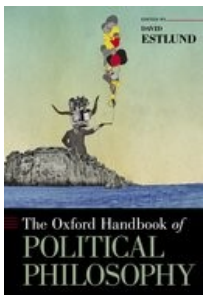

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CHAPTER

15 Human Rights

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Abstract

This article assesses recent attempts by philosophers to shed light on the justification of international legal human rights and, in the light of this assessment, to indicate the direction that fruitful theorizing should take. Among the main findings are: philosophical discourse that uses the phrase *human rights* to refer both to moral human rights and international legal human rights promotes confusion; philosophers tend to assume, rather than argue, for the Grounding View, the thesis that to justify international legal human rights it is necessary to show that they are grounded, at least in significant part, in moral human rights; and the assumption that legal human rights are best seen as attempts to help realize moral human rights fits well with the justificatory language of the core human rights documents and with the actual history of the development of international legal human rights through treaties following the ratification of the Universal Declaration of Human Rights.

Keywords: political theory, political philosophy, international legal human rights, moral human rights

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1. What is a Philosophical Theory of "Human Rights" About?

There is a long philosophical pedigree for the concept of human rights as moral rights that all people possess, regardless of whether these rights are recognized in law or social practice and independently of whether the individual has done anything to earn them, such as contribute to society. For brevity I will call such rights *moral human rights*. Nowadays the term *human rights* is often used differently to refer to the *international legal human rights* that are the focus of *international human rights practice* (hereafter, the practice). In the practice the term is also used to refer to rights that *should* be international legal human rights, as when new international human rights treaties are proposed.

The practice includes a consensus that there is a core set of documents that contain canonical statements of rights and indicate their moral foundations. These documents include, at minimum, the Universal

Declaration of Human Rights (UDHR), the Covenant on Civil and Political Rights (ICCPR), and the Covenant on Economic, Social, and Cultural Rights (ICESCR). Because its highly developed jurisprudence influences the interpretation of international legal human rights worldwide, the European Convention on Human Rights (ECHR) may also be added to the list. Human rights practice is the totality of institutional and organizational efforts to promote international legal human rights, including the activities of treaty bodies and other international organizations such as the UN Human Rights Council; the judicial application of legal
p. 280 human rights in regional human rights regimes ↳ and in domestic courts; the activities of domestic and human rights nongovernmental organizations (NGOs); and policies that make foreign aid, access to loans and credits, and membership in multilateral institutions conditional on meeting international human rights standards.

Recently philosophers have developed theories that aim to shed critical light on international legal human rights. A key point of contention is whether international legal human rights are best understood, at least in significant part, as an attempt to realize moral human rights through international law.[1] If they are, then a satisfactory justification for having a system of international legal human rights, and for the inclusion of particular rights in it, depends on whether an adequate theory of moral human rights can be produced.

The Ambiguity of "Human Rights"

Philosophers invite confusion when they use the phrase *human rights* without specifying whether they mean international legal human rights or rights that should be international legal rights or moral human rights. For example, Beitz (2010, 109) argues that human rights practice is a global practice in which states have duties to respect and promote international legal human rights in the case of their own citizens and in which their failure to do so provides a pro tanto reason for other states to take corrective action. On this view, the practice, including the system of international legal human rights, presupposes a world of states. Given the centrality of international legal human rights in the practice, the most charitable interpretation of Beitz's use of the phrase *human rights* is that he is referring to rights that are or, according to the best interpretation of the practice, should be international legal human rights.

Tasioulas (2010, 114) takes himself to be providing an objection to theories such as Beitz's by pointing out that the concept of human rights would be applicable and useful even if there were no states—if there was a single world government or global anarchy. But Beitz need not deny that the concept of human rights understood as *moral* rights applies to situations where there are not states if his claim is about the concept of international legal human rights, understood as those rights that are or should be part of the system of international legal rights. Moreover, even if one thinks that international legal human rights are grounded in moral human rights (a view Beitz disputes but Tasioulas embraces), it is perfectly consistent to hold that the concept of international legal human rights, unlike that of moral human rights, presupposes the state system.

