposed, what sense could be made of the concept of a universal human right?"<sup>24</sup> Similarly, Alan Gewirth says that "The universality of a positive [human] right is . . . a matter of everyone's always having, as a matter of principle . . . the duty to act in accord with the right when the circumstances arise that require such action and when he then has the ability to do so, this ability including consideration of the cost to himself."<sup>25</sup>

In recent years, all these features of human rights have been contested. Beginning with John Rawls, and defended by, among others Charles Beitz<sup>26</sup> and Joseph Raz<sup>27</sup>, the so-called 'political' conception of human rights offers an alternative view of the nature of human rights. In particular, advocates of this political conception argue that human rights are not based on certain features of humanity; rather, the distinctive nature of human rights is to be understood in light of their role or function in modern international political practice.<sup>28</sup> For instance, Rawls argues that "Human rights are a class of rights that play a special role in a reasonable Law of Peoples: they restrict the justifying reasons for war and its conduct, and they specify limits to a regime's internal autonomy."<sup>29</sup> According to Rawls, one of the defining features of human rights is that if a society fails to respect them, then external agents may in certain circumstances be permitted to interfere in its internal affairs, e.g., by means of economic or political sanction, or even coercive intervention.<sup>30</sup> Raz also believes that human rights characteristically set limits to a society's internal autonomy.<sup>31</sup> Beitz's view is similar, at least in outline: for Beitz, human rights are defined as safeguarding those individual interests whose protection is distinctively a matter 'of international concern' – as opposed to a merely internal, intra-state matter, say, or a matter of interpersonal morality.<sup>32</sup>

In proposing that human rights should be understood in terms of their role or function in modern international political practice, the political conception directly challenges the idea that human rights include all the rights that we have simply in virtue of being human, i.e., criterion d). In addition, the political conception also challenges other features of the naturalistic understanding of human rights. For example, consider a), the idea that human rights are a subset of moral rights. Charles Beitz has argued that "[w]e understand international human rights better by considering them *sui generis*."<sup>33</sup> More recently, Allen Buchanan has argued that many human rights are morally justified legal rights rather than

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<sup>24</sup> Cranston, *What Are Human Rights?*, p. 69.

<sup>25</sup> Gewirth, *The Community of Rights* (Chicago: University of Chicago Press, 1996), p. 63.

<sup>26</sup> Charles R. Beitz, *The Idea of Human Rights* (Oxford: Oxford University Press, 2009).

<sup>27</sup> Joseph Raz, 'Human. Rights without Foundations', in Samantha Besson and John Tasioulas (eds.), *The Philosophy of International Law* (Oxford: Oxford University Press, 2010a), 321-38.; Joseph Raz, 'Human Rights in the Emerging World Order', *Transnational Legal Theory*, 1 (2010b), 31-47.

<sup>28</sup> Beitz *The Idea of Human Rights*, p. 197.

<sup>29</sup> Rawls *The Law of Peoples*, p. 79.

<sup>30</sup> *Ibid.*, p. 81.

<sup>31</sup> Raz 'Human Rights without Foundations', p. 328.

<sup>32</sup> Beitz, *The Idea of Human Rights*, esp. p. 109-117.

<sup>33</sup> *Ibid.*, p. 197.

pre-legal moral rights, whereas Samantha Besson is developing the idea that human rights must be at once moral and legal.<sup>34</sup>

Likewise, consider c). A number of people have argued that it is not the case that all human beings at all times and places would be justified in claiming the human rights currently recognized by international practice. For instance, Article 26 (1) of the Universal Declaration of Human Rights states that: “Everyone has the right to education. Education shall be free, at least in the elementary and fundamental stages. Elementary education shall be compulsory. Technical and professional education shall be made generally available and higher education shall be equally accessible to all on the basis of merit.” As Beitz argues, “It is reasonably clear from examples like [this] that its framers could not have intended the doctrine to apply, for example, to the ancient Greeks or to China in the Ch’in dynasty or to European societies in the Middle Ages.”<sup>35</sup> Similarly, Raz argues that if human beings have the right to education at all times and in all places, “it follows that cave dwellers in the Stone Age had that right. Does that make sense? . . . The very distinctions between elementary, technical, professional and higher education would have made no sense at that, and at many other times.”<sup>36</sup> In response, some theorists have argued that human rights are ‘synchronically’ universal – that is, held by all humans at a given time, or in modern conditions – but not universal across history.<sup>37</sup>

Finally, consider e). It is becoming the norm to think of human rights as primarily entailing duties against one's state or political community. For instance, Beitz argues that ‘any plausible view of the justifying purposes of a practice of human rights must be compatible with the fact that the state constitutes the basic unit of the world’s political organization.’<sup>38</sup> As he explains, ‘a practice of human rights, so conceived, might be described as “statist” in at least two senses: its standards apply in the first instance to states, and they rely on states, individually and in collaboration, as their principal guarantors. This does not mean that human rights impose no constraints on other agents or that only states have responsibilities as guarantors. But the centrality of states to the practice of human rights cannot be denied.’<sup>39</sup> Even theorists who do not support the standard ‘political’ conception – such as Dworkin, Nickel or Pogge – think that the primary duties entailed by human rights are borne by states.<sup>40</sup> The prevalence of this view is perhaps partly due to the primacy and justiciability of state duties in human rights law.

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<sup>34</sup> Allen Buchanan, *The Heart of Human Rights* (Oxford: Oxford University Press, 2013); Samantha Besson, *Human Rights as Law* (forthcoming 2015).

<sup>35</sup> Beitz, *The Idea of Human Rights*, p. 57.

<sup>36</sup> Joseph Raz, 'Human Rights in the Emerging World Order,' *Transnational Legal Theory* 1 (2010b), p. 40 – reprinted in this volume, p. \*\*\*.

<sup>37</sup> *Ibid.*, p. 41; see also Tasioulas, ‘On the Nature of Human Rights’, pp. 17-59, at pp. 31-36..

<sup>38</sup> Beitz 2009, p. 128.

<sup>39</sup> *Ibid.*

<sup>40</sup> See Pogge, *World Poverty and Human Rights*, Second Edition, section 2.3 on the importance of ‘Official Disrespect’; see also Ronald Dworkin, *Justice for Hedgehogs* (Cambridge, Mass.: Harvard University Press, 2011), Ch. 15, in which human rights are discussed as one form of ‘political right’, rights that ‘we each as individuals have against our state’ (p. 328); see also Nickel, *Making Sense of Human Rights*, Second Edition, p. 10. Note that these theorists also leave a place for important secondary duties borne by non-state actors including trans-national corporations, supra-national institutions, NGOs and individuals. For criticism of the ‘state-centric’ approach, see Cristina Lafont, *Global Governance and Human Rights* (Amsterdam: Van Gorcum, 2013), and further discussion at p. \*\* [on welfare rights] below..

There are some reasons to believe that the difference between the naturalistic conception and the political conception has been overdrawn.<sup>41</sup> For instance, according to the naturalistic conception, human rights are rights that we have simply in virtue of being human, whereas according to the political conception, human rights are rights that set limits to a society's internal autonomy (Rawls and Raz) or rights that the international community has a responsibility to protect in modern societies (Beitz). Are these two features incompatible? One way of seeing that they need not be is to notice that the 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 bearers of responsibilities to uphold or enforce human rights, and the issue of when and how such upholding and enforcing is permitted – while the naturalistic conceptions seem to be concerned with what important features of human life ground human rights. Perhaps questions about the grounds and question about the permitted ways to enforce human rights carry no or few implications for each other, and human rights are simply those rights which are *both* grounded simply in our humanity *and* entail duties with a distinctive international function. It seems in principle possible for one to accept both a naturalistic and political conception of the formal features of human rights. To be sure, advocates of the political conception may respond that they also have views about the grounds of human rights, and we return to this in the next section.

Or, consider the concern that human rights such as the right to education are not timeless. This concern can perhaps be addressed by distinguishing, e.g., between the aim and the object of a right, or between 'highest-level' or 'basal' human rights which are universal across time and their specific instantiations at a time.<sup>42</sup> An account like this maintains that the aim of a human right is the goal or end of the human right, and the object of a human right is the means to achieving that goal or end; or it maintains that specific human rights are local constituents or instantiations of, or means for securing, over-arching high-level or basal human rights. On this distinction, the aims of human rights – or the high-level, basal rights – are timeless while the low-level objects of human rights may vary across time, location, and society. Applied to free elementary education, we can say that free elementary education is the object of a human right or is a local specific human right. As such, it makes sense only at a specific time, in a specific location, and in a specific society. By contrast, the aim of the human right to free elementary education – or the high-level, basal universal right standing behind it – is to ensure that human beings acquire the knowledge necessary to be adequately functioning individuals in their circumstances. In this regard, it does not seem odd to say such an aim or high-level right was relevant, important, and applied in the context of cavemen. One concern which this strategy must allay is that it seems to leave comparatively few genuinely timeless high-level human rights, certainly fewer than the many specific human rights found in international law.<sup>43</sup>

As noted earlier, the idea that human rights are possessed by all human beings seems to stem from the thought that all human beings have equal moral status. However, many

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<sup>41</sup> See, e.g., S. Matthew Liao and Adam Etinson, 'Political and Naturalistic Conceptions of Human Rights: A False Polemic?', *Journal of Moral Philosophy*, 9/3 (2012), 327-52.; Pablo Gilabert, 'The Capability Approach and the Debate between Humanist and Political Perspectives on Human Rights: A Critical Summary', *Human Rights Review* 14 (2013), 299-325.

<sup>42</sup> For the aim/object distinction, see Liao and Etinson, 'Political and Naturalistic Conceptions of Human Rights: A False Polemic?'. For the highest-level/lower-level distinction, see Griffin, *On Human Rights* (OUP 2008), p. 149. For the basal/derived distinction, see Wellman, *The Moral Dimensions of Human Rights* (OUP 2011), pp. 28-29. For criticism of the general strategy outlined here, see John Tasioulas, 'On the Nature of Human Rights', pp. 31-36.

<sup>43</sup> See Tasioulas, 'On the Nature of Human Rights', p. 34.

prominent philosophers have argued that children are not rightholders, thereby suggesting that not all human beings have equal moral status. For instance, both James Griffin and Carl Wellman have argued that infants are not rightholders.<sup>44</sup> One might think that if Griffin's and Wellman's accounts of human rights have this implication, then this is a reason to discount their views.<sup>45</sup> Why then do Griffin and Wellman nevertheless insist on claiming that infants are not rightholders? An explanation may be the following: in moral philosophy, writers such as Peter Singer and Jeff McMahan have long challenged the idea that all human beings have equal moral status.<sup>46</sup> For instance, Singer argues that the belief that all human beings have equal moral status is really just a form of prejudice, what he calls speciesism, which he regards as being on a par with sexism and racism. As Singer writes,

Racists violate the principle of equality by giving greater weight to the interests of members of their own race when there is a clash between their interests and the interests of those of another race. Sexists violate the principle of equality by favouring the interests of their own sex. Similarly, speciesists allow the interests of their own species to override the greater interests of members of other species. The pattern is identical in each case.<sup>47</sup>

To avoid the charge of speciesism, a number of philosophers believe that when we consider the moral status of a particular being, we should meet the Species Neutrality Requirement. This requirement says that an adequate account of rightholding should provide a criterion that does not in principle exclude any being simply on the basis of their species, and further the relevant criterion must be applicable through some objective, empirical method.<sup>48</sup> However, there does not seem to be a relevant empirical attribute that would apply to all and only human beings. The most plausible attributes such as actual sentience and actual agency do not apply to all human beings. For example, some human beings such as anencephalic children and comatose persons lack actual sentience, and many human beings including newborn infants lack actual agency. These human beings would not be right-holders on these accounts. Indeed, holding the view that only actual normative agents can possess human rights, Griffin and Wellman are led to the conclusion that very young children cannot have human rights.<sup>49</sup> Alternatively, some have rejected the Species Neutrality Requirement and defended the importance of membership in the human species.<sup>50</sup>

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<sup>44</sup> Griffin, *On Human Rights*, p. 95; Carl Wellman, *Real Rights* (Oxford: Oxford University Press, 1995), pp. 107, 113. For Griffin, the claim is that infants do not hold *human* rights; it is not clear that he rejects the view that infants could hold moral rights other than human rights.

<sup>45</sup> See e.g. Massimo Renzo, 'Human Needs, Human Rights', this volume, pp. \*\*.

<sup>46</sup> J. McMahan, *The Ethics of Killing: Problems at the Margins of Life* (Oxford: Oxford University Press, 2002); P. Singer, *Animal Liberation* (2 edn.; London: Jonathan Cape, 1990).

<sup>47</sup> Singer, *Animal Liberation*, pp. 6, 9.

<sup>48</sup> Feinberg, J., and B. B. Levenbook. "Abortion." In *Matters of Life and Death*, edited by T. Regan. New York: McGraw-Hill, 1993.

<sup>49</sup> Griffin, *On Human Rights*, p. 92. Griffin leaves open the possibility that infants could hold *rights*, if not *human* rights.

<sup>50</sup> Cora Diamond, 'The Importance of Being Human', in David Cockburn (ed.), *Human Beings* (Cambridge: Cambridge University Press, 1991), 35–62; B. Williams, 'The Human Prejudice', in A. W. Moore (ed.), *Philosophy as a Humanistic Discipline* (Princeton: Princeton University Press, 2008), 135–54. For a view that allows all human beings, including very young children, to be rightholders without running afoul of the Species Neutrality Requirement, see S. Matthew Liao, 'The Basis of Human Moral Status', *Journal of Moral Philosophy*, 7 (2010a), 159–79. Note that some theorists are open to the possibility that what we call human rights may turn out to be held by animals as well as humans, on the ground that some animals may be 'persons' just as humans are. See, e.g., Buchanan's claim that 'if "humanity" refers to personhood rather than to membership in the human biological species, and if we came to know that there were persons who were not of our biological

One further feature of human rights is worth noting here: they are often considered to be of overriding or at least special importance.<sup>51</sup> What exactly this means requires clarification: Do human rights always take priority over other rights and non-rights considerations when they conflict? Are the efforts a duty-bearer should make (or costs they should bear) to avoid violating human rights greater than those they should make to avoid violating other rights and non-rights considerations?<sup>52</sup> Are the efforts we should make to support a human rights culture greater than those we should make towards other goals? Very few theorists conceive human rights as of absolute importance in any of the senses just mentioned. Griffin argues that human rights can sometimes be overridden by other issues of justice as well as other moral values.<sup>53</sup> Similarly, the political conception outlined earlier, while defining human rights by their distinctive sovereignty-defeating importance, need not deny that human rights can be justifiably violated in extreme circumstances. And it's worth noticing that the law also acknowledges this point with the doctrine of proportionality, according to which state interference with non-absolute human rights such as privacy, or freedom of religion is lawful if proportionate to the achievement of a legitimate aim pursued by the state.<sup>54</sup> How to understand this legal doctrine, and whether it is justifiable, are highly contested matters.<sup>55</sup> Equally contested are the implications for what should be done when a legal or moral human right is justifiably violated: is the victim of a justified human rights violation or deficit owed compensation, and in what way should their treatment differ from that of a victim of an unjustified violation or deficit?<sup>56</sup> Some will consider the latter question, with its assumption that human rights violations can be justified at least on occasion, deeply misguided.<sup>57</sup> In sum, the importance of human rights, while often made part of their very definition, is highly contested.

