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### Moral Philosophy 6

Siegfried van Duffel

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### [ ] Abstract and Keywords

This article examines long-standing debates in moral philosophy that are relevant to international human rights law. It discusses the political conception of human rights and the four challenges to moral philosophy which include the notion that no particular religious tradition or particular comprehensive doctrine (or morality) grounded human rights and the belief that natural rights theories end up misrepresenting and narrowing the scope of human rights. This article also highlights the importance of the work of moral philosophers to the understanding of contemporary human rights and explains that the traditions of natural rights theories still influence contemporary human rights language in profound ways.

Keywords: moral philosophy, human rights law, religious doctrine, natural rights theories, morality

THE twentieth century saw a remarkable shift in the attitudes and preconceptions of moral philosophers. In the first half of the century, few philosophers showed any interest in the analysis and theory of human rights. It seemed as if philosophers had discarded the idea of human rights as a confused or incoherent remnant of the past. Yet, a dramatic change in the fate of human rights theory appeared in the second half of the twentieth century. Discussions about the nature of rights, the place of rights in moral theories, and the value and justification of human rights, took centre stage in academic philosophy journals. This literature has become so vast and wide-ranging that it is impossible to provide a comprehensive overview of it. This chapter, therefore, will focus on a number of long-standing debates in moral philosophy, indicating the interrelations between these debates, as they bear on the foundations of human rights. Before doing so, the chapter will begin by considering a recent challenge to the topic as such, one which asks whether moral philosophy has anything useful to say about the idea of human rights.

#### 1. The Political Conception of Human Rights

The orthodox view of human rights is that they are inherent and derive simply from the fact of being human. This view distinguishes human rights from legal and (p. 33) conventional rights, as well as from moral rights that arise due to special relationships, like the right to fulfilment of a promise made. Orthodoxy further has it that ordinary moral reasoning suffices to determine, for example, which rights inhere in human beings. This stands to reason, because if rights exist independently of any convention or institutional arrangement, it is hard to conceive of another method through which to grasp them, apart from ordinary moral reasoning.

Little more than a decade ago, most philosophers would have been surprised if someone asked whether moral philosophy were relevant to the topic of human rights. The orthodoxy has been challenged, however, by what are now generally known as 'political conceptions' of human rights, as John Rawls first set forth in *The Law of Peoples*.<sup>1</sup> More recently, Joseph Raz,<sup>2</sup> Bernard Williams,<sup>3</sup> Joshua Cohen,<sup>4</sup> and Charles Beitz<sup>5</sup> have presented alternative

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versions. Political conceptions of human rights reject the idea that human rights are rights that inhere to people simply by virtue of them sharing a common humanity, asserting that this approach disregards the distinctively political role of human rights. Rawls, for example, while he does not deny that human rights belong to all human beings, characterizes them by the role they play in regulating relations between societies. Human rights limit toleration among peoples. They are 'the necessary conditions of any...cooperation',<sup>6</sup> and they are distinguished from other moral rights, according to Rawls, in that their widespread violation can generate a pro tanto justification for forceful intervention by another (well-ordered) society.<sup>7</sup> The immunity of any society from intervention, therefore, is conditioned on its respect for the rights to life, to liberty, to property, and to formal equality. This is a notoriously truncated list, which probably explains the unease that even Rawls's admirers have displayed towards his account of human rights.

Rawls also challenged another tenet of the orthodoxy on human rights. While noting that 'comprehensive doctrines, religious or non-religious, might base the idea of human rights on a theological, philosophical, or moral conception of the nature of the human person',<sup>8</sup> he specifically rejected the possibility of such a grounding for the purpose of constructing a law of peoples. He reasons that peoples from different religious, philosophical, and moral backgrounds should be able to ( ) agree freely on the set of principles and norms of which human rights are a part (ie on the law of peoples). If human rights were to be grounded in a particular comprehensive religious or philosophical doctrine of human nature, many peoples might reject them 'as in some way distinctive of Western political tradition and prejudicial to other cultures'.<sup>9</sup>

This quote highlights one of the main motivating reasons for developing a political conception of human rights, and—specifically—for separating human rights theory from moral philosophy. But Rawls's conception has failed to convince even many of his devoted pupils, in part because of the very short list of rights that it generates. Rawls appears to be applying the label 'human rights' to only a sub-set of human rights proper. He does recognize a larger category of rights—liberal constitutional rights—which seems co-extensive with what are commonly identified as human rights, but his theory would come down to a proposal for enforcing only *some* (say, basic) human rights in international law, and hence it would not count as a conception of human rights.<sup>10</sup>

Charles Beitz's recent work, *The Idea of Human Rights*,<sup>11</sup> has taken the political conception of human rights in a very different direction—one that is particularly relevant to the question of whether moral philosophy has something to contribute. '[H]uman rights', Beitz writes, 'names not so much an abstract normative idea as an emergent political practice'.<sup>12</sup> This is perplexing, inviting the question of how to distinguish the doings that constitute this practice, other than by saying that they are related to the idea of human rights. How something can be a practice and simultaneously an idea that plays a role *in* the same practice is rather puzzling. The claim that human rights *is* a practice might be charitably re-interpreted to mean a claim that there is a practice which consists of actions, institutions, etc that are in some way related to the idea of human rights. So when Beitz uses phrases like 'the doctrine of human rights', 'the idea of human rights', and 'the concept of human rights' one may suppose that he is referring to something like 'the doctrine/idea/concept inherent in the practice'.

Beitz grants that there exist other conceptions and doctrines than the ones he identifies as inherent in the practice, but he thinks these are misguided insofar as they conceive of human rights 'as if they had an existence in the moral order that can be grasped independently of their embodiment in international doctrine and practice'.<sup>13</sup> The view that human rights 'express and derive their authority from some such deeper order of values' is also mistaken, according to Beitz.<sup>14</sup> The familiar conceptions beg questions 'in presuming to understand and criticize an existing normative practice on the basis of one or another governing conception that does not, ( ) itself, take account of the functions that the idea of a human right is meant to play, and actually does play, in the practice'.<sup>15</sup> This is unlikely to impress the proponents of the familiar theories, because their aim was not to explicate some existing practice (only Beitz claims that human rights *is* a practice), but rather the idea of human rights. The approach does, however, highlight an important question. What does it mean for some doctrine or conception to be inherent in a practice? How does one identify the role that the idea of human rights plays in the practice? If conceptions of human rights are at work in real life, they are those of the people who participate in the practice. Beitz would probably agree that many of these participants hold beliefs that natural rights theories aptly describe. People do talk about human rights as if they express and derive their authority from a deeper order of values, and they do—sometimes—criticize existing human rights practice on the basis of such moral beliefs. Moreover, Beitz does not give a good reason to think that it is impossible to characterize the idea of human rights as its practitioners hold it to be and to do so independently of the practice in which it is said to play a role. This is,

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of course, exactly what many moral philosophers understand themselves to be doing.