Like Nickel (2007), Griffin (2008), Altman and Wellman (2009), and myself (Buchanan 2003) in earlier writings, Tasioulas (2010) assumes, rather than argues for, the Grounding View (GV): *An adequate justification for international legal human rights requires appeals to moral human rights*. GV is weaker than the thesis that for every international legal human right one must show that it is either identical to, or derivable from, some moral human right. Instead, GV leaves open the possibility that some international legal human rights are justified by appeal to other moral reasons.[2]

p. 281 GV needs defending for two reasons. First, there are a number of ways to justify creating an individual legal right; showing that it would help realize some moral right is only one of them. So why assume that any international legal human right presupposes the existence of moral human rights? Second, as I explain below, some versions of "political" theories of human rights, including Rawls's (1999) and Beitz's (2010),

contend that grounding international legal human rights on moral human rights is neither necessary nor workable.

Regarding the first point, consider the legal right to health care in the domestic context. It is a mistake to assume that to justify having this legal right it is necessary first to show that there is moral right to health care and then argue that the best way to realize it is to create a corresponding legal right. There are other plausible grounds for having a legal right to health care. One can argue that such a legal right is the most efficient way for citizens to fulfill duties of beneficence, that it is necessary to avoid great disutility, that a decent society requires it, that it is necessary for the sake of solidarity or to promote equality of opportunity, that it is required by a proper recognition of individual dignity or the equal moral worth of individuals, or that it is needed if the country is to be economically competitive. A combination of such justifications is sufficient to ground the legal right, without any appeal to a moral right to health care.

Similarly, one should not assume that international legal human rights are justifiable only if there are corresponding moral human rights. Consider the legal human rights to physical security, democratic governance, and due process. One can argue that considerations of utility, decency, and respect for autonomy and dignity all converge on the conclusion that there should be an international legal right to physical security. One can then argue for having other international individual legal rights, including the right to democratic governance and due process rights, by citing evidence that these are generally needed to secure the right to physical security. At neither stage of the argument is it necessary to establish the existence of moral human rights.

Justifying the Grounding View

Nevertheless, there are two weighty reasons for holding the GV. First, although the language of the core documents is muddy, by far the clearest strand of justification is the idea of giving international legal effect to preexisting moral rights that all humans have in virtue of their inherent dignity or worth. The opening passage of the UN Charter, which preceded the UDHR, proclaims that the member states "reaffirm faith in fundamental human rights, in the dignity and worth of the human person" (Preamble to the Charter of the United Nations 1945). The UDHR's preamble appeals to "the inherent dignity and ... equal and inalienable rights of all members of the human family," states that "human rights should be protected by law," and asserts that "all human beings are born free and equal in dignity and rights" (UDHR 1948). These are clearly references to moral, not legal, rights. The preambles of the ICCPR and ICESCR replicate this language almost verbatim. The ↳ most straightforward interpretation of this phrasing is that the project the UDHR begins is to establish a global practice that realizes moral rights of all human individuals that exist independently of that.[3] If this is the central goal of the practice, as articulated in the core documents, then the fact that *some* legal rights can be established without appeal to moral rights is irrelevant. International legal human rights are not just run-of-the-mill legal rights; they are legal rights designed chiefly to further the central goal of respecting the dignity or equal moral worth of individuals by realizing moral rights, and the nature of that goal imposes constraints on what counts as a justification for them.[4]

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The assertions that there are rights we are "born with," that are grounded in the "inherent" dignity of the human person, and that apply to all individuals without further qualification imply that these moral rights are unearned in the sense that their ascription does not depend on the individual's contribution to society or other meritorious behavior and are independent of their recognition in any social practice. In brief, the moral rights that are to be realized through a system of international legal rights are possessed by individuals *on their own account, simply by virtue of their being human*.

Note, however, that "simply by virtue of being human" here means only that these moral rights are ascribed to all individuals independently of any further gender, racial, ethnic, or other qualifications, such as social

contribution; it does *not* preclude the possibility that the ascription of some (or all) moral human rights depends on assumptions about institutional context. It also does not imply that these rights are to be deduced a priori from a concept of human nature or that they exist preinstitutionally in a state of nature. Thus, for example, one can say that the right to freedom of the press implies an institution that has not always existed in human society but it is still a right that people have simply by virtue of their humanity; this means that the right is ascribable to all of us, not just those who meet further qualifications beyond being human. To the extent that international legal human rights are created to help realize moral human rights, then, a necessary condition for justifying international legal human rights is showing that there are moral human rights.