## The Grounds of Human Rights

So far we have considered the question of the nature of human rights. This section will be devoted to examining the question of their justification. As will become clear, the two questions are to some extent related. Accepting a certain view of what human rights are will naturally incline us toward a certain family of justificatory theories. But the question of what

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species, then we might decide that what we have called human rights would be more accurately called persons' rights' (Allen Buchanan, *Beyond Humanity? The Ethics of Biomedical Enhancement* (Oxford: Oxford University Press, 2011, pp. ???).

<sup>51</sup> Some authors see rights as such, or political rights, as possessing a special importance (e.g. Dworkin, *Justice for Hedgehogs*, pp. 328-9). It is especially common to see *human rights* in particular as distinctively important.

<sup>52</sup> For interesting discussion of cases where the issues raised by the first two questions diverge (i.e. cases in which the right to the fulfilment of which we should devote the most effort is not the right that takes priority in cases of conflict), see F. M. Kamm, *Morality, Mortality, Vol. II: Rights, Duties and Status* (Oxford: Oxford University Press, 1996), Ch. 12. See also Thomson's notion of 'stringency' as defining a right's importance in cases of conflict with other rights and other values (*The Realm of Rights*, pp. 152-8). For discussion focused more specifically on the importance of *human rights*, see Nickel, *Making Sense of Human Rights*, pp. 41-44 and Beitz, *The Idea of Human Rights*, pp. 33-42 and Chs. 6, 7 and 8.

<sup>53</sup> Griffin argues that justified punishment is a case of the justified violation of a human right. He defends punishment by writing that 'the demands of justice can sometimes, and to some appropriate degree, outweigh the protection of human rights' (*On Human Rights*, p. 66).

<sup>54</sup> See George Letsas, 'Rescuing Proportionality', this volume, p. \*\* [p. 1].

<sup>55</sup> Ibid. and Guglielmo Verdirame, 'Rescuing Human Rights from Proportionality', this volume, pp. \*\*.

<sup>56</sup> This issue raises questions about the 'specificationist' approach to rights. See John Oberdiek, 'Specifying Rights Out of Necessity', *Oxford Journal of Legal Studies* 127 (2008), and Thomson's argument in *The Realm of Rights*, pp. 91-98. See also Saladin Meckled-Garcia, 'Specifying Human Rights', this volume, pp. \*\*.

<sup>57</sup> For just one example focused on the absolute impermissibility of torture, see Claudia Card, 'Ticking Bombs and Interrogations', *Criminal Law and Philosophy* 2 (2008), 1-15.

human rights are and the question of what justifies their existence are clearly distinct. We might agree, for example, that human rights ought to be understood as important moral rights that all human beings possess simply in virtue of their humanity, and yet disagree about which aspects of human nature should ground human rights. In fact, we might agree that this is how the notion of human rights would be justified, and yet reject their existence altogether (just as we might agree that the god of Judaism, Christianity and Islam has certain features, while rejecting the existence of such a god).<sup>58</sup> In this section we will introduce the main approaches to the justification of human rights.<sup>59</sup>

### ***Instrumental justifications***

Let us start with the view of those who understand human rights as rights that all human beings have simply in virtue of being human. According to this view, the justification for the existence of a special class of rights called “human rights” is that they protect certain distinctive features of humanity. The most intuitive way of understanding this view is in instrumental terms: human rights are useful or essential means to realize or further valued features of human lives.<sup>60</sup> But what are these features? Three main answers have been offered to this question in the philosophical debate: one appeals to the notion of agency, one appeals to the notion of the good life, and one appeals to the notion of basic needs. We will consider these three answers in turn, beginning with the first one.

Agency is an obvious candidate for an account of human rights of the sort just described, since agency is considered by many as the distinguishing feature of human beings. The main difference between human and non-human animals seems to be that the former have the capacity to form a conception of a good life and to pursue the conception of the good life they have chosen for themselves. James Griffin argues that it is precisely in these terms that we should understand the notion of human dignity. Having human dignity is having the capacity to choose a plan of life for ourselves and to successfully pursue it without interference;<sup>61</sup> and human rights protect human dignity by protecting this capacity. When these rights are violated, our human dignity is compromised and we are not treated with the respect that is owed to us as human beings.<sup>62</sup>

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<sup>58</sup> Tasioulas, “Human Rights, Legitimacy, and International Law,” p. 19.

<sup>59</sup> Note that in this section we focus on what we see as the most influential theories in the philosophical literature, and this means that some important approaches – such as consequentialist grounds for human rights – are not discussed (see William Talbot, *Which Rights Should be Universal?* (Oxford: Oxford University Press, 2005) and *Human Rights and Human Well-Being* (Oxford: Oxford University Press, 2010)). It also means that we do not examine in detail the distinction between justifying something as a pre-legal moral right, justifying it as a right suitable for legal implementation at the national level (e.g. in a constitution, or within criminal law) and justifying it as an *international* legal human right. Buchanan thinks that philosophers have neglected the distinctive forms of justification needed for international legal rights (Buchanan, *The Heart of Human Rights*). We discuss Buchanan’s position briefly at the end of this section.

<sup>60</sup> Following Scanlon, we can identify three components that characterize an instrumental justification of rights: “(i) An empirical claim about how individuals would behave or how institutions would work, in the absence of this particular assignment of rights [...]. (ii) The claim that this result would be unacceptable. This claim will be based on valuation of consequences [...]. (iii) A further empirical claim about how the envisaged assignment of rights will *produce a different outcome*.” T. M. Scanlon, ‘Rights, Goals and Fairness’, in Waldron, ed., *Theories of Rights* (Oxford: OUP 1984), pp. 137-152. However, it is worth noticing that there might be other ways in which human rights can be grounded teleologically, but non-instrumentally - for example, as instantiations of or constituents of the values that ground them. Some of the writers we discuss (perhaps Finnis or Tasioulas) might challenge our designation of their view as ‘instrumental’.

<sup>61</sup> Griffin calls this “normative agency”. See *On Human Rights*, Ch. 2.

<sup>62</sup> Alan Gewirth argues along similar lines, but his view is, we will suggest below, not best conceived as instrumental. See Gewirth, *Reason and Morality* and *Human Rights: Essays on Justification and Applications*. For an approach somewhat similar to Griffin’s, but based on a more demanding and expansive conception of human freedom as self-development, see Gould, *Rethinking Democracy*.

But while initially appealing, agency-based accounts seem to encounter a number of problems. In particular, they seem to offer a reductive picture of the moral considerations at stake in the justification of human rights. For example, consider the paradigmatic human right not to be tortured. The fact that torture undermines one's agency by undermining one's capacity to decide how to act and to stick to the decision is certainly an important factor in justifying the existence of a human right not to be tortured.<sup>63</sup> But is it the only factor? A number of writers have argued that it isn't, and that other important factors, for example the fact that torture causes great pain, are also important.<sup>64</sup>

This objection becomes even more worrisome once we recall the fact that many human beings, most notably children and the severely mentally disabled, simply lack the capacity to act as autonomous moral agents. If we accept the view that human rights are grounded exclusively in the value of agency, we may be led to conclude that neither group can be said to have human rights. As noted earlier, Griffin himself accepts that his view commits us to the conclusion that while these subjects might have *moral* rights against torture, or at least we might have moral *duties* not to torture these subjects, they cannot be said to have a *human* right against torture.<sup>65</sup>

Again, this conclusion seems problematic. The main concern is that both morality and the law attribute human rights both to children and to the severely mentally disabled. Agency accounts fail to the extent that they are under-inclusive with respect to the class of human rights bearers.<sup>66</sup> Instead of justifying the existence of rights that all human beings possess qua human being, they justify something different: rights that all persons possess qua persons ("person" is the term used by Griffin to refer to autonomous moral agents).

One way to avoid this problem is to take a broader view according to which human rights are grounded in a plurality of goods that are required to have a good life, where agency is simply one of these goods. Other elements of a good life are freedom from great pain, knowledge, deep personal relations, and so on. This approach can be traced to Aristotle's writings, among others. Aristotle gives a penetrating investigation of *eudaimonia* or human flourishing and its connection with 'the good of man.'<sup>67</sup> A flourishing life, for Aristotle, is one characterized by virtuous activity, but virtuous activity will be impaired and harder to exercise if we lack certain fundamental goods.<sup>68</sup>

More recently, a similar approach has been adopted by those who advocate an objective list account of well-being. For example, John Finnis argues that there are certain human ends that are objectively good, by which he means that their value stems not from individuals happening to desire them but from their being basic aspects of human well-being (he calls them the 'basic forms of human good'). These include: life, knowledge, play, aesthetic experience, sociability (friendship), practical reasonableness, and religion.<sup>69</sup> In a somewhat similar vein, James Nickel argues that human rights are grounded in four secure claims: to have a life, to lead one's life, and claims against severely cruel or degrading, and against severely unfair treatment.<sup>70</sup> Likewise, in this volume S. Matthew Liao defends the

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<sup>63</sup> Griffin, *On Human Rights*, pp. 52-53.

<sup>64</sup> John Tasioulas, 'Taking Rights out of Human Rights', *Ethics* 120 (2010), 647-678, at pp. 663-666. S. Matthew Liao, 'Agency and Human Rights', *Journal of Applied Philosophy*, 27/1 (2010b), 15-25.

<sup>65</sup> Griffin, *On Human Rights*, p. 92.

<sup>66</sup> Renzo, *Human Rights and the Priority of the Moral*, Social Phil & Policy

<sup>67</sup> Aristotle. *Nicomachean Ethics*. Translated by D. Ross. Oxford: Oxford University Press, 1925, i. 7.

<sup>68</sup> *Ibid.*, 1153b17-19.

<sup>69</sup> Finnis, *Natural Law and Natural Rights*, Ch. 4.

<sup>70</sup> Nickel, *Making Sense of Human Rights*, Second Edition, pp. 61-69. In his contribution to the current volume, Nickel adds personal desert as a further ground that plays a role in the justification of some human rights. Whether Nickel's approach is founded on well-being is debatable, but Nickel writes: 'A unifying idea for these

view that human rights protect the fundamental conditions for pursuing a good life<sup>71</sup>. The justification of human rights, according to these views, is grounded in their being necessary for, or at least in their significantly contributing to, protecting conditions for human well-being.

John Tasioulas also adopts a pluralist approach that grounds the justification of human rights in a wide range of human interests, but his view is more expansive in that it does not identify a specific list of goods or claims from which human rights can be derived. Rather, Tasioulas argues that any interest sufficiently important to ground duties in others to protect, respect or advance the interest in question can justify the existence of a human right provided that *a*) this is an interest that we have simply in virtue of our humanity (i.e. independently from special roles or positions that we happen to occupy) and *b*) the duties generated by the interest are feasible in the relevant socio-historical context.<sup>72</sup>

A potential concern with this approach is that it will produce an over-expansive list of human rights. Human rights typically set some sort of minimum standards: “the lower limits on tolerable human conduct,” rather than “great aspirations and exalted ideals.”<sup>73</sup> The idea that anything we might require for a good life (including, say, the presence of valuable personal relationships) might be turned into a matter of human rights, would threaten to challenge this widely shared assumption. Of course, the theorists mentioned have responses to this concern. For example, Tasioulas argues that the threshold generated by (a) and (b) is such that his approach is not excessively expansive. And he also draws on dignity as a further ground for human rights which generates additional limits.<sup>74</sup>

Other philosophers have been drawn to a related idea that we can justify human rights by appealing to a particular class of human needs. At first, the notion of needs might sound like a non-starter for a justification of human rights, since typically the needs we have depend on the adoption of specific goals (e.g., “Ben needs to exercise to be in good shape”),<sup>75</sup> whereas human rights are rights that all human beings have, independently of any specific goals they might have adopted for themselves. However, one can argue that there is a class of needs that all human beings have simply qua human beings, and that do not seem to depend on the adoption of any specific goal or plan of life. These include things which are required in order to sustain immediately a physical, corporeal existence (like food, water, and air), but also things that human beings need in order to have a healthy psychological and social life (like a minimum degree of social interaction and a minimum level of recognition). These “basic human needs” are the needs that are to be fulfilled in order to have a minimally decent

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four secure claims is that, perfectly realized, they would make it possible for every person living today to have and lead a life that is decent or minimally good’ (p. 62).

<sup>71</sup> S. Matthew Liao, ‘Human Rights as Fundamental Conditions for a Good Life’, this volume, pp. \*\*

<sup>72</sup> See especially John Tasioulas, ‘On the Foundations of Human Rights’, this volume, pp. \*\*\*.

<sup>73</sup> Henry Shue, *Basic Rights*., p. xi.

<sup>74</sup> For alternative responses to the same concern and about over-expansiveness, see Liao's account of the specifically fundamental interests which human rights protect (‘Human rights as fundamental conditions for a good life’, this volume, p. \*\*) and Nickel's framework for getting from his four secure claims to specific rights (*Making Sense of Human Rights*, Ch. 5).

<sup>75</sup> Philosophers disagree over whether needs claims are always in the form of “A needs x in order to y”.. David Wiggins in “Claims of Need.” In *Morality and Objectivity: A Tribute to J. L. Mackie*, edited by T. Honderich, 149-202. London: Routledge & Kegan Paul, 1985; Wiggins, D., and S. Dermen. “Needs, Need, Needing.” *Journal of Medical Ethics* 13 (1987); Garret Thomson in *Needs*. London: Routledge & Kegan Paul, 1987; and G. E. M. Anscombe in “Modern Moral Philosophy.” *Philosophy* 33 (1958), p. 7 think that some needs claims do not have to take this form, while Brian Barry in *Political Argument*. London: Routledge & Kegan Paul, 1965, pp. 47-49; Alan White in *Modal Thinking*. Ithaca, NY: Cornell University Press, 1975, pp. 105-107 think that all needs claims necessarily take this form. For consideration of the kind of needs relevant to ethics, see Soran Reader, *Needs and Moral Necessity* (London: Routledge, 2007).

life. Human rights are rights that protect the conditions for a minimally decent life, by protecting the opportunity to have these needs met.<sup>76</sup>

The basic needs account might seem appealing insofar as it strikes a middle ground between agency accounts and accounts based on the idea of the good life. We have seen that one concern with the former was its being too narrow in focusing on normative agency as the only justification for human rights, thereby ignoring a number of other important elements that seem to be at play in the justification of central human rights. There are concerns, on the other hand, that good life accounts may be too expansive, as they might turn every component of the good life into a matter of human rights. The basic needs account promises to avoid both problems, since it focuses on the limited class of needs that are of universally essential importance to all human beings.