Obviously, explicating the idea of human rights that practitioners hold is not the same as describing the practice itself, although Beitz sometimes seems to insist that human rights really *is* the latter. It may still be the case that the conceptions of human rights that ordinary people have do not adequately describe the practice in which they are participating. If naturalistic conceptions distort our perception of human rights, as Beitz claims, this would presumably put into question the relevance of moral philosophy for the topic. One way of vindicating the recent contributions of moral philosophers, then, is to explain how these challenges can be met. The next section will focus in particular on four challenges: (1) the ground of human rights, (2) the scope of human rights, (3) the way human rights ground action, and (4) universality from the perspective of the (supposed) rights holders.

## 2. Four Challenges to Moral Philosophy

The first challenge is this: the people who drafted the Universal Declaration and subsequent treaties were convinced that no particular religious tradition or particular comprehensive doctrine (or morality) grounded human rights.<sup>16</sup> Christians may (p. 36) well believe that faith in Christ and a commitment to obey His commandments also requires respect for human rights, just as a Muslim may believe that Islam requires her to respect other people's human rights, but allegiance to human rights does not require one to become a Christian or Muslim, nor does it require one to renounce one's religion or to become a liberal. The problem with developing a normative theory of human rights, then, is that it seems to deny this stance; the idea of such a theory seems to suggest that accepting human rights entails endorsing the theory, and this threatens the possibility of a universal acceptance of human rights. This issue is too complex to fully address in this chapter, which will limit itself to attempting to demonstrate that moral philosophy is able to generate far more interesting and rich (better) answers to questions that political theories cannot address. For that reason alone, it deserves the close attention of anyone concerned with the topic.

The second challenge is the contention that natural rights theories end up misrepresenting and narrowing the scope of human rights, for example, by claiming that only political and civil rights can be accorded the status of genuine human rights. This critique certainly applies to certain natural rights theories, although it would be too simplistic to dismiss such theories on the assumption that their subject is too narrow compared to our ordinary judgements. Moreover, the challenge does not apply to all theories. Nevertheless, there is good reason to take the challenge seriously, because it will reveal something important about the subject. But once again, the insight can only be gained by paying serious attention to moral theories.

Thirdly, some people think that human rights are rights that citizens have against their respective government, at least in the first instance, and that natural rights theories cannot but deny this. Natural rights theorists should be worried about this challenge, even though it is mistaken, because it points to a significant problem in human rights theory—a problem that has been the subject of considerable debate among philosophers. It is a challenge not just to the natural rights approach but to anyone who takes human rights seriously.

Finally, it is often said that rights protect interests. Universal human rights, then, protect universal human interests. The fourth challenge is to determine whether there are indeed interests that every human shares, and whether these rights can somehow be derived from human nature. In particular, one might worry that anything that *can* be derived from human nature must be something much more modest than what constitutes a comprehensive list of human rights. The picture that emerges from contemporary theories, however, is somewhat more complex, and again contains the seed of a better understanding of the dynamics of contemporary human rights discourse.

The thrust of this chapter, therefore, is that natural or human rights theories are a rich source of insights that those concerned with the issue should contemplate. Before delving into the normative theories themselves, it will be useful to start with a topic that has generated much heat in the last half century; ie the question 'What are Rights?'. (p. 37)

## 3. The Nature of Rights Debate

It may seem obvious that in order to know what human rights are, we have to know what 'rights' are. Yet, in writings about human rights, one seldom finds that any attention is paid to the nature of rights. More often than not, texts

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simply include a definition of 'rights' before the author swiftly moves ahead to address other questions. Many seem convinced that readers have a firm enough grasp of the nature of the concept. This is true enough if it means that persons are generally able, without hesitation, to distinguish normative incidences that are instantiations of 'right' (in the subjective sense) from those incidences that are not. However, seeking an answer to what makes something into a right, or what is common to (all) subjective rights, reveals that the matter has been highly contested and that there is still no widely accepted answer. Philosophers writing on the topic can be generally grouped into two camps. The first is composed of proponents of the 'Interest Theory' of the nature of rights, who hold that whenever someone has a right, this means that an interest of the right-holder is being normatively protected. In other words, rights protect people's well-being. Proponents of the 'Will Theory' of rights disagree, positing that central to the concept of a right is the idea that the holder of the right has some kind of freedom, autonomy, or sovereignty, which is not necessarily the case when someone's interest is being normatively protected.<sup>17</sup>

The obvious way to decide in favour of one theory or the other would be to consider, on the one hand, whether the normative incidences normally recognized as 'rights' are also captured by the theory, and, on the other hand, whether all normative incidences that are described by the theory as 'rights' are normally recognized as 'rights' as well. This 'extensional' test thus seeks to know whether the extension of the theory differs in any way from common-sense judgment (or, if we are considering legal rights, the judgment of lawyers and jurists). Most of the debate between proponents of both theories has, in fact, been a back and forth on the shortcomings of either theory in this respect.

Bentham, one of the early proponents of the Interest Theory, had held that someone has a right if she 'stands to benefit' from the performance of a duty.<sup>18</sup> Certainly, in many cases, when people have rights they stand to benefit from someone else's duty in some way. A citizen would not have a (legal) right to political participation unless others (including the government) had duties that protect this citizen's ability to exercise her right. These duties would include a duty not to interfere with the citizen's attempt at exercising her right, and perhaps also duties to enable her (| ) to exercise the right in some way. So it seems as if standing to benefit from someone's performance of a duty is (often, at least) a necessary condition for recognizing someone as a right-holder. But is it also a sufficient condition? Consider the following example. Everyone has a duty not to murder my friend. Clearly I stand to benefit from the performance of this duty. But we wouldn't say that I therefore have a right that my friend not be murdered. My friend's right not to be murdered correlates with duties that are owed to her, not to me. So standing to benefit from someone's performance of a duty is not a sufficient condition for being a right-holder. Even if right-holders stand to benefit from someone's fulfilment of a duty, not everyone who stands to benefit from other people's fulfilment of a duty is a right-holder.

