

The philosophy of human rights II: justifying HR

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What do we justify?

1. The existence of moral human rights?
 - a. The existence of MHR understood as «natural rights», i.e. as rights we have just in virtue of being human?
 - b. The existence of MHR understood in light of contemporary HR practice and discourse?
2. The existence of legal human rights?

The difficulty of justification in ethics

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(For this and the next slide, see Dagfinn Føllesdal, "The emergence of justification in ethics", *European Review*, vol. 13. no. 2. (2005))

The problem with circular justifications?

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Criteria for a valid justification of moral human rights

- Must give normative force to HR, and provide duty-bearers with reason for action
- Must provide the *right kind* of argument for HR
Must allow us to say *which* HR there are
- Must have critical force in relation to generally acknowledged human rights
- Must show fidelity to the concept of HR one is working with
- The list of rights must be suitable for public, practical use
- Must show why interference with sovereignty is acceptable (?)

Exercise

Choose a specific human right, and discuss how you can justify it

Foundational vs derivative justifications of rights

- Nickel p. 87-91
- Derivative justifications:
 - specifying a recognized right
 - showing why a HR is necessary for/ supports the realization of a recognized right
 - "cantilever arguments": no relevant moral difference between the case for a recognized HR to A and a new HR to B (Miller, Carens)

Prudential justifications

«In terms of my (your) own interests, I am (you are) likely to be better off, and hence I (you) have good reason to accept and support human rights» (Nickel p. 55)

- Is it a *moral* justification?
- What about powerful groups? (Nickel)
- Can be motivationally useful
- Can be part of a moral justification

Utilitarian/consequentialist justification

Consequentialism =

1. A theory of value, allowing us to rank outcomes
- +
2. A theory of right action, telling us to produce the best outcome of those available to us

Utilitarian/consequentialist justification

Step 1: Utilitarianism: «we should judge norms and institutions entirely on the basis of their likely consequences for the general welfare». (Nickel p. 59)

Step 2: «Satisfaction of fundamental interests is a large part of people's welfare, so if human rights contribute greatly to the satisfaction of most people's fundamental interests, the utilitarian will take this to be a strong argument in support of human rights.» (p. 59)

Questions for consequentialist justifications

- The argument is contingent on empirical circumstances
- The argument «gets the right answer for the wrong reasons»
- Justifying moral human rights or justifying institutions/laws and/or the inculcation of prevalent beliefs about moral human rights?

The wrong reason?

Feinberg:

“Having rights enable us to ‘stand up like men’, to look others in the eye, and to feel in some fundamental way the equal of anyone. To think of oneself as the holder of rights is not to be unduly but properly proud, to have that minimal self-respect that is necessary to be worthy of the love and esteem of others.”
 (“The Nature and Value of rights”)

The wrong reason?

Nagel:

“[Rights] embody a form of recognition of the value of each individual that supplements and differs in kind from that which leads us to value the overall increase of human happiness and the eradication of misery – and this form of recognition of human value is no less important than the other.”

“Personal rights and public space”

The wrong reason?

Nagel:

“In the world with no rights and fewer killings, *no one* would be inviolable in a way in which, in the world with more rights and more killings, *everyone* would be – including the victims.»

“Personal rights and public space”

A schema for justifying HR

1. A feature of humanity which we value (human dignity)



2. A set of basic needs/interests/freedoms



3. A set of basic, general rights



4. Specification of the basic rights: a set of "proto"-HR



5. Various "filters" applied to the set of "proto"-HR



6. The final list of human rights

Nickel on the basis for HR

- A secure claim to have a life
- A secure claim to lead one's life
- A secure claim against severely cruel or degrading treatment
- A secure claim against severely unfair treatment

”A unifying idea for these 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 and minimally good” (p. 62)

Griffin on the basis for HR

1. Personhood/ normative agency: "*Homo sapiens* can form and pursue conceptions of a worthwhile life." (p 32)
2. HR are "protections of our human standing or [...] personhood"
3. Protecting personhood requires:
 - a. Autonomy
 - b. A minimum provision of resources and capabilities
 - c. liberty

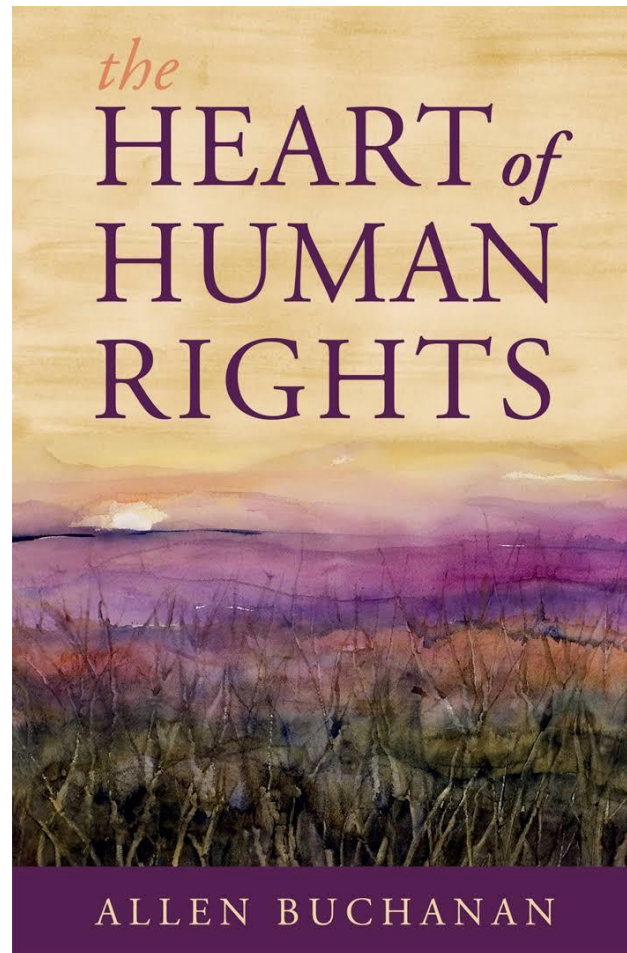
Filter: Nickel's list of tests (ch 5)