However, we might wonder whether this class of needs is sufficiently broad to support all the rights that an adequate theory of human rights should intuitively account for. Consider for example civil and political rights, such as the right to equality before the law or the right to fair trial. Which basic needs do these rights aim to protect exactly? Defenders of the basic needs approach argue that these rights can be vindicated via “linkages arguments”<sup>77</sup>, i.e. by showing that their exercise is necessary for, or at least significantly contributes to, meeting fundamental needs such as bodily security or subsistence,<sup>78</sup> but opponents of this view worry that this link might be too thin and indirect to provide a suitable justification for civil and political rights.<sup>79</sup>

Whether needs approaches will be under-inclusive, justifying too few human rights, is debatable. But it is worth noting that in order to avoid being *over*-inclusive each of the positions mentioned so far – agency, good life and needs views – has to draw on some distinction between fundamental and non-fundamental aspects of agency, of the good life or of needs: not all needs generate human rights, nor all aspects of the good life or of agency. Drawing this fundamental/non-fundamental distinction in a substantive, non-question-begging way is a challenge for each account.<sup>80</sup>

The Capabilities Approach developed by Amartya Sen and Martha Nussbaum has recently been used by Nussbaum in connection with human rights, and it shares many of the features and problems of the needs, well-being and agency accounts. According to Nussbaum, capabilities are an individual’s real opportunities to choose and to act to achieve certain functionings, and functionings are various states and activities that an individual can undertake.<sup>81</sup> Nussbaum argues that the following ten central human capabilities are particularly important, as they are “entailed by the idea of a life worthy of human dignity”: life; bodily health; bodily integrity; senses, imagination and thought; emotions; practical reason; affiliation; other species; play; and control over one's environment.<sup>82</sup> Nussbaum

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<sup>76</sup> David Miller, *National Responsibility and Global Justice* (Oxford: Oxford University Press, 2007); David Miller, “Grounding Human Rights,” *Critical Review of International Social and Political Philosophy* 15 (2012): 407–27; Massimo Renzo, 'Human Needs, Human Rights', this volume, pp. \*\*.

<sup>77</sup> Nickel, *Making Sense of Human Rights*, pp. 87-90.

<sup>78</sup> Miller, *National Responsibility and Global Justice*, p.195.

<sup>79</sup> Tasioulas, 'On the Foundations of Human Rights', this volume, pp. \*\*.

<sup>80</sup> See *ibid.*, this volume, pp. \*\* for an attempt to resist to this objection by reinterpreting the sense in which human rights are minimal conditions for a good life. The objection is expressed by those who accuse Griffin of facing a ‘dilemma’ between drawing ‘normative agency’ too narrowly or too widely (see the essays by Buchanan, Cruft, Reidy and Tasioulas, and Griffin’s response, all in R. Crisp (ed.), *Griffin on Human Rights* (Oxford: Oxford University Press, 2014 forthcoming)).

<sup>81</sup> Nussbaum, *Creating Capabilities*, pp. 20-26.

<sup>82</sup> *Ibid.*, pp. 33-34.

believes that all human beings are entitled to these capabilities and these capabilities form the basis of human rights.<sup>83</sup>

The Capabilities Approach inherits some of the problems we have found with other approaches. To give just one example, like Griffin's agency approach, the Capabilities Approach appears to have difficulty explaining many children's rights.<sup>84</sup> The reason is that many children's rights such as the rights to health care, education, name, nationality, and so on, are concerned with functionings rather than capabilities. Nussbaum tries to deflect this point by arguing that these functionings are important for helping children to develop adult capabilities.<sup>85</sup> But this response ignores the fact that some children will unfortunately not live to adulthood (e.g. children with terminal cancer) and yet it seems that these children would still have human rights to certain functionings.

In addition to the points mentioned so far, most of the approaches considered face additional challenges: they seem to commit us to the conclusion that anyone whose human rights have been violated thereby fails to possess minimal agency or a minimally decent life or a life worthy of dignity. This conclusion seems problematic because many people, perhaps most people through history, have suffered human rights deficits (e.g. by lacking a right to political participation or freedom of religion). There is something unsettling about a theory that delivers the conclusion that most human beings do not have agency or a minimally decent life.<sup>86</sup> And Allen Buchanan argues that the *non-discrimination, equal status* provisions in human rights law cannot be captured by agency, well-being or needs approaches, because one can possess a reasonable degree of agency and live a good life with one's needs met while being discriminated against or possessing low-caste status.<sup>87</sup> If this is correct, then equality of status and non-discrimination seemingly should be introduced as a separate ground of human rights. But this move depends, of course, on a highly controversial claim: agency, well-being, needs and capability theorists will have to include non-discrimination as, or as required for, a fundamental aspect of agency or well-being, or a fundamental need or capability.

### ***Non-instrumental justifications***

It is worth noticing that, despite their important differences, most of the accounts discussed so far share the same structure. They seem to adopt an instrumental mode of justification which proceeds in two steps: first, it identifies a valuable end worthy of protection (e.g. the exercise of agency, having a good life, or having the opportunity meet basic needs); second, it ascribes human rights to individuals because and insofar as possessing these rights contributes to the realization of this end. By contrast, some have offered non-instrumental justifications for human rights. Frances Kamm and Thomas Nagel, for example, argue that we hold human rights as a matter of our basic moral status and that our holding these rights is at least

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<sup>83</sup> Ibid., p. 62. Aspects of Nussbaum's capabilities approach to human rights seem non-instrumental, as when she claims that the approach can be the object of an over-lapping consensus (ibid., p. 169): if this potential consensus is the *ground* for human rights on the capabilities approach, then it is not instrumental (see discussion of Rawls at pp. \*\* in this essay below).

<sup>84</sup> See Liao, 'Human Rights as Fundamental Conditions for a Good Life', this volume, pp. \*\*, for additional discussion.

<sup>85</sup> Martha Nussbaum, *Frontiers of Justice: Disability, Nationality, Species Membership* (Cambridge, Mass.: Harvard University Press, 2006), p. 172.

<sup>86</sup> This objection is discussed in Rowan Cruft, 'From a Good Life to Human Rights: Some Complications', this volume, pp. \*\*, and Massimo Renzo, 'Human Needs, Human Rights, this volume, pp. \*\*. For defences, see Griffin, 'Replies', section 5, in Crisp (ed.), *Reading Griffin on Human Rights*.

<sup>87</sup> Allen Buchanan, 'The Egalitarianism of Human Rights', *Ethics* 120 (2010), 679-710; see also Besson, *Human Rights as Law*, Ch. 5.

partially independent of whether and how they promote or protect further human values such as agency, needs, freedoms or interests. Thus Kamm writes:

[T]here may be a type of good that already exists but that would not exist if it were permissible to transgress the right of one person in order to save many lives. This is the good of being someone whose worth is such that it makes him highly inviolable and also makes him someone to whom one owes nonviolation. This good does imply that certain of one's interests should not be sacrificed, but inviolability matters not merely because it instrumentally serves those interests. [...] Inviolability is a reflection of the worth of the person. On this account, it is impermissible for me to harm the person in order to save many in the accident, because doing so is inconsistent with his having this status.<sup>88</sup>

[F]undamental human rights [...] are not concerned with protecting a person's interests, but with expressing his nature as a being of a certain sort, one whose interests are worth protecting. They express the worth of the person rather than the worth of what is in the interests of that person.<sup>89</sup>

Accepting this view does not commit us to rejecting instrumental justifications of human rights. It is possible to hold a pluralist position according to which human rights are grounded both in their basic non-instrumental value as outlined by Kamm above, and also in their instrumental role as furthering other values such as agency, or the capacity to have a minimally decent or a good life.<sup>90</sup> Indeed, there are reasons to believe that a plausible justification based on the notion of moral status will need to be supplemented by an instrumental justification, in order to be capable of plausibly determining the precise contents of human rights.<sup>91</sup> This is because there is a wide range of normative structures that could secure humans something like a 'high status', or reflect their 'high worth', including structures in which people hold rights sharply different to those we currently recognise as human rights. For instance, Hobbes's 'right of nature' – the right that each person holds in the state of nature, that allows one to do whatever one judges necessary for one's own survival including attack others<sup>92</sup> – secures its holder with a high status. For bearers of the 'right of nature' are unconstrained by moral demands: my 'right of nature' allows me to try to eat your arm for my supper, if I can get it. By making people so unconstrained, this 'right of nature' arguably confers a higher status on people *as agents*, reflecting a particular sort of 'high worth', than the more demanding set of human rights we currently recognise.<sup>93</sup>

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<sup>88</sup> Kamm, *Intricate Ethics*, pp. 253-4.

<sup>89</sup> *Ibid.*, p. 271. Compare Thomas Nagel's similar 'status' view in his 'Personal Rights and Public Space', in his *Concealment and Exposure & Other Essays* (Oxford: OUP 2002), pp. 31-52l and Rowan Cruft, 'On the Non-Instrumental Value of Basic Rights', *Journal of Moral Philosophy* 7 (2010), pp. 441-461. See also Warren Quinn, *Morality and Action* (Cambridge: Cambridge University Press, 1994). Compare also dignity-based approaches like that of Nickel (James W. Nickel, 'Poverty and Rights', *The Philosophical Quarterly* 55 (2005), 385-402, esp. pp. 394-395

<sup>90</sup> Kamm herself seems keen to adopt this position, since she allows that inviolability can matter in part because 'it instrumentally serves [...] interests'. On this form of pluralist position, see Cruft, 'On the Non-Instrumental Value of Basic Rights', section VI, and Leif Wenar, 'The Value of Rights' in M. O'Rourke (ed.), *Law and Social Justice* (Cambridge, Mass.: MIT Press, 2005), pp. 179-209.

<sup>91</sup> This point is well made in Wenar, 'The Value of Rights'.

<sup>92</sup> *Leviathan*, Part 1, Chs. 13-14.

<sup>93</sup> This point is made without the reference to Hobbes in Kagan 1991, p. 920. Alternative high-status forms of rights are also conceivable, such as rights which prioritise being saved over not being harmed. See, for example, Kasper Lippert-Rasmussen's imagined status of 'high unignorability' which requires people to harm some in order to prevent more occurrences of similar harms to others (Lippert-Rasmussen 1996, pp. 340-341); in one

If human rights were grounded wholly non-instrumentally, simply as whatever rights secured us with a high status or reflected our high worth, then it would be unclear why we hold the human rights that we naturally think we do, as opposed to Hobbes's bare 'right of nature' or some other configuration of rights which could also get us a high status. But if human rights are also justified instrumentally because they protect agency or ensure the conditions of a minimally decent or a good life, this might be sufficient to explain why something like the traditional picture of human rights should be favoured over the Hobbesian 'right of nature' or some other alternative.<sup>94</sup>

The view defended by Kamm and Nagel is non-instrumental in that human rights are not justified by appealing to their capacity to promote, protect or further certain valuable ends, but rather by appealing to their role in expressing or reflecting the moral worth of their holders. This however is not the only way to justify human rights in a non-instrumental fashion. According to a different approach, which might be termed 'transcendental', human rights can be justified by appealing to the idea that to be an agent at all, one must conceive oneself and others as bearing human rights. For example, Alan Gewirth, the most prominent defender of this view, argues that in acting for a purpose I cannot but conceive my end as a good, and because my freedom and well-being are necessary conditions for pursuit of whatever end this might be, I have to conceive them as things that others ought to refrain from impeding. Thus, in acting I cannot avoid conceiving myself as holding rights to minimal freedom and well-being; but if so, I cannot avoid conceiving any 'prospective purposive agent' like me as bearing similar rights, as other agents do not seem to be different from me in any relevant respect.<sup>95</sup>

There is much to be said about this argument, but we simply note its transcendental form: it says that given the kind of beings we are, we cannot help but take ourselves and others as rights-bearers – this is, arguably, a *synthetic a priori* belief for Gewirth. In her contribution to the current volume, Flikschuh suggests that a Kantian conception of human rights would similarly take them as something in which we cannot help believing: a 'subjectively necessary reflective idea'.<sup>96</sup> Whether one agrees with either approach, the overall method is very different to the foundationalism of the other approaches mentioned: human rights are not grounded as serving or reflecting certain values. Rather, they are things whose existence we cannot help presupposing.

### ***Practice-based justifications***

As we have seen, some reject the traditional view according to which human rights are rights that human beings have simply in virtue of being human, and conceive them instead as rights generated within a specific practice existing at the international level. An adequate theory of

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respect, this confers a higher status on people (by making them especially unignorable) than the rights constituting 'high inviolability' which we recognise at present.

<sup>94</sup> For an attempt to combine an instrumental justification of human rights grounded on basic needs with a non-instrumental one, see Renzo, 'Human Needs, Human Rights', this volume, pp. \*\*. John Tasioulas pursue a similar strategy in defending a view that, to use his terminology, appeals both to prudential and deontological notions; see 'The Foundations of Human Rights', this volume .

<sup>95</sup> An excellent summary of Gewirth's view is given in Gewirth, *The Community of Rights*, Ch. 1.

<sup>96</sup> Unlike Gewirth, Flikschuh thinks such an approach make the concept of human rights 'constitutively indeterminable for us', something akin to the idea of God as Kant presents it. On Flikschuh's account, human rights are concepts we cannot help embracing when we face our task as lawmakers with no natural authority to coerce others. In this position, we will inevitably see those for whom we make laws as bearers of human rights, and the precise requirements of these rights will inevitably be indeterminable – human rights will thus remind the lawmaker of the 'moral enormity of public office and authority' (Flikschuh, 'Human Rights in Kantian Mode: a Sketch', this volume, pp. \*\* incl. 19).

human rights, according to these theorists, is a political or institutional theory that aims to provide the best interpretation of the normative principles underlying the international human rights practice as we know it. Hence, the label “political conception” that is often used to refer to this view.

In making this move for the first time, John Rawls was primarily motivated by the concern that speculations about which particular aspect of humanity can be said to ground human rights inevitably require the employment of ordinary moral reasoning, or what Rawls calls “comprehensive doctrines”. But according to Rawls, we should not ground human rights on such “a theological, philosophical or moral conception of the human person”,<sup>97</sup> as this may render them unacceptable from the point of view of some “well-ordered peoples” who hold incompatible religious, philosophical, and moral views.<sup>98</sup> The idea that rights generating this sort of disagreement can be legitimately enforced across different cultures is one that Rawls finds problematic.<sup>99</sup> For this reason, he suggests that we should rather think of human rights as an element of the “law of peoples”. The law of peoples is a set of principles and norms on which well-ordered peoples from different religious, philosophical, and moral backgrounds can freely agree as the basis for governing their behavior towards one another, thereby establishing a mutually respectful condition of peace.<sup>100</sup> Human rights are a prominent component of this global normative order. To be sure, well-ordered peoples may disagree about the content of human rights, but they will agree about the role that these rights play in international practice, which for Rawls consists in specifying the limits of justified interference with the internal autonomy of sovereign states. As Rawls puts it, human rights’ fulfillment ‘is sufficient to exclude justified and forceful intervention by other peoples, for example, by diplomatic and economic sanctions, or in grave cases by military force’.<sup>101</sup>

Not all advocates of the political conception follow Rawls in denouncing the appeal to ordinary moral reasoning. For instance, Raz does not commit himself to the strictures of public reason in discussing the grounds of human rights.<sup>102</sup> Furthermore, both Raz and Beitz stress the ways in which a political conception of human rights can define their function in terms of the limits of sovereignty without making human rights violation a matter for *armed intervention*. Responses to human rights violations can take different forms, including economic and diplomatic sanctions, or even simply formal censure from other states or some international body.<sup>103</sup>

Some theorists worry that the political conception relies too much on the international practice of human rights as we currently know it. One concern is that whether there is a case for international concern or intervention will depend on varying contingent features of the geopolitical order, but the existence of a human right should not depend on these features.<sup>104</sup> In response, adherents of the political conception could argue that they do not make the existence of a human right depend on whether there is an actual, all-things-considered current

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<sup>97</sup> Rawls, *The Law of Peoples*, p. 81.