Interest Theorists, from the twentieth century until recently, have geared much of their work towards solving problems such as these. Some of the famous attempts refer in some way to the intentions of the lawgiver or to the reasons that the lawgiver might have. Thus it has been suggested that a person has a right when the lawgiver imposes a duty *in order to* protect some interest of hers (or an aspect of her interest), or when an interest of hers *is a reason to* impose duties.<sup>19</sup> Yet this approach raises problems of unearthing the intentions of the lawgiver, or the reason for the imposition of a duty. What were the intentions of the lawgiver when murder was outlawed, and how will we know the reason for imposing a duty (on government officials) to provide basic education for children? Perhaps safeguarding a continuous supply of qualified labour for enterprises concerned the lawgiver more than the interests of children. It seems doubtful that any perception of an intention of the lawgiver can guide the identification of rights.<sup>20</sup> There is, moreover, a more serious problem that follows from speculation about the intentions of the lawgiver; it may lead to a conclusion that some rights are not intended to protect the interests of the right-holders, but are directed at the interests of others. Take the right of a journalist to withhold information on her sources from the police. This right clearly serves to protect the ability of the journalist to carry out her job, and thus it protects an interest of hers. However, it seems at least as plausible that the right to withhold information regarding sources arose in order to protect the interest(s) of the public at large (in a free press), rather than the interests of journalists in the ability to carry out their profession (even though the latter is of course a necessary condition for the former).<sup>21</sup>

The example just given seems to show that protecting a right-holder's interest is not always the reason for the existence of the right, and this presents a serious challenge to attempts to provide a definition that consists of necessary and sufficient conditions for the existence of a right, based on the reasons for protecting an interest. To

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be sure, not all versions of Interest Theory are of this kind; for example, (p. 39) Matthew Kramer has recently developed a quite different version. But, no existing version seems to capture adequately the intuitive judgements regarding the identification of rights.

The most distinguished proponent of Will Theory was Herbert Hart. He thought that the characteristic feature of rights is that they provide the holder with some kind of control over another person's duty 'so that in the area of conduct covered by that duty the individual who has the right is a small-scale sovereign to whom the duty is owed'.<sup>22</sup> Take the right of a patient to be treated by her doctor. The doctor has a duty to treat the patient to the best of her ability, but the patient controls this duty in the sense that the doctor cannot do anything without the patient's consent. The patient also may waive or extinguish the doctor's duty. Moreover, if the doctor breaches her duty, the patient may choose whether to sue or not and may waive or extinguish the duty to pay compensation. Having some of these powers over someone else's duty makes one a small-scale sovereign and thus a right-holder. This definition seems to capture something of the reason why the patient is considered a genuine right-holder and not a mere beneficiary of the doctor's duty. It also captures the idea that we can *exercise* rights. However, the definition has consequences that many find disconcerting. Hart himself recognized that, according to his definition, criminal law did not confer rights on people. Thus, to claim a (legal) right not to be killed or not to be harassed on the street would at best be to use the term 'right' in a loose, imprecise way.

The problems do not stop there. Because rights, according to Will Theory, involve some kind of control over someone's duty, it would seem sensible to ascribe rights only to beings that are capable of exercising such control. Consequently, it seems that human infants and the mentally infirm, for example, do not have rights. For many critics, this consequence amounts to a *reductio ad absurdum* of Will Theory; if a theory of the nature of rights denies rights to children, this can only be an indication that something has gone awfully wrong. Another troubling consequence of Will Theory is that it may entail in some cases that a right is lost when the law strengthens protection of an interest. The classic example is that of a minimum wage. Should the law require employers to pay employees a certain minimum wage, the right of employees can be strengthened—so it seems—by making workers unable to contract to work for a salary less than the minimum wage (simply by declaring any such contract invalid). For the Will Theory, however, it seems that such a law, by taking away the control of a worker, divests the worker of a right. Conversely, most of us would rather consider the rule that eliminates the worker's ability to contract for a lower salary as strengthening the right to a minimum wage.

The debate between Interest Theorists and Will Theorists has raged for many decades. Although new contributions to the debate continue to appear, one can discern (p. 40) a sense of exasperation with the seemingly endless nature of the debate. One scholar concluded that the debate has ended in a stand-off,<sup>23</sup> and others have thought that a solution to the problem must be found in some combination or hybrid of the two theories. Before turning to that possibility, it is useful to consider what exactly philosophers have been doing when attempting to give an account of the nature of rights. There are two rather crude candidates for an answer to this question, both of which turn out to be unsatisfactory. This suggests that there exists a real problem here, deserving of a better response. A third alternative requires consideration of the historical roots of the contemporary debate on the nature of rights.

The first answer seems to impose itself when considering the kind of objections that proponents of either account have raised against the competing account. Typically they have tried to show that the competing account diverges from linguistic intuitions on the topic of human rights—that it identifies normative incidences as rights that are not recognized as rights or, conversely, that it fails to classify certain normative incidences as rights that are commonly characterized as rights. This cannot be correct. If one could decide the disagreement by gauging the extensional adequacy of each account, the debate would have ended decades ago, for it must be obvious to any observer that Interest Theory does considerably better than Will Theory in this respect. So why has the debate continued? One reason is that not merely intuitions about the proper *extension* of the domain of rights, but also what one could call the *intension* of the concept, motivate it. This would explain why Will Theorists tend to be relatively untroubled by the awareness that their conception of rights effectively rules out many common-sense intuitions regarding the word 'right'. It also provides an explanation of why the debate seems interminable; different kinds of intuitions are pulling in different directions, with no obvious way to establish the weight of these different intuitions, making it hard to see how either side in the debate might come up with an argument that would convince the other side.

The second answer considers that if some intuitions regarding 'rights' are indeed incompatible with others, then it

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would seem necessary for the purpose of scholarly debate to narrow down the use of the term, perhaps so that it refers to the largest consistent subset of those intuitions. This would involve more or less consciously ruling out some intuitions as improper, thus stipulating away some of the intuitions (preferably as few as possible) in order to distil a vocabulary suitable for academic discourse. This suggestion may make sense of the continued existence of different definitions of 'rights', but it generates a huge problem of intelligibility. How is it possible for intelligent individuals to debate stipulative definitions for decades? Of course, some stipulative definitions may be closer to the usage of a word in ordinary language (or in legal discourse), but such observations could not obtain the status they have acquired in the nature of rights debate, namely that of casting doubt on (| ) the acceptability of the definition. At the least, semblance to linguistic intuitions could only be one of a set of criteria among other criteria, such as coherence and clarity, by which to judge the usefulness of a definition of rights. The most effective defence of a stipulative definition would be to show that it is (or could be) part of a powerful theory, but proponents of either account have not tried to make this argument. Instead of using their respective definition to build a theory on the topic, they have baptized their definitions with the label 'theory' and have argued that it corresponds better to intuitions in comparison with other definitions.

If neither response makes sense of the debate, other options must be considered. There is good reason to think that the debate is misguided; Interest Theory and Will Theory are better seen as attempting to capture different kinds of rights.<sup>24</sup> If that is correct, neither Interest Theory nor Will Theory is a genuine account of 'rights' and therefore to ask which of the two definitions of rights is the correct one is to ask a pseudo-question. This raises two important questions: first, if two different kinds of rights ('Interest Theory rights' and 'Will Theory rights') exist, is it more than linguistic coincidence that we call them both rights? Or, to put the question differently, what makes both kinds of rights, rights? The first is a question for a better conceptual analysis. Second, why has the debate taken this particular shape? This is a question about the historical roots of the debate. I would like to suggest that both kinds of rights are the basis of two very different theories of natural rights, and this accounts for some of the assumptions which have sustained the contemporary debate.