1. Substantial and recurrent threats
("regularly present and dangerous" p. 74)
2. Importance of what is protected
3. Can it be a universal right?
4. Would some weaker norm be as effective?
5. The burdens are justifiable
6. Feasibility in a majority of countries

Other filters?

- Is the need/interest such that it can meaningfully be made the object of a *right*? Ex tranquility of mind (Sen), romantic love (Tasioulas)
- A proper subject of international concern?
- ...

Buchanan on the justification of international legal human rights



«The Mirroring View»

Buchanan: «The Mirroring View holds that to justify an international legal human right typically involves defending the claim that a corresponding moral human right exists. The qualifier ‘typically’ is designed to accommodate the fact that some who hold this view acknowledge that in some cases a justified international legal right does not mirror a moral human right, but rather is either (a) a specification of a moral human right (as the right to freedom of the press is a specification of the right to freedom of expression), or (b) something that is instrumentally valuable for realizing a moral human right (as some think that an international legal right to democratic government is instrumentally valuable for realizing some important moral human rights, even if there is no moral human right to democratic government). »

According to the mirroring view,
justifying a ILHR can take three
forms:

1. Arguing that the corresponding MHR exists
2. Arguing that the ILHR is a specification of an existing MHR
3. Arguing that the ILHR is instrumentally necessary for realizing an existing MHR.

Two aspects of the Mirroring View

1. A MHR is necessary in order to ground a ILHR
2. Any MHR is sufficient in order to ground a ILHR.

The mirroring view and the founders

Cf. UDHR, preamble:

“Whereas recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world,”

Cf. the preambles to ICCPR and ICESCR

"Considering that, in accordance with the principles proclaimed in the Charter of the United Nations, recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world,

Recognizing that these rights derive from the inherent dignity of the human person,...

Possible implications of the Mirroring View

1. New ILHR should be introduced
2. Some existing ILHR should be removed or «downgraded»
3. If a proposed new ILHR is not grounded in a MHR, it should not be adopted

In short: the mirroring view provides us with a critical «test» for accepting or rejecting ILHR

A canonical example: periodic holidays with pay

- Universal Declaration of Human Rights, article 24: “Everyone has the right to rest and leisure, including reasonable limitation of working hours and periodic holidays with pay.”
- Cf. International Covenant on Economic, Social and Cultural Rights, article 7.

Buchanan's first line of criticism

MHR are **insufficient** for grounding ILHR

1. Not all MHR are fit for legalization, ex. the right to be treated with respect
2. MHR do not have sufficient weight for justifying extensive duties
3. MHR do not allow for the social coordination necessary to justify extensive duties

MHR do not have sufficient weight for justifying extensive duties

- Many ILHR are quite costly to realize, e.g. the right to health, the right to due process, i.e. they involve costly duties
- A MHR only exists if the corresponding duties can be justified
- The duties corresponding to MHR must be «*solely subject-grounded*»: something about the individual subject having that right must be sufficiently important to justify the cost

«To put the point bluntly: No matter who you are, you are not important enough to justify a set of duties that correlate with the panoply of legal rights that constitute the modern rights-respecting welfare state, much less important enough to justify a system of international human rights law that serves to support the welfare state's system of rights.» (Buchanan, HoHR)

Buchanan's third criticism

«To justify a moral right, one must show that the corresponding duties exist, that is, that someone has the duties in question or, on some theories of rights, one must at least show that it would be justifiable to impose the duties on someone. But whether an individual, A, has a moral duty, D, to do X, and whether it is justifiable to require A to do X (to impose the duty on him) can depend on whether A has reasonable assurance that others are going to fulfill that duty” Without this assurance, it may be unfair to require A to do X. If D is merely a moral duty, then A may not have this assurance, in which case he will not have the duty and it will not be justifiable to impose the duty on him; consequently, there will be no duty and hence no right» (Buchanan, HoHR)

Buchanan's second line of criticism

- MHR are **not necessary** for grounding ILHR
- Buchanan's instrumental approach:

“The fundamental and quite general point is that legal rights, whether domestic or international, do not presuppose corresponding moral rights. This should be no surprise, given that individual legal human rights are instruments that can serve a number of purposes, including moral ones of various types. The moral purposes for which individual legal rights are instrumentally valuable are not restricted to the realization of antecedently existing individual moral rights” (Buchanan, HoHR)

An example of the instrumental approach

The legal right to health can be justified because it:

- “can promote social utility
- contribute to social solidarity
- help to realize the ideal of a decent or humane society
- increase productivity and to that extent contribute to the general welfare
- and provide an efficient and coordinated way for individuals to fulfill their obligations of beneficence”

(Buchanan, HoHR)

Briefly on Buchanan's second line of criticism: the moral force of ILHRs is lost

David Luban, "Human Rights Pragmatism and Human Dignity".

Luban: "Why should state leaders (pretend to) feel ashamed about violating [ILHR], any more than they feel ashamed about violating technical regulations about the size and shape of cartons in international shipping?"