<sup>98</sup> *Ibid.*, p. 68. For Rawls, ‘well-ordered peoples’ include liberal peoples and what Rawls calls ‘decent peoples’, his prime example of which are (to put it roughly) peoples without aggressive aims and with a system of law governed by a common good idea of justice that secures human rights for its members (*ibid.* pp. 64-68).

<sup>99</sup> We will come back to this problem below, when considering the skeptical concern that human rights are a ‘Western’ imposition.

<sup>100</sup> *Ibid.*, pp. 3-4.

<sup>101</sup> *Ibid.*, p. 80.

<sup>102</sup> Raz, ‘Human Rights in the Emerging World Order’, this volume, pp. \*\*.

<sup>103</sup> E.g. Beitz, *The Idea of Human Rights*, p. 121. Note that Rawls also mentions ‘diplomatic and economic sanctions’ as well as military intervention. See the quotation in the previous paragraph in the main text

<sup>104</sup> For a subtle version of this point, see Tasioulas, ‘On the Nature of Human Rights’, pp. 55-56. See also Tasioulas’s worry about whether the type of role picked out by the political conception (namely, as marking the limits of sovereignty) ‘is really an appropriate basis for withholding the label “human right”’ from rights which do not fulfil this role (p. 56).

case for international concern, but on a principled distinction between matters that *may or should* be of international concern (such as torture) and those that *may not or should not* (such as marital fidelity). This distinction should guide actual practice rather than being determined by it. This response might seem unhappy for those, like Beitz, who try to ground human rights in the practice, rather than in free-standing principles about the appropriate nature of the international order.<sup>105</sup> But Beitz and other political theorists could argue that such principles are themselves encoded in or underlie current human rights practice.

A worry is that such a political view seems to rest on the assumption that the international practice of human rights is sufficiently homogeneous as to warrant only one interpretation of its underlying principles. But this assumption is questionable. Most notably, different societies seem to disagree as to which rights are genuine human rights, which might lead to significant disagreement about the contours of the practice, in spite of the more general agreement about the role that human rights should play once they are recognized as such.<sup>106</sup>

To be sure, there is a growing body of documents to which we can point at in articulating what the international practice of human rights is, but the problem is that the way in which these documents are to be interpreted is itself open to interpretation. In light of what should this interpretation be carried out? A good interpretation is one that will construct the principles underlying the practice in their best light, but this very idea presupposes the existence of moral standards in light of which the principles can be reconstructed.<sup>107</sup> If so, the appeal to a moral theory that some versions of the political conception intend to avoid seems inevitable after all.<sup>108</sup>

Perhaps this criticism relies on an overstatement of the disagreement about human rights that can be plausibly said to exist in the international practice. According to a second family of practice-based justifications, the distinctive feature of human rights is precisely the fact that they are normative standards about which different cultures can be said to agree, despite the fact that they adopt very different moral and religious views. Instead of focusing on the relationship between the protection of human rights and sovereignty, this view justifies human rights by appealing to the fact they are, in Rawlsian terminology, the object of an “overlapping consensus” among holders of different conceptions of the good. No matter how different these conceptions of the goods will seem at first, if we look closely enough we will see that there is a substantive agreement about the existence of a class of human rights and about the type of protection that they afford to their holders.<sup>109</sup>

Of course the claim that human rights are morally binding norms, no matter which particular culture we belong to, is one that naturalistic conceptions of human rights will also make. The difference between naturalistic conceptions and overlapping consensus views, however, is profound, and depends on the different role that agreement plays within these two

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<sup>105</sup> Recall Beitz’s idea of international human rights as ‘sui generis’, *The Idea of Human Rights*, p. 197.

<sup>106</sup> See Victor Tadros, ‘The Right to Security: Boring and Less Boring Questions’, this volume, pp. \*\*.

<sup>107</sup> For an interesting attempt to defend the idea of a critical reconstruction of the practice that is “immanent to the practice” itself, see Andrea Sangiovanni, “Justice and the Priority of Politics to Morality,” *Journal of Political Philosophy* 16 (2008): 137–164.

<sup>108</sup> See Miller, *National Responsibility and Global Justice*, p. 170-2, Laura Valentini, ‘In what Sense Are Human Rights Political?’, *Political Studies*, 60 (1) (2012), 180-94, Massimo Renzo, ‘Human Rights and the Priority of the Moral’, *Social Philosophy & Policy* (forthcoming), presents a different argument in favour of the conclusion that the appeal to moral considerations is harder to avoid than defenders of the political view acknowledge.

<sup>109</sup> For discussion of this idea, and some limited, critical endorsement, see the essays in Joanne R. Bauer and Daniel A. Bell (eds.), *The East Asian Challenge for Human Rights* (Cambridge: Cambridge University Press, 1999), especially the essays by Onuma Yasuaki, Charles Taylor, Abdullahi An-Na’im, Norani Othman, Suwanna Satha-Anand and Joseph Chan.. See also Donnelly, *Universal Human Rights in Theory and Practice*, Ch. 5. For critical discussion, see Beitz, *The Idea of Human Rights*, Ch. 4.

views.<sup>110</sup> According to the former, the fact that different cultures will converge on human rights norms, is merely a consequence of the fact that these norms are part of a universal moral order which is binding independently of whether it is accepted or not within a specific culture. According to overlapping consensus views, by contrast, the fact that different cultures could reasonably agree from very different starting points about these norms is precisely what grounds the authority of these norms. Human rights are morally binding in virtue of the fact that they constitute normative standards on which different societies holding different moral and religious views could converge.

However, the “overlapping consensus” approach runs into a dilemma. Either it is understood as a view about the consensus which exists among *all* societies or it is understood as the consensus that exists only among those societies that adopt a *reasonable* conception of the good.<sup>111</sup> In the former case, the view is basically tantamount to simply denying that there can be any substantive disagreement among different societies about the content and the interpretation of human rights. This move is puzzling not only because it seems to fly in the face of reality, but also because it would avoid the objection of parochialism (or cultural imperialism) not by providing an answer to it, but rather by simply denying the force of the objection (often without providing sufficient evidence in support of its striking conclusion).

If, on the other hand, the overlapping consensus view is interpreted as predicating the existence of consensus only among those societies that qualify as reasonable, a question arises: what are the normative standards in virtue of which the status of “reasonable society” is granted? Some might worry that these standards will be those typical of a certain brand of liberalism, and that therefore the consensus reached within this view, far from being genuinely universal, will be limited to those cultures that are expression a particular conception of the good.<sup>112</sup> We think this would be too quick: ‘reasonable’ need not be interpreted as ‘liberal’. For Rawls, ‘decent’ societies include some non-liberal societies.<sup>113</sup> Nonetheless, if consensus is ultimately what grounds human rights, what can justify limiting this to consensus among groups that already meet some prior standard? The worry is that this standard, rather than consensus, is what is ultimately doing the justificatory work.

A third approach to the justification of human rights that takes seriously the role they play within the global practice is the one recently developed by Allen Buchanan, and in a somewhat similar fashion by Samantha Besson.<sup>114</sup> Buchanan and Besson focus on one specific element of the practice, namely international human rights law. This choice is determined by the fact that this body of law plays a crucial role within the global practice of human rights.<sup>115</sup> But international human rights law, Buchanan notices, is constituted by a number of legal rights and other legal rules which need not be the legal embodiment of corresponding moral rights.<sup>116</sup> Legal rights are norms created by appealing to a number of considerations and goals, only some of which will have to do with the need to protect given

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<sup>110</sup> Beitz, *The Idea of Human Rights*, p. 74

<sup>111</sup> It should be noted that, while the view is often defended by appealing to the former interpretation (Beitz, 76), it is the second one that is faithful to the idea of “overlapping consensus” as formulated in Rawls’s work.

<sup>112</sup> John Tasioulas, ‘The Legitimacy of International Law’, in Samantha Besson and John Tasioulas (eds.), *The Philosophy of International Law* (Oxford: Oxford University Press, 2010a), pp. 97-118.

<sup>113</sup> Rawls, *Law of Peoples*, pp. 64-70

<sup>114</sup> Allen Buchanan, *The Heart of Human Rights* and ‘Why *International Legal Human Rights?*’, this volume, pp. \*\*\*; Samantha Besson, *Human Rights as Law* and ‘Human Rights and Constitutional Law: Patterns of Mutual Validation and Legitimation’, this volume, pp. \*\*.

<sup>115</sup> Buchanan could be charged with overlooking the centrality of non-legal aspects of the practice of human rights, including perhaps especially human rights activism. For an account of the practice which encompasses law, activism, journalism, philosophy and politics, see James Nickel, ‘What Future For Human Rights?’, *Ethics and International Affairs* 28 (2014), 213-223.

<sup>116</sup> Buchanan lists a range of components of international human rights law which do not take the form of rights: (*The Heart of Human Rights*, Appendix 1).

moral rights. Indeed, Buchanan argues that some legal human rights, in particular rights to public goods, cannot plausibly be grounded on individual pre-legal moral rights.<sup>117</sup> Thus we should not see the task of justifying human rights law as requiring a justification for antecedent moral rights which this law reflects. Instead, we can justify a given legal human right by appealing to a plurality of justifications, including how the right serves the interests of people beyond the individual right-holder. Buchanan claims that the many grounds for human rights law include the enhancement of the legitimacy of the state and the provision of a unified legal framework for handling genuinely global problems such as climate change.<sup>118</sup>

Buchanan's approach has several advantages. One is that it offers an ecumenical framework, useable by anyone who wants to defend legal human rights, whether or not they are committed to there being pre-legal moral rights, and whether or not they believe – like 'political' theorists – that certain rights mark a limit to state sovereignty.

Theorists have yet to respond to Buchanan's work in detail, but one central problem is that some of the moral force of human rights law would seem to be lost if one followed Buchanan in denying that the duties entailed by legal human rights were owed morally to the right-holder, and hence in denying that the violation of a legal human right morally wronged the right-holder. Buchanan plausibly characterizes human rights law as 'a set of universal standards [...] whose primary purpose is to regulate the behaviour of states toward individuals under their jurisdiction, considered as social individuals, and for their own sakes'.<sup>119</sup> Can we understand a given legal human right as genuinely regulating behaviour *for its holder's own sake* if the corresponding duties are grounded in a way that is fundamentally independent of the moral importance of the right-holder?<sup>120</sup>

### **Which new human rights are actual human rights?**

Having discussed the nature and grounds of human rights, we now consider critical approaches. Karel Vasek famously distinguished 'three generations' of human rights: first civil and political rights, secondly social rights and thirdly solidarity rights including group rights and rights to peace and development.<sup>121</sup> The second and third generations are often conceived as new, and are often targets of attack. Whether they are new is controversial. Rights to subsistence, health and education (to take some from the 'second generation') are not found in the US 1789 Bill of Rights nor in the French 1789 Declaration of the Rights of Man and of the Citizen. But the inclusion of such rights to assistance (sometimes called

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<sup>117</sup> Ibid., p. 61. See also the discussion of socio-economic rights in the next section of the current essay, below.

<sup>118</sup> See especially Buchanan, 'Why *International Legal Human Rights*?'.

<sup>119</sup> *The Heart of Human Rights* p. 86

<sup>120</sup> David Luban develops a criticism akin to ours in his contribution to this volume (Luban, 'Human Rights Pragmatism and Human Dignity', this volume, pp. \*\*). He notes that people would not campaign for (and in that sense 'enforce') legal human rights if they thought they were not reflective of underlying natural moral rights. This could be questioned: perhaps people would campaign on behalf of legal human rights if they thought they reflected important moral considerations which did not take the form of pre-legal moral rights. Nonetheless, if they thought this, such campaigners would not seem to be fighting for human rights *for the sake of right-holders*. An alternative response to Buchanan is to reject his thesis that duties owed morally to someone must be grounded individually in what they do for that person. This response allows one to say that some duties grounded in what they do for beings beyond the right-holder are nonetheless owed morally to the right-holder, and reflect her moral rights. For critical discussion, see Rowan Cruft, 'Why is it Disrespectful to Violate Rights?', *Proceedings of the Aristotelian Society* 113 (2013), 201-224.

<sup>121</sup> Karel Vasek, 'A 30-Year Struggle: The Sustained Efforts to Give Force of Law to the Universal Declaration of Human Rights', *Unesco Courier* 10 (1977), 29-30. For an excellent subtler taxonomy, see Nickel *Making Sense of Human Rights*, Second Edition, pp. 93-95.

‘positive’ rights) in the 1948 Universal Declaration or 1966 Covenant on Economic, Social and Cultural Rights was not wholly new. In 1689, Locke wrote that a needy person has ‘a right to the surplusage’ of others’ goods; the later 1793 French Declaration included a similar right; and such claims echoed medieval writers.<sup>122</sup>

Nonetheless, central rights within Vasek’s first generation (e.g. rights not to be tortured, or against arbitrary arrest and detention) have been subjected to less philosophical criticism than rights from the other generations. The Universal Declaration introduced several rarely seen rights that have been objects of controversy, including the rights to employment, periodic holidays with pay, medical care, social security and housing. Further, a number of international declarations on children’s rights have asserted that children have a right to be loved. Some have also asserted that there is a human right to assisted suicide.<sup>123</sup> And, the Director-General of UNESCO claimed in 1997 that there is a human right to peace. Are all these rights real human rights? For example, is there really a human right to paid holidays? It seems that people may have a human right against being required to work all the time. But do they have a human right that their holidays are paid?<sup>124</sup> Or is there really a right to be loved? Is love something that can be an appropriate object of a duty?<sup>125</sup>

In what follows, we focus on two broad forms of human rights that have been the target of especially frequent criticism: first, positive rights to goods and services (sometimes called socio-economic rights), and secondly, group rights.