Although the core documents appeal to moral human rights, they do not rely on a theory of them; hence, it is not surprising that they and subsequent human rights treaties sometimes make implausible claims about what should be included in a system of international legal human rights. For example, ICESCR notoriously includes the right to periodic holidays with pay. This putative right is too specific to be included in a list of legal rights intended to apply to all societies. In contrast, it is plausible to assert that, under modern conditions, there is a moral human right to respite from work without serious economic loss to the individual.[5] This more abstract right can be realized through a number of institutional mechanisms. Guaranteeing periodic holidays with pay is only one of them—and one that may not be appropriate or feasible in many societies. Those who hold the GV believe that a sound theory of moral human rights would provide resources for avoiding such errors. So the GV not only accords with the central idea of the practice as
p. 283 expressed ↳ in the core documents; it also promises to provide resources for critical revision of the system of international legal human rights.

Beitz (2010) suggests that there is a more basic goal of human rights practice and that a proper characterization of it need not employ the concept of moral human rights. He notes that the founding of human rights practice was a response to the widely held perception, in the ruins of World War II and the Holocaust, that it was necessary to devise a discourse and a set of institutions that would protect individuals from harm inflicted by their own states (Beitz 2010, 130–33). But Beitz's account is seriously incomplete: He fails to note that, very early on, indeed with the drafting of the UDHR, the dominant view was that achieving the needed protection required a clear affirmation of the principle that individuals were all *equally worthy* of serious protections *on their own account*, that is, independently of whatever value they derive from their membership in a national or ethnic or racial group and independently of their contribution to society. The UN Charter, the UDHR, and the two Covenants are scrupulous in avoiding any suggestion that the possession of these rights is conditional in any of those ways, instead insisting that all human individuals, without any further qualification, possess them. They, as well as subsequent conventions, use the language of inherent dignity to convey this fundamental idea.[6] They could just as well have used the language of equal moral worth (or basic moral equality). Beitz's characterization of human rights practice includes the idea that individuals are to be protected but not that they are worthy of protection on their own account, omitting the key idea of dignity. Strangely, it also ignores the clear references to moral human rights in the core documents.

Beitz is correct to emphasize that the practice began as a response to World War II and the Holocaust, but he does not explain why the need to protect against such horrors took the form of international legal rights of individuals rather than legal duties of states (with no correlative rights of any kind); rights of ethnic, racial, or religious groups (rather than individual rights); or simply a weakening of international legal strictures against intervention in domestic conflicts. What Beitz overlooks is the fact that the fascist ideologies that were generally thought to have been the root cause of the catastrophes to which the creation of a regime of international legal human rights was the response were both *radically collectivist* and *radically inegalitarian*. They explicitly repudiated both the idea of the *equal* dignity of all human beings and the idea that all people are deserving of stringent protections *on their own account*, independently of their group membership or

contribution to society. As an extreme form of nationalism, fascism held that whatever value individuals have derives from their role in furthering the life of the collective, hence its radical collectivism. As an extreme variety of racial thought, fascism held that some humans lack significant moral worth, hence its radical inegalitarianism.

To the extent that human rights practice is a conscious reaction to the horrors wrought by fascism, it is not surprising that the core documents explicitly affirm what fascist ideology denied—hence the emphasis on the equal dignity of every human being and the notion that all individuals are entitled to stringent protections on their own account.

p. 284 This central idea—the repudiation of radical inegalitarianism and radical collectivism—could perhaps be conveyed by the notion of equal moral worth or dignity, without reference to moral human rights. But unless such abstract notions can be cashed out in more determinate requirements for how individuals are to be treated, they provide little guidance for constructing a list of international legal human rights. The idea that a proper recognition of the dignity or equal moral worth of human individuals requires respect for their moral rights adds needed content.

Theories of moral human rights can be viewed as attempts to give content to the notion of respecting dignity or equal moral worth, and the insistence that these rights are possessed by all can be seen as a clear affirmation of equal dignity or moral worth. The language of rights is better suited to the task of providing content than the language of mere duties. One can have a duty regarding a person without owing that duty to her and hence without any suggestion that the person herself is worthy of serious moral consideration in her own right. If the central goal of the practice is not just to provide substantial protections to individuals against state power but to do so on the assumption that they are all equally worthy of these protections on their own account, then the widely held view that international legal human rights are attempts to give legal effect to moral human rights makes good sense. If that is the case, then a philosophical theory of legal human rights cannot avoid reliance on an account of moral human rights.