### 4. New Analyses of Rights

An increasing number of scholars, exasperated with the seemingly interminable debate between Interest Theory and Will Theory, have started searching for alternatives that would combine the virtues of both. These alternatives have taken several forms: multi-function theories, normative constraint views, capacious versions of either theory, and hybrid theories.<sup>25</sup> This author's own theory will be used as a starting point for the rest of the chapter. This analysis of rights connects the two kinds of rights in a non-ad hoc manner. In addition, there is a fit between the best analysis of the concept of rights and the best contemporary theories of human rights. Further, the twofold structure of the concept of rights parallels two very (p. 42) different theories of human rights and, historically, two traditions (or theories) of natural rights. These traditions have shaped not only intuitions about the proper reference of the word 'right', but also a broader framework of assumptions taken for granted when talking about rights. Consequently, it will become clear how seemingly unsolvable problems in contemporary human rights theories are the product of an evolution which can only be genuinely understood in light of the historical antecedents from which contemporary human rights theories have emerged. The upshot is that moral philosophy, if analysis and more than a mere superficial knowledge of the historical development of natural rights theories properly inform it, is indispensable in order to understand the problems that plague contemporary human rights thinking.

A new analysis of the concept of rights, in order to be an acceptable replacement of existing analyses, should do better than these existing analyses in capturing intuitions about rights. Given the current state of the debate, and the suggestion that there are two different kinds of rights, a new analyses (1) should be extensionally at least as adequate as the best versions of Interest Theory; (2) should make sense of the twofold nature of the domain of rights; and (3) should do so in a non-ad hoc manner (ie it should explain what 'Will Theory rights' and 'Interest Theory rights' have in common). An analysis of rights that does this and more posits that rights enable agency and that they do so in two different ways. Rights ('Interest Theory rights') enable agency by removing normative impediments to action and by normatively protecting the interests of the agent. They also enable agency by granting agents normative power and, hence, by making it possible to act normatively—ie to generate normative changes ('Will Theory rights'). If this analysis of rights indeed solves the problems that plague Interest Theory and Will Theory, it serves to establish an intimate connection between rights and agency. And, as it happens, this link between rights and agency is also an enduring feature of the best theories of human rights.

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If we trace the historical roots of the contemporary debate over the nature of rights, it should become clear why the debate has taken this particular shape. This should not be understood as a mere historical claim. In the following section, it will become clear that no single natural rights theory can accommodate 'Will Theory rights' and 'Interest Theory rights'—even though both are normative incidences that enable agency—at least not in respect to fundamental rights. When they are considered as natural rights, both kinds of rights give rise to normatively incompatible theories. This is why the history of natural rights theories can be seen as a history of two theories, despite the fact that historically many authors have tried to combine both kinds of rights. In the next section, right-libertarianism is presented as the theory which takes 'Will-Theory rights' as basic. It will show that some versions of the theory fail to establish the conclusions they purport to establish, precisely because they have interpreted the rights fundamental to their theory as interest-based. For the sake of convenience, in looking at natural rights theories in (p. 43) which 'Will Theory rights' and 'Interest Theory rights' are embedded, the remaining sections will refer to natural property rights and natural rights to welfare.

### 5. Human Rights as Natural Property Rights

The contemporary version of the theory that takes fundamental human rights to be 'Will Theory rights' is libertarianism (or certain versions thereof), although not all libertarians have thought of libertarianism as a natural rights theory. The theories here share the claim that there are only negative, and not positive, moral rights.<sup>26</sup> Negative rights are rights against interference. So there may be a negative right not to be harassed on the street, or a negative right not to have one's car stolen or to be prevented from entering one's home. The characteristic feature of negative rights is that they correlate with duties that people can discharge without actually doing anything—they are obligations of abstention. To enjoy the right, it suffices that everyone abstains from doing anything. This is what distinguishes negative rights from positive rights, for the latter sometimes requires other people to do something in order to discharge their duty toward the right-holder. The human right to affordable healthcare seems incomplete unless someone has a duty to provide affordable healthcare to me; and this would obviously be a positive duty, because that person or agent may have to do something in order to discharge it.

It will be clear that libertarianism's claim that there are no positive, but only negative rights, has radical consequences for human rights doctrine, because it entails, for example, that there is no right to adequate nutrition, basic healthcare, or education.<sup>27</sup> For most persons, such consequences are counter-intuitive, and libertarians have not usually relied exclusively on an appeal to intuition to defend their position. One alternative way to defend libertarianism—particularly apt, of course, to a natural rights theory—is by appealing to human nature. Human beings, philosophers often say, are different from animals in the human ability to make genuine decisions. Genuine human action is not instinctive or impulsive, but rather based on evaluation. Reflection may lead to a decision not to satisfy some desires, while others are deemed worth pursuing. Developing projects or deciding to pursue certain complex goals may in turn generate particular new needs. The importance of this for a theory of natural rights is that genuine human action can be seen to require such real choices, and—crucially—that each individual can only make such a choice for (p. 44) herself (because nobody can determine another person's values or pursuits). Hence it is central to living a truly human life that one is allowed to make such choices and, presumably, to act on them. Thus 'Freedom of Choice', in many libertarian writings, is supposed to ground libertarian conclusions, but there is at least one line of argument from this idea that clearly does not deliver the desired conclusion, and it is important to examine why it does not.

All persons presumably have an interest in leading a life appropriate to human beings. If making choices and acting on them is what is critical to being human, then surely there is an interest in being able to do so. And since these interests are weighty enough to deserve protection, they (at least *prima facie*) provide the foundation for 'Interest Theory rights' not to be interfered with in the exercise of one's choices.<sup>28</sup> For the libertarian, only the negative duty not to interfere with the freedom of another limits this right—or freedom—to do what one chooses to do. Grounding human rights in interests, however, does not deliver libertarian conclusions for three incontrovertible reasons. First, even if it is agreed that humans have an interest not to suffer interference when pursuing their aims, this is clearly not their only interest. In fact, it is arguably not even their most urgent interest. Before seeking to be free from other people's interference, individuals need to be functional human beings, which requires that one have access, among other things, to basic nutrition and health. If an interest in freedom grounds rights, it is hard to see why an interest in survival should not ground rights as well. These survival rights cannot be merely negative. While abstention from interference will ensure individual freedom of action, protection of the interest in sustenance

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requires assistance from other people in those instances when persons are unable to provide for themselves. This in itself is enough to dismiss those versions of libertarianism which aim to ground rights in interests.

The libertarian may attempt to defend the interest theory by saying that: 'Even if we have interests other than the interest in no one interfering with our actions, the latter still is more fundamental to a genuine human existence, and it therefore grounds human rights that trump other rights in case of conflict. But enforcing positive duties *always* conflicts with free choice, and this in effect makes positive rights irrelevant.' This leads to the second reason why the libertarian argument fails; the interest in freedom does not require that choices are *never* restricted. Freedom in a society cannot be absolute; individuals can still be free in most of what they do, even if governments collect income tax to provide for the needy.