### ***Socio-economic human rights***

One criticism of human rights to goods and services (subsistence, health, education) claims that such rights are absurdly demanding. Nickel, although supportive of these rights, puts the point neatly when he writes that ‘[c]reating grand lists of human rights that many countries cannot at present realize seems fraudulent to many people’.<sup>126</sup> The thought is that it seems

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<sup>122</sup> John Locke, *First Treatise of Government* (1689), s. 42. Tierney writes: ‘Around 1200 Alanus held that the poor man did not steal because what he took was really his own *iure naturali* – which could mean either “by natural right” or “by natural law”. About the same time another glossator suggested that the person in need “could declare his right for himself”. [...] Finally, the doctrine entered the mainstream of medieval jurisprudence when Hostiensis reformulated it more sharply and included it in his very widely read *Lectura on the Decretals*’ (Tierney, *The Idea of Natural Rights*, p. 73). See the discussion in Siedentop, *Inventing the Individual*, p. 248. Alanus’s right, like Locke’s ‘right to the surplusage’, could be taken as a Hohfeldian privilege – that is, as simply the absence of a duty, on the part of the needy person, to refrain from taking the wealthy person’s surplus. If so, it differs from the 1948 Declaration, which *prima facie* appears to grant Hohfeldian claim-rights entailing duties to ensure that needy people are given food, clothing, housing and medical care (Universal Declaration, Art. 25). For Hohfeld’s distinctions between forms of right, see Wesley N. Hohfeld, *Fundamental Legal Conceptions*, ed. W. W. Cook (New Haven, Yale University Press, 1964). For discussion of the American and French declarations and their political, polity-founding function, see Moyn, *The Last Utopia*, pp. 23-6.

<sup>123</sup> M.P. Battin, ‘Suicide: A Fundamental Human Right?’, in M. P. Battin and D. J. Mayo (eds.), *Suicide: The Philosophical Issues* (New York: St. Martin’s Press, 1980), 267-85., pp. 267-285.

<sup>124</sup> Carl Wellman points out that although the right to paid holidays is “an official affirmation by a highly respected international organization, almost everyone has regarded it as suspect” (*The Proliferation of Rights: Moral Progress or Empty Rhetoric?* Boulder, Colorado: Westview Press, 1999, p. 2). But for a strong defence of it, see Jeremy Waldron, ‘Liberal rights: two sides of the coin’ in his *Liberal Rights* (Cambridge: Cambridge University Press, 1993), pp. 1-34 at pp. 12-13.

<sup>125</sup> For a negative answer, see David Miller, *National Responsibility and Global Justice*, p. 187, and in more detail John Tasioulas, ‘On the Grounds of Human Rights’, this volume, pp. \*\* [15] (though Tasioulas’s rejection only targets the existence of positive duties to provide others with romantic love). For an account of a form of love that could be an object of duty, see S. Matthew Liao, ‘The Right of Children to Be Loved’, *Journal of Political Philosophy*, 14/4 (2006a), 420-40; S. Matthew Liao, *The Right to Be Loved* (New York: Oxford University Press, forthcoming).

<sup>126</sup> Nickel, ‘Human Rights’, *Stanford Encyclopedia of Philosophy*. For early expression of this concern, see Cranston, *What are Human Rights?* For a cautious expression of the concern, see Virginia Held, ‘Care and

fraudulent to proclaim that, say, each citizen of Mozambique has a right to a decent standard of health care when Mozambique is too poor to provide adequate health care for all its citizens.<sup>127</sup> In fact, the government of Mozambique will likely have to leave this right unfulfilled for the large majority of its citizens. Calling it a right can therefore seem a sham: the right does not secure health care for citizens nor, one might add, does it license citizens to criticize their government or claim compensation for the government's failure to fulfil it, for if the government truly cannot afford to fulfil the right then it is not censurable for failing to do so.

Defenders of human rights to expensive goods and services such as health care sometimes appeal to the fact that there is nothing logically inconsistent about rights or duties that cannot be jointly fulfilled. For example, we might say with Waldron that '[F]or each [citizen of Mozambique], it is *not* the case that his government is unable to secure holidays with pay, or medical care, or education, or other aspects of welfare, *for him*. Indeed, it can probably do so (and does!) for a fair number of its citizens [...]; rather it is the combination of all the duties taken together which cannot be fulfilled'.<sup>128</sup> Waldron goes on to show that there is nothing incoherent or inconsistent in the existence of a set of jointly unfulfillable rights or duties. Yet although Waldron is correct about the coherence of his position, we might worry that there remains something 'fraudulent' or (as Nickel also suggests) 'farcical' about a set of important rights most of which the duty-bearer will normally have to leave unfulfilled due to lack of resources.<sup>129</sup>

An alternative defence of demanding socio-economic human rights questions the assumption that the right-holder's state or government must be the bearer of the duties entailed by the right. One might, instead, take the duties entailed by a Mozambiquan citizen's human right to health to be borne by the governments of wealthy nations, by wealthy businesses operating in Mozambique, or by wealthy individuals from other parts of the world.<sup>130</sup> There is enough wealth in the world that some allocation of duties will be possible that ensures that most people have most of their socio-economic human rights

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Human Rights', this volume, pp. \*\* [6]. Note that this should be distinguished from Buchanan's concern about such rights: unlike the critics, Buchanan thinks socio-economic human rights can be defended, but only by abandoning an individualistic approach to their justification (*The Heart of Human Rights*, Ch. 2).

<sup>127</sup> For discussion, including the relevant figures for healthcare spending and available income in Mozambique, see Gopal Sreenivasan, 'A Human Right to Health? Some Inconclusive Skepticism', *Aristotelian Society Supplementary Volume* 86 (2012): 239-65, at pp. 245-6. In 2009, average Organisation for Economic Co-operation and Development (OECD) healthcare spending per capita was \$3361 (purchasing power parity), while Mozambique's annual per capita gross domestic product was \$770 (PPP), and its health spend per capita was \$55 (PPP). If human rights are universal, it would seem wrong to say that the standard of healthcare required by human rights for a citizen of Mozambique is lower than that required by human rights for a citizen of the OECD (though see the discussion of 'progressive realization' in the main text below). If the standard of health care required by human rights is universal across the globe, it seems likely that the relevant standard will be higher than Mozambique can afford: perhaps it will not be more than \$770 (PPP), but it will be high enough that if Mozambique fulfilled its citizens' human right to health, there would be insufficient funds left to fulfil other important human rights in Mozambique.

<sup>128</sup> Waldron, 'Rights in Conflict', in his *Liberal Rights*, pp. 203-224 at pp. 207-8. We have adjusted the quotation to apply to Mozambique.

<sup>129</sup> As Eddy puts it, 'An uncomfortable implication of [Waldron's] approach is that if there are twenty million people who are at risk of disease, and only enough vaccine for one person, we would have to say that all twenty million people had a right to the vaccine' (Katherine Eddy, 'Welfare Rights and Conflicts of Rights', *Res Publica* 12 (2006), 337-356 at p. 351). Not inconsistent or incoherent, perhaps, but surely farcical. See Wolff's discussion of the unattractive practical results of enshrining in law a right to health that cannot be fulfilled for all citizens (Jonathan Wolff, 'The Content of the Human Right to Health', this volume, pp. \*\* at p. 12).

<sup>130</sup> For this approach, see e.g. Charles Beitz, 'The Force of Subsistence Rights', this volume, pp. \*\* [at p. 19], Charles Jones, 'The Human Right to Subsistence', *Journal of Applied Philosophy* 30 (2013), 57-72, at pp. 65-66, Nickel, *Making Sense of Human Rights*, Second Edition, p. 150.

fulfilled. Of course, the principles allocating duties are controversial, and we return to this below. But to avoid fraudulence or farcicality it looks sufficient to deny that the right-holder's state or government must be the duty-bearer.

This response may seem to have a significant cost, as it seems to deviate from the practice of human rights in international law. It seems to be a deviation to hold that the *primary* duties entailed by human rights need not be borne by the right-holder's state or government. A less radical alternative holds that duties to provide health care for the Mozambiquan citizen fall on others *if her government cannot provide it*, but the government is still the primary duty-bearer with others secondary. Yet even this less radical view is still a deviation from international practice, if the secondary duties are taken to be enforceable or justiciable rather than 'purely' moral.<sup>131</sup> And to avoid farcically demoting the Mozambiquan citizen's right to something like a 'manifesto' right, it seems that one must see the relevant duties as enforceable or justiciable.<sup>132</sup>

A further option is open to those who wish to defend human rights to goods and services while remaining faithful to the norms of international human rights law. The International Covenant on Economic, Social and Cultural Rights does not designate as 'a rights violator' any state which fails to provide food or health for its citizens. Such a state will still be conforming to the Covenant so long as it is 'tak[ing] steps [...] to the maximum of its available resources [...] with a view to *achieving progressively* the full realization' of the Covenant's rights.<sup>133</sup> What this means, one might argue, is that the international legal human right to health or health care is best described as (roughly) a *human right that one's government take available steps towards providing health care for its citizens*. Some argue that the discretion this gives governments means that the socio-economic rights in international law are not genuinely rights at all, but rather goals that governments are legally compelled to pursue.<sup>134</sup> And some think that this conception of socio-economic rights as akin to goals is the morally correct one.<sup>135</sup>

Many see the last position as too weak: health care seems just as important to the individual right-holder as not being arbitrarily detained (say), so why should one have a human right to the latter, but only a human 'right' *that one's government take available steps towards* the former?<sup>136</sup> This concern gains bite when we notice that any right is expensive to

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<sup>131</sup> See the UN's 'Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect, and Remedy" Framework' for the status of human rights responsibilities borne by businesses.

<sup>132</sup> Imagine a Mozambiquan citizen saying 'Oh yes, I have a human right to health care: my state cannot afford to supply it but the US government (along with other wealthy bodies) has a duty to supply it. Of course this moral duty cannot or should not be made into law, but it is there nonetheless.' A whiff of fraudulence remains. For discussion of Beitz's defence of 'manifesto' rights, see p. \*\* below and Beitz's essay in our volume, p. \*\*.

<sup>133</sup> Social Covenant, art. 2, emphasis added.

<sup>134</sup> Wellman, *The Moral Dimensions of Human Rights*, p. 71. See also James W. Nickel, 'Goals and Rights Working Together?', in Malcolm Langford, Andy Summer, Alicia Ely Yamin (ed.), *The Millennium Development Goals and Human Rights: Past, Present and Future* (Cambridge: Cambridge University Press, 2013), pp. 38-38 and Rowan Cruft, 'Human Rights as Rights', in Ernst and Heilinger (eds.), *The Philosophy of Human Rights*, pp. 129-58.

<sup>135</sup> See Nickel's claim that 'treating very demanding rights as goals has several advantages. One is that proposed goals that exceed one's abilities are not as farcical as proposed duties that exceed one's abilities. [...] Another advantage is that goals are flexible; addressees with different levels of ability can choose ways of pursuing the goals that suit their circumstances and means' (Nickel, 'Human Rights', *Stanford Encyclopedia of Philosophy*). Note that we can explain why we still call socio-economic human rights 'rights' even though they are really goals. If *the individual's* interests, autonomy or well-being are the ground for her government's adopting her health or subsistence as among its important goals, then these goals' grounds have a right-like individualistic structure, a structure in which the individual is foregrounded (Cruft, 'Human Rights as Rights', pp. 151-55).

<sup>136</sup> For this form of argument, see e.g., Jones, 'The Human Right to Subsistence'. Elizabeth Ashford's essay in our volume can be read this way, if 'importance' is understood in the 'basic' sense as a pre-requisite for other

institutionalize, including rights against torture or arbitrary detention.<sup>137</sup> Why pick out socio-economic rights as especially problematic here? Indeed, one way to address the objection is empirical: one could question whether institutionalizing grand lists of socio-economic rights really is fraudulently expensive for individual states.<sup>138</sup> Taking this route, one could also question the controversial interpretation of the international legal human right to health given in the preceding paragraph: perhaps it really is a right to a certain standard of health care, and the 'progressive realisation' doctrine refers only to what states must do if they cannot fulfil this right.

In addition to the burdensomeness objection to human rights to goods and services, a second objection maintains that independently of their *cost*, human rights to goods and services are problematic because prior to institutional allocation, it is indeterminate who bears the duties to fulfil them. As Onora O'Neill argues,

[T]he correspondence of universal liberty rights to universal obligations is relatively well-defined even when institutions are missing or weak. For example, violation of a right not to be raped or a right not to be tortured may be clear enough, and the perpetrator may even be identifiable, even when institutions of enforcement are lamentably weak. But the correspondence of universal rights to goods and services to obligations to provide or deliver remains entirely amorphous when institutions are missing or weak'.<sup>139</sup>

Note that the complaint is not merely *epistemic*: it is not that it is hard to know who bears what duties correlative to pre-institutional socio-economic human rights. Nor is the complaint our first worry, that the relevant duties are absurdly *burdensome* for impoverished states. O'Neill is, rather, concerned that there is no determinate answer to the question of who bears what duties in the case of pre-legal socio-economic human rights, rights that should guide the creation of laws.<sup>140</sup>

In response to O'Neill's objection, one could argue that there are genuine principles that allocate the duties correlative to socio-economic human rights. Proposals in the literature include Barry's contribution principle (which says agents who 'merely suspect' that they have contributed to the existence of acute deprivations – in terms of health or education, say – bear duties to alleviate them)<sup>141</sup>, Kamm's principles about the importance of proximity (which claim that we bear greater responsibility to alleviate suffering the nearer we or our

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rights (Ashford, 'A Moral Inconsistency Argument for a Basic Human Right to Subsistence', pp. \*\*. See also Beitz's essay, 'The Force of Subsistence Rights' (pp. \*\*) and Shue, *Basic Rights*.

<sup>137</sup> S. Holmes & C. Sunstein, *The Cost of Rights: Why Liberty Depends on Taxes* (New York: W. W. Norton, 1999).

<sup>138</sup> We can picture the argument that Cuba has institutionalized socio-economic rights at the expense of civil and political rights. If this is possible for a fairly low-income state like Cuba, might it not be possible for other low-income states? Why prioritise the civil and political rights instead? Of course, many will find good answers to the latter question, but we could also ask whether there is really a trade-off here. Some might see it as absurd to claim blithely that almost the full range of human rights is affordable for almost any human society, but we see some attractiveness in the claim. The argument will appeal to humans' resourcefulness; the argument would then run that where the full range is unaffordable, this will most likely be due to external interference (e.g. fraudulent trade, colonial oppression)..

<sup>139</sup> Onora O'Neill, *Bounds of Justice* (Cambridge: Cambridge University Press, 2000), p. 105. See also O'Neill, 'Response to John Tasioulas', our volume pp. \*\*.