There is a second reason to affirm the GV: It is consonant with the most natural understanding of the historical relationship between the UDHR and subsequent treaties. The UDHR is not a legal document but rather an attempt to list moral rights of all human individuals that are suitable for being given international legal effect, in the expectation that this will be realized in subsequent treaties, which did indeed occur. The UDHR does not just identify some moral values or other as being worthy of international legalization; it focuses primarily on a particular kind of moral item "unearned" rights that all human individuals have independently of their being recognized in law or social practice.

These two considerations constitute a strong prima facie case for the GV; nonetheless, several prominent theorists reject it, embracing instead a radically different understanding of international legal human rights and therefore of the practice.

Political Theories

The label "political theories of human rights" is applied to the theories of Rawls and Beitz. Both of their theories can be reasonably interpreted as consisting of two main elements: a rejection of the GV and a positive view according to which the key to justifying international legal human rights is understanding their political function in the international order. For Rawls (1999, 79) the political function is that compliance with international legal human rights (properly pruned) renders a state immune from external interference. For Beitz (2010, 30–32), violation of international legal human rights within a given state supplies other states with a pro tanto reason for taking some sort of corrective action (not necessarily coercive intervention).

p. 285 Rawls rejects theories that attempt to ground legal human rights in rights that all individuals have by virtue of their humanity/dignity or equal moral worth and instead contends that legal human rights are best conceived as specifying the conditions for intervention: If a state complies with legal human rights (or, rather, a subset of them, what Rawls calls "human rights proper"), then it is entitled to good standing in international society and should be regarded as immune to infringements of its sovereignty (Rawls 1999, 81).[7] Many critics, including Beitz, have pointed out that Rawls's characterization of the political function of international legal human rights does not fit the practice: These rights serve to do much more than mark the boundaries of immunity from intervention.

Rawls believes that the idea that all human beings have certain moral human rights simply by virtue of their humanity, dignity, or equal moral worth is inconsistent with the moral views exemplified in decent though hierarchical societies. A society qualifies as decent for Rawls if it is not aggressive toward other societies and exemplifies a common-good conception of justice; that is, the society's institutions reflect the belief that the good of each member of society counts (Rawls 1999, 68).

Rawls holds that international legal human rights, properly conceived, are the requirements that a society must meet to qualify as a form of cooperation (Rawls 1999, 65). Unfortunately, he says too little about what counts as cooperation, only contrasting it with slavery and stipulating that it includes the requirement that the good of all members of the society must be taken into account in the public order. Rawls does not say why it is so important that society be noncoercive and take every individual's good into account. One obvious answer would be that this is required by proper respect for equal moral worth or dignity. Rawls cannot avail himself of this answer, because he thinks doing so would be inconsistent with the moral views of decent hierarchical, that is, inegalitarian societies. Yet it is unclear that he can give any satisfactory answer that does not commit him to the fundamental equality of all individuals.

A society can be cooperative in Rawls's minimal sense and satisfy his criteria for decency and yet involve systematic discrimination on grounds of race or gender. Thus, his view is inconsistent with the egalitarian character of many international legal human rights (e.g., rights of equality before the law, equal rights to remedies for violations of rights, and rights against discrimination on grounds of race or gender). Quite apart from that, however, the question is this: Why should states be regarded as immune from intervention so long as they respect that minimal set of rights that is required for their society being decent and a form of cooperation in Rawls's undemanding sense? Rawls's answer is that requiring anything more substantial would violate liberalism's commitment to tolerance.

The understanding of tolerance that leads Rawls to this radically revisionist position on international legal human rights is implausible (Buchanan 2010a, 26–30). His conception of tolerance is too lax because his criteria for decency are too undemanding: They omit minimal epistemic standards. A society that is decent in Rawls's sense may deny equal rights for women or minorities because its dominant moral view is based
p. 286 on false factual assumptions. Thus, a morality that endorses systematic ↳ racial or gender discrimination would be worthy of toleration, according to Rawls, even if it relied on false beliefs about the natural inferiority (in intelligence, moral agency, etc.) of those relegated to an inferior status. In such a morality, the good of those subject to discrimination would count but would count less—perhaps much less—than the good of those that are wrongly regarded as naturally superior, *and the source of this deep inequality would be a patently false set of factual beliefs*. Rawls simply stipulates his undemanding criteria for decency. He offers no argument for them and does not address the issue of minimal epistemic standards. He suggests that the only alternatives are his notion of toleration or the unreflective, wholesale transfer of a liberal point of view to the international scene. But there is nothing peculiarly liberal about insisting on minimal epistemic standards when the stakes are extraordinarily high, as in the justification of the most basic features of society.