The third reason for the failure of the libertarian case for negative rights based on an interest in freedom is that this interest *would* ground positive duties. This is especially the case if this interest is thought to ground property rights. Libertarianism (p. 45) does not guarantee property, but if there is an interest in being able to control property, then there must also be an interest in *having* some property. More generally, an interest in freedom exists because there is an interest in being able to pursue things, and the protection of this ability requires positive duties, as well as negative ones.

As may be obvious by now, attempts to ground libertarianism in human interests fail because the intuitions which underlie the theory are of a different kind. Libertarianism is not a theory of rights based on interests, but a theory of fundamental property rights. To fully understand this idea, it is helpful to see how it developed historically. By the early fourteenth century, the Franciscan religious order had been embroiled for decades in a dispute over the spiritual foundation of their order. The Franciscans distinguished themselves from other religious orders in that they claimed not to own anything, either individually or in common. They even claimed not to have any (legally enforceable) right to the things they used. In the language of the period, the Franciscans sought to live a life without any *dominium* (lordship). Pope John XXII strongly attacked this doctrine, and in one of his writings, he claimed that Adam, the first human being, already had exclusive *dominium* of temporal things.<sup>29</sup> A Dominican cleric, John of Paris, had suggested some two decades earlier that true *dominium* is not dependent on human law, because it is the result of labour.<sup>30</sup> Two decades later, German theologian Konrad von Meigenberg would make a very similar claim.<sup>31</sup> It seems that the core of the labour theory of property, now associated with John Locke, was already emerging three-and-a-half centuries earlier.

In Roman law, *dominium* referred to the actual control of a landlord (a *dominus*) over his property. However, in the later Middle Ages, the meaning of *dominium* expanded in at least two ways. First, it came to mean any form of normative control, so that anyone having a legal right could be said to have a kind of *dominium*. Second, it came to refer to the control of a human being over her faculties. Aquinas, for example, held that the *dominium* of man over his own will makes him capable of *dominium* over other things.<sup>32</sup> In the sixteenth century, these ideas were further developed into a full-fledged theory of fundamental property rights (allowing for (p. 46) a very wide sense of 'property', so that it encompassed the fundamental right of a people to its own jurisdiction) during the fierce dispute over the rights of the American 'Indians'. The Spanish theologian Francisco de Vitoria argued that even a sinner 'does not lose dominion (*dominium*) over his own acts and his body'.<sup>33</sup> For Vitoria this was demonstrably true, because many observers had agreed that the 'Indians' had built cities and ordered their affairs; the 'Indians' were not simply running around like brutes. This was enough for Vitoria to conclude that the Spanish conquistadors were not entitled to appropriate any indigenous property or to subject them forcefully to the Spanish king. In sum, for Vitoria, the mere fact of having control (*dominium*) over one's will seemed to entail having *dominium*, in the sense of normative control (rights) over one's possessions, and *dominium*, in the sense of the normative control of a community over itself, entailing immunity from being subjected to a ruler that one has not chosen oneself.<sup>34</sup>

Contemporary intuitions regarding fundamental property rights are the descendants of the idea that human beings have *dominium* over their will and actions, and therefore over parts of the outside world. The best support for this claim is that the idea generates a theory of fundamental property rights that is more adequate than its contenders. Two ideas (both of which Locke used) have been at the forefront in recent debates over the justification for fundamental property rights: one is the labour theory of property acquisition, and the other is the idea that one can acquire property if one leaves 'enough and as good'. The latter has been the subject of intense debate.<sup>35</sup> The problem with the 'Lockean proviso' is that no one has up to now been able to give it specific content that will allow it to function as a criterion of just appropriation in the state of nature.<sup>36</sup> However, the proviso—even if one were to

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develop a workable version—only restricts legitimate acquisition; it does little or nothing to justify property acquisition. References to labour usually play this role, and the mixing-labour argument for property acquisition is notoriously problematic.

One problem with the labour theory is that in many cases it fails to provide an adequate reference to what is acquired: how much labour is required, and what exactly has an individual mixed with her labour when she has built a fence around a piece of land?<sup>37</sup> More importantly, it remains unclear how the mixing argument justifies appropriation at all. How could it, for example, justify acquisition of land? Moreover, the argument from labour mixing seems to presuppose self-ownership. A theory of fundamental property rights should first try to make sense of the intuition that human beings are self-owners and owners of things they have made, as (p. 47) well as the intuition that individuals can appropriate external goods, including natural resources and parts of land. All this can be done by assuming that the underlying notion is that human beings incorporate things into plans. The medieval theory discussed above connects the ability to have *dominium* to free will and hence to intentional behaviour. This approach makes sense even of such difficult questions as why humans own themselves (they use their own body purposively) and how they can acquire property in resources and land (both can play an essential part in human projects). The crucial idea here is that of creation.<sup>38</sup> In other words, the idea that human beings are sovereigns secularizes the idea that God has *dominium* over the universe because he has created it. This in turn suggests questioning whether these ideas have any place in a secular world. Similar doubts emerge when examining the basis of natural rights to welfare.

### 6. Natural Rights to Welfare

Authors of current human rights texts often lament the proliferation of human rights claims, apparently fearing that too many claims will erode the special status of human rights. In common discourse, a human rights violation is perceived as particularly grave, associated with genocide and war crimes, rather than, for example, the lack of a smoke-free environment. If all that people desire to claim from their government is called a human right, then the sense of urgency normally attached to human rights will surely dissipate. More dangerously, if human rights claims cannot be distinguished from other human desires, this may foment scepticism towards the language of human rights as such. The responses of moral philosophers to this situation can be divided into three categories. A minority does not see proliferation as problematic. A second group consists mostly of libertarians who think that the only sensible conception of human rights is that of natural property rights discussed above. Many of them view proliferation as the result of misconceiving rights as anything other than civil and political rights.<sup>39</sup> A third group consists of philosophers who share a broader view of human rights, but who think that philosophy has a role to fulfil in distinguishing rights claims from other claims.

One way to evaluate these responses is by bringing in the second challenge to natural rights theories—the claim that these theories end up misrepresenting the (p. 48) scope of human rights. This claim has some initial plausibility when levelled against the theories of fundamental property rights discussed in the previous section, but it is much less obviously true with regard to theories that construe natural rights as protecting interests of human beings. These theories are often critical of the more extravagant rights-claims and hence do not aim to merely describe actual human rights discourse. However, in light of the widespread belief that the domain of human rights is becoming overstretched, it seems too rash to rule them out as serious attempts to describe the phenomenon of human rights on this basis alone. To do so would be to deny that the belief is as much part of contemporary human rights discourse as the more extravagant right claims. When looking carefully at theories of natural rights to welfare, however, it becomes apparent that they do not succeed in stopping the proliferation of human rights.