<sup>140</sup> The objection only works, of course, if one takes human rights to goods and services to be pre-institutional rights, rights that institutions should reflect. But as our discussion of the nature of human rights showed, this is the mainstream view of at least the central or basal human rights, even among those who adopt the 'political' conception

<sup>141</sup> Christian Barry, 'Applying the Contribution Principle', *Metaphilosophy* 36 (2005), 210-227.

means are to the suffering person or the threat to them)<sup>142</sup>, Miller's 'connection theory' of responsibility (which proposes 'six ways in which remedial responsibilities [e.g. duties to provide health care, housing or education] might be identified' and allocated, including to those who cause the deprivation, to those who benefit from it, to those capable of alleviating it, and to those sharing community with the suffering person)<sup>143</sup> or Wenar's least-cost principle (which says that 'the agent who can most easily avert the threat [e.g. by delivering subsistence supplies] has the responsibility for doing so – so long as doing so will not be excessively costly').<sup>144</sup> If any one of these proposals is correct, then the allocation and content of duties correlative to pre-institutional human rights to goods and services seems determinate.

Perhaps this shows excessive faith in the principles listed: are they at all plausible? And will they really pick out determinate duty-bearers with defined duties?<sup>145</sup> Many of the proposals deviate from the legal norm that the primary duty-bearer will be the right-holder's state or government. An alternative is to return to the notion that such human rights set *goals* rather than entailing determinate duties.<sup>146</sup> Or a different approach again is to argue that pre-institutionally, human rights to goods and services entail universally borne *duties to institutionalize*, rather than duties to provide the relevant goods and services: they entail duties to make a determinate allocation of duties.<sup>147</sup> In a sense, this is Beitz's view when he defends the idea that some human rights to goods and services can be acceptably conceived as 'manifesto' rights in Feinberg's sense. Beitz suggests that even when a socio-economic human right entails no *determinate* or *fulfillable* duties to supply its substance (to roll together both our objections), nonetheless such a right 'count[s] in favor of actions by which an agent can help establish conditions in which those deprived, or their successors, could enjoy the substance of the right in future'.<sup>148</sup> To avoid the earlier charge of 'fraudulence' or 'farcicality', much will turn on the stringency, determinacy and justiciability of this reason to 'help establish conditions' for delivering the right's object.

It is very important to see that there is powerful pressure to make one or other of the solutions sketched above work. This is because there are strong reasons in favour of human rights to goods and services, despite the doubts outlined. Health care, subsistence, education are basic needs or interests, and essential to the individual's autonomy.<sup>149</sup> Further, meeting these needs as a matter of right also seems necessary to ensure full respect for *other* well-grounded human rights, or for the values that ground them. For example, following Shue,

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<sup>142</sup> F. M. Kamm, *Intricate Ethics* (OUP 2007), Chs. 11 and 12; see p. 377 for a summary of her claims about our intuitions.

<sup>143</sup> David Miller, *National Responsibility and Global Justice*, pp. 99-107.

<sup>144</sup> Leif Wenar, 'Responsibility and Severe Poverty' in Pogge (ed.), *Freedom from Poverty as a Human Right* (Oxford: Oxford University Press, 2007), pp. 255-274 at p. 260.

<sup>145</sup> One could also re-run O'Neill's point with a more epistemic focus: because we do not *know* what duties are entailed by human rights in a pre-institutional context, asserting such rights is pointless or maybe even incoherent (see O'Neill, *Bounds of Justice*, p. 105, the paragraph following the quotation in the main text above). There is also an epistemic aspect in her 'Reply to John Tasioulas', this volume, pp. \*\* [9-10]. Even if we do grasp the relevant principles allocating duties, we might not know this.

<sup>146</sup> See note 158 above. See also, for rejection of the Hohfeldian idea that a human right only exists when its correlative duties exist, John Tasioulas, 'The Moral Reality of Human Rights' in Pogge (ed.), *Freedom from Poverty as a Human Right*, pp. 75-102

<sup>147</sup> This is one way to read Pogge's idea that any human right to X imposes pre-institutional duties on all citizens to organize society so that 'all its members have secure access to X' (Pogge, *World Poverty and Human Rights*, Second Edition, p. 70).

<sup>148</sup> Beitz, *The Idea of Human Rights* p. 121, and 'The Force of Subsistence Rights', this volume, p. \*. See also Feinberg's discussion of subsistence rights in *Rights, Justice, and the Bounds of Liberty*, p. 153.

<sup>149</sup> See, e.g., the essays by Ashford, Beitz, Brownlee, Griffin, Held, Liao, Renzo, Tasioulas and Wolff in our volume below.

Ashford shows that meeting these needs is necessary to prevent one's being exploited by someone who offers one a 'subsistence exchange contract' in which one sacrifices one of one's other rights in return for subsistence.<sup>150</sup>

### **Group human rights**

Along with socio-economic rights, group human rights are a frequent target of specific criticism. We can distinguish two types of group human right. One is a human right held by an individual on the basis of his or her membership of a particular group. Examples include the distinctive rights one holds as a woman, a child, or a member of a minority group.<sup>151</sup> The second type is a human right held by a group. An example is a people's right to self-determination.<sup>152</sup>

Doubts about the general notion of individually held, group-differentiated rights tend not to challenge the moral justification of such rights, but simply to question their designation as 'human rights'. In what sense can my distinctive rights as a woman, a child, or a member of an oppressed minority be rights that are held universally by all humans, including those who are not women, children, or members of minorities? Nickel proposes the following test: a group-differentiated, individually held right can legitimately be called a human right "if it is derivable (using plausible additional premises) from a universal human right".<sup>153</sup> On this basis, Nickel suggests that we can and should take, for example, women's rights to prenatal care as human rights because "[s]tanding behind the right to prenatal care during pregnancy is the universal right to basic medical care. The right to prenatal care necessary to the health and survival of mothers and babies is derivable from that general right".<sup>154</sup>

In explaining why individually borne, group-differentiated rights are sometimes human rights, this strategy resembles the explanation (in terms of 'aim' and 'object' or 'higher-level'/'basal' and 'lower-level') offered for why some rights that seem highly specific to modern conditions, such as the right to the availability of higher education, can nonetheless qualify as human rights.<sup>155</sup> In both cases, a non-universal right is deemed a human right because it is derivable from a universal human right – or more controversially (and this goes beyond Nickel's proposal), because it is derivable from some universal value (autonomy, well-being, needs) that grounds universal human rights.

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<sup>150</sup> Ashford, 'A Moral Inconsistency Argument for a Basic Human Right to Subsistence'; Shue, *Basic Rights*. Whether this should be understood as the claim that respect for a right to subsistence is necessary to avoid *violating other* human rights, or whether instead respect for a right to subsistence is necessary for respect for *the values grounding* other human rights, is an important issue. See the debate between Ashford and Beitz in our volume (pp. \*\* and \*\* below).

<sup>151</sup> Consider "the right of the child who is separated from one or both parents to maintain personal relations and direct contact with both parents on a regular basis" (Convention on the Rights of the Child, art. 9). See J. T. Levy, 'Classifying Cultural Rights' in Ian Shapiro and Will Kymlicka (eds.), *Ethnicity and Group Rights (Nomos 39)* (New York: New York University Press, 1997) for a helpful taxonomy of group-differentiated rights..

<sup>152</sup> See the first Article in both Covenants: 'All peoples have the right of self-determination'.

<sup>153</sup> Nickel, *Making Sense of Human Rights*, Second Edition, p. 163.

<sup>154</sup> *Ibid.*, p. 162. A different strategy for explaining group rights maintains that, say, my right, as a child, to maintain contact with my parents is a human right because it can be reconceived as a universal right that takes a conditional form: the universal right to *maintain contact with one's parents if one is a child*. This strategy is suspect, partly because any right whatsoever can be converted into a universal right by this process. For example, my morally justified right, based in university regulations, to timely submission of essays by my students can be taken as the universal right to *timely essay submission if one is a lecturer in institution X*. (For a sophisticated discussion and further argument against this strategy, see Jeremy Waldron *The Right to Private Property* (Oxford: Oxford University Press, 1988), pp. 117-120). Nickel's strategy is superior because it is more discriminating: it does not permit all rights to be converted into universal rights.

<sup>155</sup> See above, pp. \*\* [reference to earlier in the Introduction]. Also, for the case of education in particular, see Joseph Raz, 'Human Rights in the Emerging World Order', this volume, pp. \*\* [40].

Contrary to this approach, some theorists suspect that many fundamentally important rights and other moral concerns fail Nickel's test, or our extended version of it. Or alternatively they argue that defending particular individuals' rights via this derivation from universal rights is misleading or distorting. For example, some feminist theorists question the derivation of specific women's rights to prenatal care from universal rights to health care. Lucinda Joy Peach outlines the general position thus: "Cultural feminists generally stress the significance of differences between men and women and among women. [...] Cultural feminists are, then, skeptical about the value of subsuming all 'women' under the concept of 'human' as the latter has been defined in international human rights law".<sup>156</sup> We return to these concerns in discussing anti-universalist and feminist criticisms of human rights in the next section.

Many critics of group human rights are more exercised by the second type: human rights held by groups, rather than human rights held by individuals in virtue of their membership of a group. Some theorists doubt the very existence of pre-legal, moral rights *held by groups*.<sup>157</sup> These theorists suggest that many of the group rights that we want to call human rights are best understood as in some sense reducible to or shorthand for pre-legal moral rights held by individuals: the right ascribed to the group is not fundamental. For example, Griffin suggests that the legal group right to national sovereignty is reducible to individually held rights of the nation's members, including the individual "right to autonomy (not to have our major decisions taken for us) and [...] right to liberty (not to be blocked from carrying out our decisions)".<sup>158</sup> Similarly, Wellman claims that "the legalization of the right of peoples to self-determination serves to protect the moral human rights to liberty and equitable treatment of individual persons".<sup>159</sup>

Whether to follow these skeptical authors will be determined, in part, by one's conception of what human rights are and what grounds them. Those who conceive human rights primarily in terms of their function within the contemporary international order will have good reason to make space for group rights of both the types we have discussed, given their centrality to this international order. As Beitz notes in relation to women's rights, "[i]f [...] one regards human rights functionally, as elements of a practice whose purpose is to elevate certain threats to urgent interests to a level of international concern, then the conceptual objection [to group rights] can be sidestepped".<sup>160</sup> But, importantly, we have seen that even those who take human rights simply to be those universal rights all humans hold in virtue of being human can find a space – albeit a derivative one – for group rights as a special class within lists of human rights: as derived from universally held individual human rights or their grounds. Accommodating group rights in a non-derivative way is more challenging.

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<sup>156</sup> Lucinda Joy Peach, 'Feminist Reflections on "Women's Rights as Human Rights"', in David A. Reidy and Mortimer N. S. Sellers (eds.), *Universal Human Rights: Moral Order in a Divided World* (Lanham, MD.: Rowman and Littlefield, 2005), pp. 81-108 at p. 90. For doubts about rights 'related to reproduction and childbearing' in particular, see p. 91.

<sup>157</sup> Careful and limited versions of this position are evident in Griffin, *On Human Rights*, Ch. 15 and Wellman, *The Moral Dimensions of Human Rights*, pp. 67-68. Unlike these authors, Nickel is happy to accept that groups can hold genuine pre-legal moral rights; he just doubts that they should be called 'human rights'. Group rights are for him "not human rights in the standard sense because they are not rights that people simply have as humans rather than as members of some state or group. This is not to deny, however, that group rights may appropriately be included in human rights treaties and in other areas of international law. Nor does it deny that [g]roup [r]ights may sometimes be justifiable by reference to the same sorts of considerations as justify human rights." (Nickel, *Making Sense of Human Rights*, Second Edition, p. 164)

<sup>158</sup> Griffin, *On Human Rights*., p. 274.

<sup>159</sup> Wellman, *The Moral Dimensions of Human Rights*, p. 67. See also, Jeremy Waldron, 'Two Concepts of Self-Determination', in Samantha Besson and John Tasioulas (eds.) *The Philosophy of International Law* (Oxford: Oxford University Press, 2010), p. 357

<sup>160</sup> Beitz, *The Idea of Human Rights*, p. 189.

## Are there any genuine human rights?

We have examined particular concerns about specific human rights. Yet, despite the popularity of human rights discourse, one sometimes encounters wholesale doubts about human rights as such. We consider four lines of criticism in this section.

### *Human rights as problematically ‘Western’*

Perhaps the most common attack is that human rights express a “Western” (or, more precisely, a Western European and North American, or perhaps a capitalist, or a Northern, or an affluent) moral and legal order unfit for imposition as a universal standard around the world. This is sometimes expressed as criticism of the inclusion of certain particular rights within international practice.<sup>161</sup> But it is also sometimes expressed as an attack on the very idea of human rights.<sup>162</sup>

In its most straightforward form, the claim is that although many people believe that there are some rights held universally by every human being, this is a mistake: human rights adherents are misled by their specific, parochial “Western” moral outlook. One ground for this critique is relativism: according to different versions of this view, one’s society or one’s culture or one’s own view ‘is the sole source of the validity of a moral right or rule’.<sup>163</sup> On the ‘social’ version of this view, humans from a society that lacks the concept of human rights, or that considers human rights claims invalid, will lack valid, binding human rights, even if such rights are present in international law; or alternatively they will only hold human rights relative to ‘Western’ societies, not relative to their own standpoint.<sup>164</sup> If the members of this society lack such rights or only hold them relative to a ‘Western’ standpoint, then genuinely universal morally valid human rights seem not to exist, for such rights are meant to obtain objectively for all humans, no matter the kind of society in which they live or the standpoint from which they are viewed.

Standard responses to the relativist include the claim that rejection of human rights by some cultures or groups could be an error, perhaps based on some mistaken factual or metaphysical beliefs – rather than involving the non-existence of human rights ‘for that culture’. A related response notes that if an evaluative concept, such as ‘human rights’, has arisen in one culture, this is not in itself ground to doubt that it refers; there might well be human rights – either rights borne by humans in virtue of their humanity, or rights that mark issues of international concern – even if the concept is a Western product.<sup>165</sup> After all, to the extent that it was first understood by Newton, the law of universal gravitation is a Western discovery, but this does not compromise its universal validity. A further response notes that some human rights might conflict with each other and might conflict with other values, and

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<sup>161</sup> Some of Lee Kuan Yew’s criticism of human rights maintains that some ‘Asian values’ can have the status of human rights – e.g. a right to economic development. He simply questions the inclusion of, or the priority given to, rights to political participation (see the discussion in Bell and Bauer (eds.), *The East Asian Challenge for Human Rights*, esp. pp. 4-7).

<sup>162</sup> See Makau Mutua’s claim that ‘the globalization of human rights fits a historical pattern in which all high morality comes from the West as a civilizing agent against lower forms of civilization in the rest of the world’ (Mutua, *Human Rights: A Political and Cultural Critique* (Philadelphia: University of Pennsylvania Press, 2002), p. 15); see also his claim that human rights discourse involves conceiving the activist as “Saviour” of third-world “Victims” of violations by local “Savages” (ibid., Ch. 1).

<sup>163</sup> Jack Donnelly, *Universal Human Rights in Theory and Practice*, Second Edition, pp. 89-90.

<sup>164</sup> See the claims in the American Anthropological Association ‘Statement on Human Rights’, *American Anthropologist* 49 (1947), 539-43.