Beitz also rejects attempts to ground international legal human rights in moral human rights, declaring that the attempt to do so will lead the theorist to misunderstand the actual practice of human rights. But his skepticism is aimed only at the least plausible understandings of moral human rights. He assumes that moral human rights must be conceived as preinstitutional, that is, as natural rights traditionally understood (Beitz 2010, 51–53). He then notes that many international legal human rights presuppose modern institutions. As I have already noted, adherents of the GV can simply reject the assumption that moral human rights are preinstitutional. Instead, they can operate with a conception of the moral rights that all or most human beings now have, where this takes into account institutions and other social conditions, so long as these are widespread and likely to persist. Alternatively, they can conceive of moral human rights as preinstitutional but simply point out that an attempt to realize them in a system of international legal rights will need to take existing institutions into account. In either case, adherents to the GV can accommodate the fact that (at least some) legal human rights presuppose institutions. Beitz's criticism applies only to theories that *identify* legal human rights with moral rights understood as preinstitutional rights, not those that attempt to *ground* legal human rights in moral human rights. To my knowledge, no contemporary theorist holds the identity view, though many hold the GV. Once we distinguish between the grounding and the identify views, Beitz's central contention evaporates: There is nothing about the attempt to invoke moral human rights to justify international legal human rights that prejudices or distorts one's attempts to give an accurate characterization of the practice.

Although Beitz appears to reject attempts to ground international legal human rights in moral human rights, unlike Rawls, he nonetheless tries to ground them in general human interests. He says that legal human rights can be understood as protecting "urgent interests," defined as those that "would be recognizable as important in a wide range of typical lives that occur in contemporary societies" (Beitz 2010, 110). But urgent interests thus defined are incapable of generating duties, much less the directed duties, entailed by rights. To say that one has a moral right to everything that is recognized as important in a broad
p. 287 range of typical lives would be ↳ excessive, to say the least, nor would it be plausible to omit reference to moral human rights and say that every "urgent" interest thus defined deserves protection by a corresponding international legal human right.

Beitz provides no satisfactory alternative to GV—only the undeveloped notion of interests that are morally important enough to ground duties—a notion that, if fleshed out sufficiently, would presumably look rather like that of moral human rights. He admonishes theorists who subscribe to the GV to abandon it and focus on understanding human rights practice, but his own characterization of the practice indicates that it lacks the normative and conceptual resources to justify the system of international legal human rights.

My assessment of political conceptions is summarized as follows. Rawls's version is implausible because of its inaccurately narrow conception of the function of legal human rights and its defective notion of tolerance. Beitz's version is incompatible only with a version of the GV that no one seems to hold—one that asserts if international legal human rights are justified by appeal to moral human rights, then international legal human rights must not presuppose institutions.[8] Beitz's view is also normatively unsatisfying: His appeal to urgent interests falls far short of a justification for having a system of international legal rights.

2. The Inadequacy of Current Interest-Based Views

To his credit, Griffin (2008, 3) takes seriously the idea that dignity plays a central role in justifying international legal human rights. He offers a specific interpretation of dignity: It is the status of being a "normative agent." Normative agency, for Griffin, includes three elements: autonomy (the ability to have a conception of a worthwhile life), liberty (freedom from interference by others), and provision (adequate resources for implementing one's conception of a worthwhile life). Griffin contends that the best justification for international legal human rights is that they are needed to realize moral human rights (understood as protections for normative agency). Thus, he subscribes to the GV.[9]

Several philosophers argue that it is implausible to hold that normative agency is the only interest that grounds moral human rights (Raz 2010, 324–26). Consider the right against torture. It is true that being tortured can have a negative impact on one's normative agency, but it has other effects that also contribute to the justification saying that there is a right against it. Being tortured is terrifying and painful, and it tends to undermine one's capacity for trust and intimacy.