Theories of 'natural rights to welfare' come in many different varieties. One theory that has attracted considerable attention recently is the 'capabilities approach' to human rights. Martha Nussbaum, for example, has argued that humans need certain capabilities in order to lead a fully human life.<sup>40</sup> However, it is far from clear how this criterion might lead to a more or less determinate list of capabilities that deserve to be protected as human rights. The most promising versions of the theory start from the idea that the fact that human beings are agents distinguishes them from other beings. Thus, the starting point of these theories is very similar to that of the theory of natural property rights: human beings are distinct from other beings, because humans can evaluate their desires and urges and choose the projects they want to pursue. Since leading a fully human life is leading the life of an agent, these theories posit, human rights entitle each person to the things needed in order to be functioning agents. This

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suggestion grounds rights to adequate nutrition, to healthcare, to (basic) education, to freedom, etc.

Theories of welfare rights that base these rights on the notion of agency face the obvious objection that not all human beings are agents. Most significantly, infants are not agents in the relevant sense. In response to this objection, some theorists have simply bitten the bullet and maintained that not all human beings, only agents, have rights.<sup>41</sup> If this result is hard to accept, one can extend the theory by arguing that human rights protect not only existing agency but also the coming into being of human agents.<sup>42</sup> Unfortunately, that addition doesn't solve the problem; some human beings (p. 49) never have been or never will be agents. Conversely, some animals may possess the capacities associated with agency. Intuitions regarding human rights, however, are that *all* and *only* human beings have human rights, a conclusion not captured by a theory that grants rights to agents and potential agents.

Another problem with these theories—one that has given rise to an extensive literature—is that they give rise to positive rights (ie rights that entail positive duties). The right to medical healthcare implies that someone has a duty to provide it. Now it may well be possible, in the twenty-first century, to provide adequate nutrition and perhaps even basic healthcare for everyone, but this has not always been the case, and it is not something that can be taken for granted even for the future. Most philosophers agree that there is no duty to do something if it cannot be performed. Therefore, if people living in the third quarter of the twentieth century were unable to feed the world population, they could not have had a duty to do so.<sup>43</sup> Consequently, if they did not have this duty, then no one had a right to adequate nutrition. This result does not sit squarely with the idea that human rights are universal in both time and space, and libertarians have used it to argue that human rights must therefore be negative rights only. Friends of welfare rights have taken different approaches to avert this conclusion. First, some have tried to blur the distinction between positive and negative rights, arguing that the protection of negative rights also entails positive duties.<sup>44</sup> Second, others have argued that positive rights do not require everyone to act; they merely require support for institutions that provide the things that people have a right to.<sup>45</sup> Third, some have held that humans only have duties to do what is in their power to provide the things to which people have rights.<sup>46</sup> Fourth, it has been suggested that humans only have rights to those things that are effectively enforceable.<sup>47</sup> None of these responses solve the problem, however, leaving a seemingly incoherent conception of human rights. (p. 50)

The third problem is the most serious. Surely, if a theory of human rights is to be of any use at all, it should provide a solid basis on which to distinguish real from 'supposed' human rights. At first sight, this is exactly what these theories do. They claim that humans have a right only to the things necessary to be an agent, ie to the things needed to be able to develop and pursue a conception of the good.<sup>48</sup> This requires autonomy (the ability to develop a conception of the good), some amount of welfare (enough to protect the ability to pursue each person's conception of the good), and freedom. The crucial question, however, is: how much of each is required? It is clear that autonomy comes in many different degrees, and it is far from clear how reference to the idea of human agency can provide anything close to a precise limit to the level of education to which human rights entitle each individual.<sup>49</sup> Similarly, it is unclear how rights to welfare can be derived with any amount of precision from the requirement that individuals must be able to function as agents. In one sense of 'agency', it seems that neither education nor welfare is necessary, except in extreme circumstances. After all, most human beings, no matter how uneducated or poor they happen to be, are still functioning agents. The same goes even more for freedom. Someone who is unjustly imprisoned does not lose agency in the process. If this sense of agency is taken as a guideline, the result will be a list of human rights that is even thinner than Rawls's. In fact, it would be unrecognizable as a list of human rights. However, contrary to what might be expected, these theorists actually generate very extensive lists of human rights. Griffin, recognizing the difficulty, writes that his account of rights has an 'amplifier' conception of agency at its heart, which includes both having certain capacities and exercising them. He recognizes that this provides a highly indeterminate list of human rights, and so he suggests considering 'practicalities' in order to make it more determinate. The same is true for Gewirth. He requires that the means of acquiring wealth and income be distributed equally so far as possible. Thus it turns out that these theories, rather than constraining the proliferation of human rights, provide either highly indeterminate or sheer limitless accounts of the things individuals are entitled to as human rights.<sup>50</sup>

The persistence of these problems would suggest that they are inherent to any theory of welfare rights. However, there is a religious version of the theory that is (p. 51) not troubled by them. Brian Tierney is one of several historians who have suggested that throughout the early history of natural rights theories, rights were persistently linked not with the ability to develop projects, but with the idea of conscience.<sup>51</sup> The importance of this difference

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can hardly be over-emphasized. A sense of obligation to obey God's commandments, as well as an idea that human beings have a role to fulfil in God's plan for the world, pervaded Medieval European culture. It was natural for Christians to assume that God had given each and every individual the talents needed to carry out their duties. It was also commonly assumed that God had given the earth and its produce so that humans may be nourished. Under these conditions, rights to subsistence could be construed as negative rights—ie the right that others not take more than what they need, in case doing so would prevent another from surviving. In fact, from the thirteenth century onwards, there was a stable consensus among canon lawyers, theologians, and Roman lawyers, to the effect that, in times of necessity, every human being had a right to take whatever was needed in order to survive. Since this was a negative right, it did not suffer from the problems associated with positive human rights. Also, Christians did not need to tie this right to any human capacity; nobody doubted that all human beings, and only human beings, had this special role in God's plan. The stable consensus (from the thirteenth century on to at least the second half of the seventeenth century) to the effect that this right only applied to cases of extreme necessity is only natural given these assumptions. The idea was not—as in modern, secular theories—that humans have these rights in order to carry out their own plans. Rather, the idea was that individuals should be able to perform their role in God's plan. Thus, the problems that seem so incontrovertible in the context of modern theories did not plague this religious version of natural rights to welfare. This suggests—again—that the problems are due to the secularization of the original theories.

### 7. Conclusion

This chapter aimed to show the importance of the work of moral philosophers to the understanding of contemporary human rights. The underlying conviction guiding the story is that the traditions of natural rights theories, as they have developed (p. 52) since the thirteenth century, still influence contemporary human rights language in profound ways. These traditions continue to shape debates from that of the nature of rights to attempts to answer questions like 'Which rights do we have?' or 'Who is responsible for delivering the things to which we are entitled?'. Failure to recognize this theoretical foundation results in an impoverished understanding of the current condition and (theoretical) problems.