<sup>165</sup> Griffin, *On Human Rights*, pp. 133-4; Nickel, *Making Sense of Human Rights*, Second Edition, pp.171-2..

some of these conflicts might involve irresolvable incommensurability: incommensurability which can be mistaken for ‘relativity to a culture’ or ‘relativity to a framework’. Griffin makes subtle versions of these and additional anti-relativist points.<sup>166</sup>

A different ground for taking the “Western” origins of human rights to undermine their existence stems not from *relativism*, but from consideration of the *diversity* of forms of human life, human flourishing and good lives. Human rights, many believe, are supposed to help support right-holders in living a minimally good life.<sup>167</sup> But what if there are a great many ways to live a minimally good life, which share none but the most abstract of features (e.g. involving some lifespan, some action)? Any substantive list of rights will then seem to favour a particular form of minimally good life over alternatives.<sup>168</sup> One option is to make human rights very abstract, perhaps no more than a right to ‘a minimally good life’.<sup>169</sup> But to do this is, one might think, to give up on the notion of human rights. Certainly it involves a sharp deviation from the numerous, specific rights found in international human rights documents.

In response, theorists often highlight the shared, universal aspect of the goods they think human rights protect. Defenders of minimalist approaches, such as those that ground human rights on basic needs or fundamental conditions, or capabilities, for example, typically argue that the claim that human beings need things like food, shelter or minimum level of health does not depend on adopting some controversial metaphysical view about human nature or a particular conception of the good. Meeting basic needs or having certain capabilities or fundamental conditions is indeed a precondition for the pursuit of any conception of the good.<sup>170</sup> Whether this move is convincing is a matter for debate.

A second concern raised under the umbrella of “Western moral imperialism” is that it is *illegitimate* to enforce human rights within societies which do not recognize them, and perhaps even illegitimate to criticize such societies. The worry is that legitimate enforcement of a right or criticism of a society requires that those subject to such enforcement or criticism accept or could recognize as good reasons the grounds for the enforcement or criticism. Coupled with the premise that those living in societies conceptually distant from the ‘West’ in which human rights thinking originated do not and cannot recognize or accept human rights as a ground for enforcement or criticism, some theorists reach the conclusion that such enforcement or criticism is unjustified.<sup>171</sup> Note that this concern is not alleviated by the anti-relativist points mentioned earlier, and that is perhaps one reason why such responses sometimes seem crass. To show that ‘the West’ is right about the existence of human rights is not to show that ‘the West’, or indeed anyone, can legitimately enforce such rights worldwide.

There are two versions of the concern about legitimacy. For those who adhere to the naturalistic view that human rights are the moral rights humans hold simply in virtue of being human, the worry is simply as stated above: human rights cannot be legitimately enforced

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<sup>166</sup> See Griffin, ‘The Relativity and Ethnocentricity of Human Rights’, this volume, pp. \*\*, See also Nickel, *Making Sense of Human Rights*, Second Edition, Ch. 11; Donnelly, *Universal Human Rights in Theory and Practice*, Second Edition, Chs. 4-7; Renzo, ‘Human Needs, Human Rights’, this volume, pp. \*\*.

<sup>167</sup> How minimal the ‘minimally’ should be read is a matter for debate, of course..

<sup>168</sup> For an argument of this type for the view that human rights to liberty in particular protect a particular, narrow conception of liberty, see Jiwei Ci, ‘Liberty Rights and the Limits of Liberal Democracy’, this volume, pp. \*\*..

<sup>169</sup> This could be seen as an (absurdly) extreme version of the distinction between aim and object, or ‘higher-level’/‘basal’ and ‘lower-level’ rights discussed earlier (pp. \*\* above [reference to earlier in this essay]).

<sup>170</sup> See the sketches of the needs, fundamental conditions and capability approaches in the previous section..

<sup>171</sup> Griffin considers this in the later sections of ‘The Relativity and Ethnocentricity of Human Rights’, as does Renzo in ‘Human Needs, Human Rights’. There are also suggestions of this thought in Ci, ‘Liberty Rights and the Limits of Liberal Democracy’ and in Simon Hope, ‘Human Rights Without the Human Good? A Reply to Jiwei Ci’, this volume, pp. \*\*.

worldwide. By contrast, because the political conception defines human rights as those whose violation *pro tanto* legitimates some enforcement internationally, for adherents of the political conception the worry is that there are no genuine human rights, even if there are universal moral rights.

In response to this worry in either form, one can question the premise that human rights are justifiable only in ‘Western’ terms: this response has been pursued in very different ways by Rawls, An-Na’im, Cohen, Donnelly, Taylor, as well as several authors in our volume.<sup>172</sup> Or one can question the claim that legitimate enforcement requires that those subject to such enforcement in some sense accept or could recognize as good reasons the grounds for the policy of enforcement.

Adherents of the naturalistic approach could also embrace the anti-enforcement conclusion but deny that it undermines human rights discourse: perhaps many human rights are not universally enforceable but are genuine human rights nonetheless. To support this point, one could note that some human rights seem by their very nature unsuited to enforcement. For instance, consider the idea of a human right to respect. Is the right to respect something that is enforceable? If not, rather than giving up the idea of a right to respect, perhaps we should rethink our commitment that human rights require (or typically require) enforceability.<sup>173</sup>

### ***Marxist criticisms of human rights***

Marx was trenchant in his criticism of rights and human rights.<sup>174</sup> One strand of criticism concerns the distinction between a ‘public’ and a ‘private’ sphere. A person’s particular constitutional rights define that person’s public status vis-à-vis fellow citizens; and the person’s human rights arguably define the person’s public status vis-à-vis other humans, including non-citizens and aliens.<sup>175</sup> Public matters can be objects of legitimate concern and action by others within the relevant public sphere, while private matters cannot even if – as in the case of infidelity to one’s life partner, say – they involve wrongs.

Now, Marx can be interpreted as arguing that this distinction between private and public matters conceals injustice and alienation. For example, considered as right-holders, an impoverished worker and a wealthy company owner who agree a wage contract possess equal

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<sup>172</sup> Rawls, *The Law of Peoples*, pp. 78-81; Abdullahi A. An-Na’im, ‘The Cultural Mediation of Human Rights: The Al-Arqam Case in Malaysia’ in Bauer and Bell (eds.), *The East Asian Challenge for Human Rights* pp. 147-68; Joshua Cohen, ‘Minimalism About Human Rights: The Best We Can Hope For?’, *Journal of Political Philosophy* 12 (2004), 190-213, Jack Donnelly, *Universal Human Rights in Theory and Practice*, Second Edition, Ch. 5, Charles Taylor, ‘Conditions of an Unforced Consensus on Human Rights’ in Bauer and Bell (eds.), *The East Asian Challenge for Human Rights*, pp. 124-46. See the essays by Griffin, Miller and Renzo in our volume, Chs. \*\* below. Note also the discussion of ‘overlapping consensus’ views at pp. \*\* above.

<sup>173</sup> Finally, even if human rights could in principle be ‘enforced’ for or on a particular group, ‘Western’ nations might well – due e.g. to colonial oppressive actions, or unfair trade wars – have lost their standing to perform this enforcement.

<sup>174</sup> See especially Karl Marx, ‘On the Jewish Question’, repr. in David McLellan (ed.), *Karl Marx: Selected Writings*, Second Edition (Oxford: Oxford University Press, 2000), pp. 46-70. The essay was originally written in 1843 for the *Deutsch-französische Jahrbücher*.

<sup>175</sup> If the ‘political’ conception is correct, then this ‘public’ aspect is built into the very notion of a human right: it is a right that is in some sense ‘everyone’s business’. If the ‘naturalistic’ conception is correct, human rights arguably need not be limited to the public sphere: one might have some ‘private’ human rights that should not be matters of public concern, such as a right that one’s spouse be faithful to one or that one not be lied to by one’s friends (see Gewirth, *Human Rights: Essays on Justifications and Application*, p. 56; Sen, *Development as Freedom*, p.210; Wellman, *The Moral Dimensions of Human Rights*, pp. 36-9; Tasioulas, ‘On the Nature of Human Rights’). Nonetheless, many ‘naturalistic’ theorists deny that there can be ‘private’ human rights (see e.g. the final section of Roger Crisp, ‘Human Rights: Form and Substance’ in Crisp (ed.), *Griffin on Human Rights* (Oxford: Oxford University Press, forthcoming 2014)).

status in the public sphere. They possess a similar status as equal bearers of rights to contract, vote within a democracy, to the protection of law and so on. But, so the Marxist contends, this appearance of equal status created by the concept of rights is an illusion which hides the often unjust social forces determining economic and political events, and hides the ways in which human life is stunted under capitalism.<sup>176</sup> Many Marxists go further and maintain that it is precisely rights' function to shield injustice and legitimate capitalist alienation and exploitation. On this view, human rights have emerged under capitalism because they help to uphold it.<sup>177</sup>

However, a defender of human rights could argue that the status they create, and the public/private distinction it articulates, can work to hide injustices and legitimate alienation and exploitation only if one misconceives the particular human rights people hold. Thus one response to Marx claims that the contemporary human rights regime, with its new socio-economic and group rights, gives people an equal status that, if respected, would ensure that each person leads a minimally decent human life. A more radical but still rights-friendly response is that, with appropriate far-reaching additional rights or further norms, the human rights regime could play a useful or necessary part in giving people a proper equal status even if it does not at present.<sup>178</sup>

Neither response is Marx's own. For Marx, human rights as such are the problem, not the particular rights we include on our list:

“[N]one of the so-called rights of man goes beyond egoistic man, man as he is in civil society, namely an individual withdrawn behind his private interests and whims and separated from the community. Far from the rights of man conceiving of man as a species-being, species-life itself, society, appears as a framework exterior to individuals, a limitation of their original self-sufficiency. The only bond that holds them together is natural necessity, need and private interest, the conservation of their property and egoistic person”.<sup>179</sup>

One concern here is that the very idea of rights focuses on the right-holder as 'egoistic man'. This could be paraphrased as the worry, shared with some conservatives, that to think of oneself as a right-holder is to think of oneself as entitled to certain benefits, and is thereby to overlook the duties one owes to others. In Marx's version, the concern is primarily about

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<sup>176</sup> See, e.g., Marx's claim that "Right by its very nature can consist only in the application of an equal standard; but unequal individuals (and they would not be different individuals if they were not unequal) are measurable only by an equal standard in so far as they are brought under an equal point of view, are taken from one definite side only".(Marx, 'Critique of the Gotha Programme', repr. in David McLellan (ed.), *Karl Marx: Selected Writings*, Second Edition, pp. 610-616 at p. 615. The view that Marx took rights to shield *injustice* is controversial, and depends on vexed interpretative questions about whether Marx saw capitalism as unjust (for a good summary of the issues, see Steven Lukes, 'Justice and Rights', in Alan Ryan, ed., *Justice* (Oxford 1993), pp. 164-184). The claim that Marx took rights to hide and legitimate *alienation* and *exploitation* is less controversial.

<sup>177</sup> See, e.g., G. A. Cohen, *Karl Marx's Theory of History: A Defence* (Oxford: Clarendon Press, 1978). See Marx's claim that 'The ideas of the ruling class are in every epoch the ruling ideas, i.e., the class which is the ruling material force of society is at the same time its ruling intellectual force' (Marx, *The German Ideology*, repr. in McLellan (ed.), *Karl Marx: Selected Writings*, Second Edition, pp. 175-208 at p., 192. .

<sup>178</sup> See the discussion of socio-economic rights in the previous section above. Within our volume, Ci offers a critical voice against the approach which tries to defend the current regime: Ci argues that the liberty rights enshrined in human rights practice are compatible with inequalities that stunt individual self-determination ('Liberty Rights and the Limits of Liberal Democracy'). For the more radical but still rights-friendly response, see Carol C. Gould, *Rethinking Democracy* and also *Globalizing Democracy and Human Rights* (Cambridge: CUP 2004).

<sup>179</sup> Marx, 'On the Jewish Question', p. 61.

how rights make society ‘appear as a framework exterior to’ the right-holder. By separating out ‘oneself’ and ‘society’ in how one thinks about oneself, rights thereby prevent people thinking of themselves in the manner appropriate to their communal ‘species-being’.

Some defences of human rights reject this concern head-on, highlighting the value of an individualistic self-conception.<sup>180</sup> A further promising response asks whether the Marxist critique is primarily targeted at how *thinking of oneself as a right-holder* can tend to make one think in an excessively individualistic way, rather than targeted at rights themselves. As Waldron notes in relation to a similar communitarian criticism of rights, human rights are useful as “something to fall back on if an attachment [e.g. to one’s society, or one’s culture] fails”.<sup>181</sup> This is true even if it is distorting to focus solely on one’s status as a right-holder. One can concede to the Marxist and the communitarian that humans are very much more than holders of human rights, and indeed very much more than holders of any sort of rights; so focusing solely on one’s status as a right-holder will be distorting. But this is compatible with the thesis that we are nonetheless right-holders, and that to deny this is also distorting, and overlooks claims we can make if our communitarian, personal or private attachments fail. An additional response notes how many of our rights protect social or communal aspects of right-holders, rather than protecting right-holders as lone individuals. A related point is articulated by Gould when she observes that human rights “come into being as claims each has on the others and hence exist as rights only in such a social framework of recognition”.<sup>182</sup>

### ***Feminist concerns about human rights***

Concern about the distorting individualism of a focus on rights is equally present in feminist criticisms of human rights. There is a rich diversity of such criticism; Reilly lists some of the positions as follows:

“Simply put, anti-universalist feminist critics across the philosophical spectrum challenge dominant Western-centric, neo-liberal, male-defined and otherwise biased interpretations of supposedly universal norms (human rights, equality, rule of law, etc.) and their role in perpetuating practices that systematically disadvantage women and marginalized groups in society. This includes, for example, a public-private divide that conceals private abuses of power; atomistic individualism that privileges rights to private property and profit-making over rights to development, health, welfare and so on; failures to recognize and address inequalities flowing from structural disadvantage and oppression, including global inequalities; ‘impartialist reasoning’ that often serves male-defined interests (e.g. failures of justice systems in rape cases); and cultural and political processes of false universalization wherein the perspectives of a hegemonic grouping become *the* particular worldview from which universal norms are formulated and imposed on less dominant groups in society, including women and minorities. Postmodern and post-structural thinkers are particularly trenchant in their rejection of universal norms – viewing them as modernist, totalizing narratives that are deeply implicated in a complex of dominating and oppressive practices”.<sup>183</sup>

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<sup>180</sup> See Siedentop, *Inventing the Individual* and Feinberg’s defence of rights as allowing individuals to make demands upon each other simply qua individuals (‘The Nature and Value of Rights’ in *Rights, Justice, and the Bounds of Liberty*, pp. 143-158). For critical discussion of the varied forms of individualism, see Steven Lukes, *Individualism* (Oxford: Blackwell, 1973).

<sup>181</sup> Jeremy Waldron, ‘When Justice Replaces Affection: the Need for Rights’, in his *Liberal Rights*, pp. 370-391 at p. 391. Note that Waldron considers himself to be addressing Marx along with contemporary communitarians (pp. 382-5).