I agree that the interest in normative agency is too narrow a base for an account of moral human rights capable of grounding a plausible list of international legal human rights. There is, however, a more basic problem that broader interest-based theories such as those of Nickel (2007) and Tasioulas (2010), as well as
p. 288 needs-based ↳ accounts such as those of Miller and Altman (2009) and Wellman (2009), share with Griffin's account: The conception of interests (or needs) with which they operate is too limited to make sense of strong rights against discrimination on grounds of gender or race—a type of international legal human right that is arguably of considerable importance in the practice (Miller 2007).

Such rights, which appear in the Women's Convention and ICESCR, prohibit all forms of discrimination, not just those that are so severe that they undercut the opportunity for a minimally good life, or undermine normative agency, or thwart the satisfaction of their needs (General Assembly of the United Nations 1979, Preamble and Article 1; General Assembly of the United Nations 1976, Article 7.a.i). For example, a person might be doing exceptionally well in life but still be paid less because of her gender or color, or she might suffer discrimination of a more symbolic sort, such as being required to use separate drinking fountains or toilets. In a world with a long and shameful history of racism and sexism, such discrimination can be reasonably viewed as an affront to dignity or a denial of equal moral worth, even if it is not so damaging to a person's good as to qualify as a rights violation according to current interest-based or needs-based theories.[10]

Interest-based and needs-based theories purport to provide content for the notion of dignity or equal moral worth that figures so prominently in the discourse of human rights practice. It is plausible to hold, as they do, that respect for dignity or recognition of equal worth requires the protection of certain basic interests, including the satisfaction of needs. But the examples of "soft discrimination" noted above suggest that there is a social-comparative aspect of dignity or equal moral worth that such accounts neglect.[11]

The social-comparative aspect of dignity focuses not on whether an individual's life is minimally good (Nickel 2007), or whether she is living reasonably well as a normative agent (Griffin 2008), or whether her needs are being satisfied (Miller 2007; Altman and Wellman 2009) but rather on whether she is being treated as if she had a lower basic moral status by virtue of the fact that she is a woman or a person of color. Discriminatory treatment can be an affront to dignity in the social-comparative sense even when it does not prevent the individual from living a minimally good life, doing reasonably well as a normative agent, satisfying her needs or functioning well. The social-comparative aspect of dignity or equal worth has to do not with how well one is doing but with how one is being treated vis-á-vis others and the view of one's relative status that this treatment expresses. To capture the social-comparative aspect, it appears that current interest-based theories must either expand their conception of the interests to be protected or

acknowledge that moral human rights and consequently the international legal human rights that are designed to realize them not only protect interests but also in some instances secure the individual against the threat of being relegated to an inferior status. Needs-based theories, in contrast, seem incapable of accommodating the social-comparative aspect of dignity. To the extent that they meaningfully distinguish needs from interests, they must construe needs either in a strictly biological fashion (something like
p. 289 Maslowian drives) or as what might be called core interests, ↳ those whose satisfaction only assures a minimally satisfactory human life. On either construal, needs-based theories offer an implausibly lean conception of what dignity or respect for equal moral worth requires and cannot begin to explain the presence of strong rights of discrimination in lists of legal human rights. Two crucial questions for future research are whether a theory of international legal human rights should include the idea that dignity or equal moral worth has a social-comparative aspect, and, if so, what sort of theory can capture it. One possibility worth considering is that a proper recognition of the equal moral worth of individuals has two components: protection of basic interests and protection against being relegated to an inferior status (even when this does not undermine basic interests).

3. Insufficient Attention to the Institutional Challenges to Human Rights Practice

Institutions and the Scope and Conflict Problems

Those who subscribe to the GV typically think that a theory of moral human rights is needed to resolve questions about the proper scope of international legal human rights and to address conflicts among them. But in the practice, international legal human rights are specified and conflicts among them are addressed through the attempts of treaty bodies to monitor compliance, the work of NGOs in translating treaty obligations into concrete behavioral standards and policies, domestic legislation and judicial decisions, and rulings by courts in regional human rights regimes.

If one looks only at the rights-norms as they appear in treaties, their abstractness and the lack of resources in the documents for specifying their scope and resolving conflicts among them will naturally lead one to conclude that the scope and conflict problems are of mammoth proportions. But this would make about as much sense as inspecting the formulation of civil and political rights in the U.S. Constitution's first ten amendments and concluding that they are so hopelessly abstract that there is no way of determining their scope or resolving conflicts among them in a principled way—ignoring the fact that their current embodiment in law is the result of a couple of centuries of legislation and adjudication.