The answer to the first challenge against the relevance of moral philosophy has been the article as a whole. It may well be that those who prepared the Universal Declaration of 1948 shared a strong conviction that they were creating a new language, but that does not preclude unearthing the ways in which traditions found in the abundant work of moral philosophers have moulded both the concept and theory of human rights.

The second challenge—that moral philosophy ends up misrepresenting the scope of human rights—requires a qualified response. Certain theories certainly generate lists that diverge significantly from the rights ordinarily identified as human rights.<sup>32</sup> Other theories, however, expose almost exactly the same indeterminacy as can be found in contemporary human rights discourse. The stance of this chapter has been that studying these theories is rewarding in that it can expose the dynamics that drive the discourse.

The third challenge—that natural rights theories misrepresent the distinctly political character of human rights—can be answered by contending that this character has been exaggerated. It is true that governments are the most common violators of human rights and that special responsibilities are assigned to governments to protect human rights. To some extent this reflects the fact that governments are among the most powerful actors in today's world. Yet, locating the primary responsibility for protecting human rights with political institutions does not solve the immense problem with the conception of human rights as positive. An intuitive understanding of rights is at odds with the idea that the only genuine human rights are those that governments can in fact protect. Hence there remains a problem understanding how there can be positive human rights without correlative duties.

A fully adequate response to the fourth challenge is beyond the scope of this chapter. If the historical development of the natural rights tradition influences human rights language and theory in profound ways, it would be surprising indeed if there were no significant differences in the ways in which human rights are understood and conceptualized in non-Western cultures. Such differences may have been of marginal political importance until now, but they may well become increasingly potent as the geopolitical power of many non-Western nations continues to grow. China, for example, has been very active in developing its own conception of human rights. Despite the extensive literature on 'non-Western conceptions of (p. 53) human rights', there is only rudimentary

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understanding of these issues in the West. Scholars and activists may continue for a long time to debate whether the idea of human rights is distinctly Western or not. This chapter has suggested that the search for an answer to that question should start with a thorough study of the works of moral philosophers.

## Further Reading

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## Notes:

(1) John Rawls, *The Law of Peoples* (Harvard UP 1999).

(2) Joseph Raz, 'Human Rights without Foundations' in Samantha Besson and John Tasioulas (eds), *The Philosophy of International Law* (OUP 2010).

(3) Bernard Williams, *In the Beginning Was the Deed: Realism and Moralism in Political Argument* (Geoffrey Hawthorn (ed), Princeton UP 2005).

(4) Joshua Cohen, 'Is there a Human Right to Democracy?' in Christine Sypnowich (ed), *The Egalitarian Conscience: Essays in Honour of GA Cohen* (OUP 2006).

(5) Charles R Beitz, *The Idea of Human Rights* (OUP 2009).

(6) Rawls (n 1) 68.

(7) John Tasioulas, 'Are Human Rights Essentially Triggers for Intervention?' (2009) 4 *Philosophy Compass* 938, 940.

(8) Rawls (n 1) 81.

(9) Rawls (n 1) 68.

(10) Tasioulas (n 7) 943. See further S Matthew Liao and Adam Etinson, 'Political and Naturalistic Conceptions of Human Rights: A False Polemic?' (2012) 9 *J Moral Philosophy* 327.

(11) Beitz (n 5).

(12) Beitz (n 5) xii.

(13) Beitz (n 5) 7.

(14) Beitz (n 5) 7.

(15) Beitz (n 5) 8.

(16) See eg Johannes Morsink, *The Universal Declaration of Human Rights: Origins, Drafting & Intent* (University of Pennsylvania Press 2000).

(17) A good introduction to the debate is Matthew H Kramer, NE Simmonds, and Hillel Steiner (eds), *A Debate over Rights: Philosophical Enquiries* (OUP 1998).

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- (18) For analysis, see David Lyons, *Rights, Welfare and Mill's Moral Theory* (OUP 1994) 27-30.
- (19) See Joseph Raz, 'Legal Rights' (1984) 4 OJLS 1; Lyons (n 18) 23-46.
- (20) See Kramer, "Rights Without Trimmings." In Kramer, Simmonds and Steiner (eds), *supra* n. 16 at p. 85.
- (21) For discussion and references, see Gopal Sreenivasan, 'A Hybrid Theory of Claim-Rights' (2005) 25 OJLS 257, 265-66.
- (22) HLA Hart, *Essays on Bentham: Studies in Jurisprudence and Political Theory* (Clarendon Press 1982) 183.
- (23) Leif Wenar, 'The Nature of Rights' (2005) 33 Phil & Pub Aff 223, 223.
- (24) Siegfried Van Duffel, 'The Nature of Rights Debate Rests on a Mistake' (2012) 93 Pac Phil Q 104.
- (25) See eg Rowan Cruft, 'Rights: Beyond Interest Theory and Will Theory?' (2004) 23 L & Phil 347; Sreenivasan (n 21); Wenar (n 23); George W Rainbolt, *The Concept of Rights* (Springer 2006); Gopal Sreenivasan, 'Duties and their Direction' (2010) 120 Ethics 465.
- (26) Eg Jan Narveson, *The Libertarian Idea* (Temple UP 1988) 58.
- (27) Loren E Lomasky, *Persons, Rights, and the Moral Community* (OUP 1987) 96.
- (28) See eg Murray N Rothbard, *For a New Liberty: The Libertarian Manifesto* (rev edn, Collier Books 1978) 17. The first part of Hegel's *Philosophy of Right* contains the classical defence of property along these lines, but Hegel was of course not a libertarian.
- (29) Virpi Makinen, *Property Rights in the Late Medieval Discussion on Franciscan Poverty* (Peeters 2001).
- (30) See John of Paris, *On Royal and Papal Power* (JA Watt (tr), Pontifical Institute of Medieval Studies 1971) 103. On John of Paris, see especially Janet Coleman, 'Medieval Discussions of Property: Ratio and Dominium According to John of Paris and Marsilius of Padua' (1983) 4 Hist Pol Thought 209. See also Janet Coleman, 'Dominium in Thirteenth and Fourteenth-Century Political Thought and its Seventeenth-Century Heirs: John of Paris and Locke' (1985) 33 Pol Stud 73.
- (31) On Konrad von Meigenberg, see Gisela Drossbach, *Die 'Yconomica' des Konrad von Meigenberg: Das 'Haus' als Norm für Politische und Soziale Strukturen* (Bohlaus 1997) 185-87; Karl Ubl and Lars Vinx, 'Kirche, Arbeit und Eigentum bei Johannes Quidort von Paris' in Christoph Egger and Herwig Weigl (eds), *Text-Schrift-Codex* (Mitteilungen des Instituts für Österreichische Geschichtsforschung 2000).
- (32) Aquinas, *De Perfectione Spiritualis Vitae*, ch XI, quoted in Annabel S Brett, *Liberty, Right and Nature: Individual Rights in Later Scholastic Thought* (CUP 1997) 14.
- (33) Anthony Pagden and Jeremy Lawrence, *Vitoria: Political Writings* (CUP 1991) 242.
- (34) Francisco de Vitoria, 'De Indis' in Pagden and Lawrence (n 33) esp 250-51.
- (35) For an overview, see Helga Varden, 'The Lockean 'Enough-and-as-Good' Proviso: An Internal Critique' (2012) 9 J Moral Phil 410.
- (36) Varden (n 35) 442.
- (37) See Robert Nozick, *Anarchy, State, and Utopia* (Basic Books 1974) 174-75.
- (38) For discussion, see Siegfried Van Duffel, 'Libertarian Natural Rights' (2004) 16 Critical Review 353.
- (39) Maurice Cranston, *What Are Human Rights?* (Basic Books 1962) 36-38; Maurice Cranston, 'Human Rights: Real and Supposed' in DD Raphael (ed), *Political Theory and the Rights of Man* (Macmillan 1967) 52.
- (40) See eg Martha C Nussbaum, 'Human Functioning and Social Justice: In Defense of Aristotelian Essentialism' (1992) 20 Pol Theory 202. Literature on the capabilities approach is vast. A recent critique along these lines is