<sup>182</sup> Carol Gould, *Globalizing Democracy and Human Rights*, p. 144. For more on the way that human rights are not individualistic, see Gould, ‘A Social Ontology of Human Rights’, this volume, pp. \*\* below.

<sup>183</sup> Niamh Reilly, *Women’s Human Rights* (Cambridge: Polity 2009), p. 3.

Some of the criticisms listed have already been discussed, e.g. concerning the downgrading of ‘rights to development, health, welfare’ or concerning the dangers of universal norms enforceable worldwide;<sup>184</sup> but it is important to note their intersection with specific feminist concerns. Even if some of the attacks on human rights – as ‘Western’ constructions or as excessively demanding, say – can be dismissed when expressed in the terms considered earlier in this Introduction, their articulation from a feminist perspective could be harder to dismiss. In what follows, we focus on problems generated by the public-private distinction, and on criticism arising from the ethics of care. But we do not thereby deny the importance of the other, related criticisms.<sup>185</sup>

Initially it is worth noting, as Reilly’s list makes clear, that not all feminist criticisms target the very existence of human rights. Feminist concerns are unlike the others discussed in this section, in that many feminists do not take themselves to be criticising human rights as such (although some do).<sup>186</sup> Many feminists defend human rights, but argue that significant work is needed to ensure that they are construed in an appropriately non-patriarchal way. Much criticism is aimed at our current international legal system, or at the general idea that human rights are best expressed and enforced through law.<sup>187</sup> Others defend human rights but argue for the parallel and equal importance of moral and political considerations that go beyond rights.<sup>188</sup>

A specific feminist concern about the expression of human rights in law focuses on the fact that human rights entail primary legal duties for states. Thus MacKinnon writes:

“States are the only ones recognized as violating human rights, yet states are also the only ones empowered to redress them. Not only are men’s so-called “private” acts against women left out; power to act against public acts is left exclusively in the hands of those who commit those acts.”<sup>189</sup>

Part of the concern here is, as in Marx, with the very idea of a public/private distinction: such a distinction can hide or legitimate domestic violence, rape, abuse and patriarchal coercion and tyranny, as well as injustices in our distribution and conception of domestic labour including child-rearing. Proposed responses range from a radical rejection of the public/private distinction to an attempt to delineate a narrower private sphere, within which serious harms cannot be tolerated.<sup>190</sup>

In principle, even the radical move seems compatible with human rights: one way to make this move would be to introduce a range of justiciable legal human rights within what has traditionally been thought of as the private sphere.<sup>191</sup> But many feminists would be troubled by this simplistic recourse to law as the solution. One source of this concern, a

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<sup>184</sup> See pp. \*\* and \*\* above.

<sup>185</sup> In focusing on the public-private distinction and the ethics of care, we follow Gould, *Globalizing Democracy and Human Rights*, p. 143.

<sup>186</sup> For someone who is critical but also supportive of human rights, see Virginia Held, ‘Care and Human Rights’, this volume, pp. \*\*.

<sup>187</sup> See what Lucinda Joy Peach calls the ‘liberal feminist defence’ of human rights, and the critical edge this brings to aspects of contemporary human rights practice (Peach, ‘Are Women Human? Feminist Reflections on “Women’s Rights as Human Rights”’), pp. 86-89. See also Held, ‘Care and Human Rights’, p. \*\* and Catharine A. MacKinnon, ‘Crimes of War and Crimes of Peace’, in Shute and Hurley, *On Human Rights* (OUP 1993), p. 84 and p. 97.

<sup>188</sup> Held, ‘Care and Human Rights’, p. \*\*.

<sup>189</sup> MacKinnon, ‘Crimes of War and Crimes of Peace’, p. 93.

<sup>190</sup> For the latter, see Gould, *Globalizing Democracy and Human Rights*, p. 148.

<sup>191</sup> Some liberal thinkers seem willing to do this with respect to non-justiciable human rights: thus Gewirth countenances a right not to be lied to by one’s friends, and Sen affirms a human right to a say in important family decisions (see references at note [CHECK] above). But neither conceives these as justiciable rights enforceable by law.

source which also drives some feminist concerns about the universality of human rights, is derived from the ethics of care. This conception of ethics is built on Gilligan's work on gendered modes of moral development and Noddings's valorisation of specific relationships of care.<sup>192</sup> Held summarises some of its key features thus:

“The ethics of care rests on a conception of persons as relational and interdependent, and on an appreciation of the values of care embedded in practices of care [...] Attending to care and its practices brings to the fore such values as empathetic understanding, sensitivity to the needs of others and especially, responsiveness to such needs [...] Care seeks to meet effectively, and with sensitivity and respect, the actual needs of embodied persons located in actual contexts. It appreciates and relies on the caring emotions and rejects the view of the dominant theories that morality must be based only on ideal, abstract, impartial principles recognizable by reason”.<sup>193</sup>

This approach to ethics can generate criticisms of human rights law, as including too few ‘rights to be cared for’, such as rights to health care and other ‘welfare’ rights or, more controversially, children’s rights to be loved.<sup>194</sup> It can generate criticisms of law as a means for delivering care, for example on the ground that legal reasoning is too algorithmic to enable contextually specific caring responses, and on the ground that law cannot require the kind of emotional response that caring involves.<sup>195</sup>

Note that the latter point is not simply that law should not require certain emotional responses, but also that sometimes an appropriate emotional response may be impossible if it is required by duty (legal or moral). For example, there is the concern that if one tried to love someone else romantically because the law demanded it, what one would end up with would not be romantic love. There may be conceptual as well as empirical limits to what duty can require.<sup>196</sup>

This line of argument has been developed, by some proponents of the ethics of care, into much more radical criticisms of the existence of human rights as moral rights, criticisms that bite independently of whether human rights should be legalized. On one version, the very idea of rights stands in opposition to care. For rights specify what I can demand as my entitlement. This notion that some service can be demanded and must be supplied as a matter of entitlement is, it is claimed, in sharp tension with the idea that the service will or can be provided as a matter of care. Care involves a directed concern for the specific recipient, and this type of concern can seem either impossible or at least extremely difficult to supply as a response to an entitlement.<sup>197</sup>

In addition, the idea of *human* rights introduces the idea of demands I can make simply in virtue of my falling within the general category, ‘human’. Again, this can seem in tension with the idea of caring as a concern for an individual in all their particularity and

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<sup>192</sup> See Carol Gilligan, *In a Different Voice: Psychological Theory and Women's Development* (Cambridge, Mass.: Harvard University Press, 1982); Nel Noddings, *Caring: A Feminine Approach to Ethics and Moral Education* (Berkeley: University of California Press, 1984).

<sup>193</sup> Held ‘Care and Human Rights’, pp. \*\* [10 and 11].

<sup>194</sup> On socio-economic rights and feminism, see Held, ‘Care and Human Rights’, pp. \*\*; on the right to be loved, see S. Matthew Liao, *The Right to Be Loved* (New York: Oxford University Press, forthcoming).

<sup>195</sup> On women’s socio-economic rights, see Gould, *Globalizing Democracy and Human Rights*, pp. 149-51. On children’s rights, see David Archard, *Children: Rights and Childhood*, Second Edition (London: Routledge, 1993, esp. pp. 118-123. On the limits of the law, see e.g. MacKinnon, ‘Crimes of War, Crimes of Peace’, pp. 97-8, Peach, ‘Are Women Human?’, p. 91; Held, ‘Care and Human Rights’, p. \*..

<sup>196</sup> See Tasioulas, ‘On the Foundations of Human Rights’, this volume, pp. \*\* [14-15].

<sup>197</sup> On the idea of rights as entitlements, see Feinberg, ‘The Nature and Value of Rights’. Tensions between notions of entitlement or right and care can be found in Gilligan, *In a Different Voice* and Noddings, *Caring*.

context. Is it really possible to care for you ‘as a human’, as opposed to as the specific embodied being you are?

Many adherents of the ethic of care do not make these radical criticisms, because they think care is compatible with or even conceptually bound up with rights.<sup>198</sup> Yet even such rights-friendly theorists often see care as an extremely important, historically overlooked complement and corrective to a narrow, legalistic approach to human rights.

### ***Human rights as problematically unenforced***

The final brand of concern about human rights which we consider dates back at least to Bentham.<sup>199</sup> It is a doubt about any kind of pre-legal right, human or natural. Recently, the view has been expressed by Raymond Geuss who argues, like Bentham, that rights do not exist unless they are actually enforced, and he adds that international law in territories whose governments do not recognise human rights does not normally qualify as appropriately ‘enforced’. Geuss writes:

“Either there is or there is not a mechanism for enforcing human rights. If there is not, it would seem that calling them ‘rights’ simply means that we think it would (morally) be a good idea if they were enforced, although, of course, they are not. A ‘human right’ is an inherently vacuous conception, and to speak of ‘human rights’ is a kind of puffery or white magic.”<sup>200</sup>

Geuss goes on, using the case of Indonesia, to argue that the international law of human rights is not currently enforced universally, and that if it were this would be ‘the invention of a new set of positive “rights”’ rather than the emergence into visibility of a set of natural human rights that already existed’.<sup>201</sup>

In our view, the actual enforcement condition on rights which appeals to Geuss and Bentham, and to ‘rights externalists’ including Darby, Martin and James, cannot be motivated.<sup>202</sup> We frequently refer to unenforced rights. Consider the legal right not to have eggs and flour thrown at one’s windows. This is violated by many citizens in places where Hallowe’en is celebrated, and the police and courts rightly do not pursue enforcement. Or consider black citizens’ rights to political participation in apartheid-era South Africa. People frequently conceive this as a violation of moral right by the apartheid government, rather than the mere absence of a morally desirable legal right.<sup>203</sup> It is unclear to us why *rights in*

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<sup>198</sup> See e.g. Gould, *Globalizing Democracy and Human Rights*, pp. 143-147; Held, ‘Care and Human Rights’, pp. \*\*. .

<sup>199</sup> Jeremy Bentham, ‘Anarchical Fallacies’ in Jeremy Waldron (ed.), *Nonsense Upon Stilts’: Bentham, Burke, and Marx on the Rights of Man* (London: Methuen, 1987).

<sup>200</sup> Raymond Geuss, *History and Illusion in Politics* (Cambridge: Cambridge University Press, 2001), p. 144. A similar view – that rights only exist when in some sense socially recognized or enforced – is found in various forms in ‘rights externalists’: see Derrick Darby, ‘Rights Externalism’, *Philosophy and Phenomenological Affairs* 68 (2004), 620-634, Rex Martin, *A System of Rights*. See also Susan James, ‘Rights as Enforceable Claims’, *Proceedings of the Aristotelian Society* 103 (2003), 133-47.

<sup>201</sup> Geuss, *History and Illusion in Politics*, p. 145.

<sup>202</sup> See note [CHECK TWO NOTES UP] above.

<sup>203</sup> Whether rights must be *enforceable* (either in the sense of it being *possible* to enforce them, or *permissible* to do so) if not *actually enforced* is much more debateable. For the view that it is definitive of rights (and not just *human rights*) that it is morally permissible to demand their fulfillment, where demanding involves a request that can permissibly be backed up by force, see John Skorupski, *The Domain of Reasons* (Oxford: Oxford University Press, 2010), pp. 307-313. For discussion of unenforced legal rights, see Matthew H. Kramer, ‘Getting Rights Right’ in Kramer (ed.), *Rights, Wrongs, and Responsibilities* (Basingstoke: Palgrave, 2001), pp. 28-95 at pp. 65-73.

*particular*, as opposed to other moral norms (e.g. those requiring the pursuit of moral goals) or legal requirements (e.g. tax rules) must be enforced in order to be genuine.

### **The structure of the volume**

This volume is the first to offer a comprehensive set of essays on the fast-growing field of the philosophical foundations of human rights. It contains thirty-eight essays, all but two of which are original, and is divided into four sections: first on human rights' foundations, secondly, on human rights in law and politics, thirdly, on a range of canonical and contested human rights and fourthly, on concerns about and alternatives to human rights.

In each section we have sought chapters covering a broad range of positions including both established views and new insights. For instance, within the section on human rights' foundations, the venerable ideas that human rights are grounded on human interests and on human dignity are discussed in detail (Tasioulas; O'Neil; Liao; Cruft; Waldron, Simmons; Gould; Gilabert), as is the newer idea that human rights are grounded on personal desert (Nickel; Stemploska). In the section on human rights in law and politics, the vexed questions of the relationship between human rights and international law, and the relationship between domestic legal systems and inter- and supra-national law are discussed (Raz; Miller; Buchanan; Luban; Besson; Meckled-Garcia; Letsas; Verdirame). In the section on canonical and contested human rights, particular central human rights, including such traditional civil rights as free speech (Brettschneider; Alexander), religion (Lucca; Audi), and security (Lazarus; Tadros), are examined along with work on the status of more controversial human rights including self-determination and democracy (Christiano; Peter) and such 'socioeconomic' rights as health (Wolff; Brownlee) and subsistence (Ashford; Beitz). In the final section, familiar but important concerns about the ethnocentric nature of human rights (Griffin; Renzo), and about the extent to which human rights need supplementing by a care ethics (Held; Mendus), are considered, while new Kantian and other strands of criticism of human rights are also introduced (Flikschuh; Sangiovanni; Ci; Hope). It is worth noting that none of the essays in this final section is strictly critical of human rights as such; rather they offer alternative perspectives, interpretations and supplements. Many of the chapters in the two central sections – on human rights in law and politics, and on canonical and contested human rights – focus on quite specific issues such as proportionality or religion. We have chosen the particular range of issues both for its intrinsic interest and because as a whole the chapters give the reader a broad grasp of the diversity of challenges facing an overarching account of the foundations of human rights.

We have pursued a dialogic approach in assembling our chapters.<sup>204</sup> They fall into pairs, with the second chapter in each pair written in part as a response to the first. In some cases authors take the opportunity to develop their own views while in others a detailed response is offered. In our view, this dialogical approach is particularly important for a survey volume of this type. We want to make clear that such a survey cannot 'tell' the reader what the philosophical foundations of human rights are. Human rights' foundations are too contested for this. Indeed, what it is for human rights to have foundations is contested, as is the metaphysical nature of human rights. For these reasons, we believe an accurate introduction must involve a diversity of voices. In addition, we believe the dialogic approach

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<sup>204</sup> The model for us has been Samantha Besson and John Tasioulas's volume *The Philosophy of International Law*. Besson and Tasioulas in turn cite the annual supplementary volume of the *Proceedings of the Aristotelian Society* as an inspiration (Besson and Tasioulas, 'Introduction', *The Philosophy of International Law*, pp. 1-27 at p. 19).

offers a particularly strong way to enable the reader to learn about and engage with the philosophical foundations of human rights.

We believe the range demonstrates the breadth and value of philosophical theorising about human rights.<sup>205</sup>

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<sup>205</sup> Many thanks to Simon Hope, Jim Nickel, Andrea Sangiovanni and John Tasioulas for helpful comments on a draft of this Introduction.