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Rutger Claassen and Marcus Duwell, 'The Foundations of Capability Theory: Comparing Nussbaum and Gewirth' [April 2012] *Ethical Theory and Moral Practice*.

(41) Most recently James Griffin, *On Human Rights* (OUP 2008) 34, 83-95. CS Nino, *The Ethics of Human Rights* (OUP 1991) 35-37. Dereck Beylveid, *The Dialectical Necessity of Morality: An Analysis and Defense of Alan Gewirth's Argument to the Principle of Generic Consistency* (University of Chicago Press 1991) 446-48.

(42) This argument is problematic in its own right. A good discussion is Roy W Perret, 'Taking Life and the Argument from Potentiality' (2000) 24 *Midwest Studies in Philosophy* 186-97.

(43) See eg Carl Wellman, *Welfare Rights* (Rowman and Allanheld 1982) 35-39, 159-63; Allan Buchanan, *Justice, Legitimacy, and Self-Determination: Moral Foundations for International Law* (OUP 2004) 181-86; Katherine Eddy, 'Welfare Rights and Conflicts of Rights' (2006) 12 *Res Pub* 337, 351; Danny Frederick, 'Why Universal Welfare Rights Are Impossible and What It Means' (2010) 9 *Politics, Philosophy & Economics* 428.

(44) See eg Henry Shue, *Basic Rights: Subsistence, Affluence, and US Foreign Policy* (Princeton UP 1980) ch 2; Raymond Plant, 'Citizenship, Rights, Welfare' in Jane Franklin (ed), *Social Policy and Social Justice* (Polity Press 1998); Stephen Holmes and Cass R Sunstein, *The Cost of Rights: Why Liberty Depends on Taxes* (WW Norton 2000); Thomas W Pogge, *World Poverty and Human Rights* (Polity Press 2002) ch 2; Raymond Plant, 'Social and Economic Rights Revisited' (2003) 14 *King's College Law Journal* 1, 11.

(45) See Jan Narveson, *Morality and Utility* (Johns Hopkins UP 1967) 235-36; Elizabeth Ashford, 'The Duties Imposed by the Human Right to Basic Necessities' in Thomas Pogge (ed), *Freedom from Poverty as a Human Right: Who Owes What to the Very Poor?* (OUP 2007) 216-17.

(46) Eg Amartya Sen, 'Elements of a Theory of Human Rights' (2004) 32 *Phil & Pub Aff* 315, 339. See also Eddy (n 43) 354.

(47) See Raymond Geuss, *History and Illusion in Politics* (CUP 2001) 146; Susan James, 'Rights and Enforceable Claims' (2003) 103 *Proceedings of the Aristotelian Society* 133. Much of this is inspired by Onora O'Neill's famous critique of 'manifesto rights'. See eg 'Women's Rights, Whose Obligations?' in Onora O'Neill, *Bounds of Justice* (CUP 2000) 99. Although her writings sometimes seem to imply this much (eg Onora O'Neill, *Towards Justice and Virtue: A Constructive Account of Practical Reasoning* (CUP 1996) 134), O'Neill has not gone so far as to deny that rights may exist, even if they are not 'realized' or 'matched' by a set of distributed obligations.

(48) Griffin (n 41) 34; Alan Gewirth, *Reason and Morality* (U Chicago Press 1978) 64; Raymond Plant, 'The Moral Basis of Welfare Provision' in Raymond Plant, Harry Lesser, and Peter Taylor-Gooby, *Political Philosophy and Social Welfare: Essays on the Normative Basis of Welfare Provision* (Routledge and Kegan Paul 1980) 61; Alan Gewirth, 'The Basis and Content of Human Rights' in Alan Gewirth, *Human Rights: Essays on Justification and Application* (U Chicago Press 1982) 53; Raymond Plant, 'Needs, Agency, and Welfare Rights' in J Donald Moon (ed), *Responsibility, Rights, and Welfare: The Theory of the Welfare State* (Westview Press 1988) 60.

(49) Most authors do not even raise the question. Gewirth does raise it, but never answers it. See Alan Gewirth, *The Community of Rights* (U Chicago Press 1998) 105.

(50) Griffin (n 41) 37-39; Gewirth, *Reason and Morality* (n 48) 246-47. In a highly illuminating analysis, Donald Regan has argued Gewirth's case requires that agents value the freedom to pursue their future projects *whatever they turn out to be*. Donald Regan, 'Gewirth on Necessary Goods: What is the Agent Committed to Valuing?' in Michael Boylan (ed), *Gewirth: Critical Essays on Action, Rationality and Community* (Rowman and Littlefield 1999). Similarly agents must also value the ability to pursue their future projects whatever they turn out to be.

(51) Brian Tierney, *The Idea of Natural Rights: Studies on Natural Rights, Natural Law and Church Law 1150-1625* (Wm B Eerdmans 1997).

(52) Not many moral philosophers would regard this as a flaw. Their self-assumed task is not to catalogue human rights.

**Siegfried van Duffel**

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Siegfried van Duffel an assistant professor at Nazarbayev University. He was trained as a philosopher, but completed his PhD in law at Ghent University Law School. After spending three years as an assistant professor at Groningen University, where he taught ethics and political theory, he became a post-doctoral fellow in the National University of Singapore's Department of Philosophy. In 2010, he worked on a research project with the Center of Excellence in Philosophical Psychology, Morality and Politics at the University of Helsinki. He later taught three semesters at the University of Hong Kong and one semester at the National Taiwan University in Taipei. Mr van Duffel is widely published, with articles appearing in the *European Journal of Philosophy*, *The Encyclopedia of Political Thought*, and *The Pacific Philosophical Quarterly*, among others. Currently, his main project is to complete a book on human rights and cultural differences that aims to describe human rights theories as an aspect of the culture in which they were developed.