Legal processes constitute a kind of *institutionalized practical reasoning*. This reasoning, whose quality depends on the nature of the institutions, can help specify legal norms and resolve conflicts among them in a morally plausible way. Before assuming that a philosophical theory is needed to answer questions concerning scope and conflict, one would first need to assess the effectiveness of existing legal processes in
p. 290 human rights practice in addressing these problems. One would also ↳ need to determine whether these processes are already implicitly relying on philosophical theories, perhaps underdeveloped ones. To my knowledge, no philosopher theorizing international legal human rights has addressed these questions.

An Enriched Conception of Philosophical Theory

Evaluating the resources of existing legal processes for solving scope and conflict problems will require a social moral epistemology of international legal human rights. By "social moral epistemology" I mean the systematic comparative study of the efficacy and efficiency of alternative institutions and practices so far as they facilitate the formation of justified norms and the beliefs needed for their appropriate application. A central task of social moral epistemology is to identify the features of institutions and practices that lend moral plausibility to the norms and beliefs they foster.

With respect to institutionalized norms, moral plausibility has two dimensions: procedural legitimacy and content credibility. Legitimate institutional processes can contribute to the legitimacy of the norms they produce. Procedurally legitimate norms are presumptively authoritative independently of their content. Institutional processes can also confer moral credibility on norms when they are considered from the standpoint of content, if those processes have epistemic virtues that provide assurance that the content will be appropriate, given the purpose or function of the norms. For example, if a norm is meant to protect a certain interest, then institutional processes that shape the content of the norm should be informed by accurate information about what threatens the interest and what measures will reliably counter those threats.

A social moral epistemology of international legal human rights would have to begin with an accurate characterization of the processes by which these rights are initially formulated, specified, contested, and revised and then go on to evaluate the contribution that these processes make to the moral plausibility of international legal human rights. Assuming that constitutional rights in well-developed liberal constitutional democracies have considerable moral plausibility and that this is due in part to the specific characteristics of that sort of polity, including not only its democratic character but also the quality of its legal system, one would first try to identify the relevant characteristics and make their contribution to the moral plausibility of the norms explicit. This would involve exhibiting the epistemic virtues of various institutional arrangements—for example, showing how democratic legislative processes help identify interests worthy of the exceptionally strong protection that constitutional rights provide, in part by ensuring that law making draws on reliable information about what is conducive to citizens' well-being. The next step would be to determine whether the practice contains processes that have these epistemic virtues. If the conclusion is that human rights practice is deficient in this regard, then the next task would be to devise proposals for institutional development that would remedy these defects by actions that are both feasible and consistent with the values that the practice is supposed to promote. Such an institutional approach to the normative challenges to the practice presupposes a much more ambitious role for philosophical reasoning than merely providing a theory of moral human rights. An account of which moral human rights should be realized in international law and an account of how well legal-institutional processes perform in addressing scope and conflict problems is also needed.

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4. Normative Challenges to Human Rights Practice

A philosophical theory should respond to the full range of normative challenges to human rights practice. By "normative challenges" I mean objections to or problems with the practice that bear on what our practical stance toward it should be—whether we should support it, oppose it, seek to reform it, or try to dismantle it. So far, I have argued that the proper strategy for justifying international legal human rights, if the primary goal is to marshal the resources of international law to protect individuals from threats to their dignity or equal moral worth, is to ground these legal rights, at least in significant part, on moral human rights. At present, there is no satisfactory theory of moral human rights and no developed attempt to ground a system of international legal human rights in such a theory. *In fact, none of the theorists discussed in this article has even addressed the fundamental question of why international, as opposed to purely domestic, legalization of moral human rights is needed.*[12] Yet even if we had a satisfactory account of how *all* international legal human rights are grounded in moral human rights, three serious normative challenges would remain: (a) the questionable legitimacy of institutional efforts to implement legal human rights; (b) the questionable legitimacy of legal human rights norms themselves, given the apparent deficiencies of the processes by which they are created and specified; and (c) the supremacy problem (the controversial nature of the claim of international human rights law to override even the most fundamental domestic law).

The Questionable Legitimacy of Institutional Implementation of Legal Human Rights

The implementation of legal human rights appears to be morally arbitrary. For example, neither China nor the United States is likely to be excluded from favorable trade regimes because of their human rights violations. This unevenness in implementation is only one aspect of a larger problem philosophers have often neglected: the legitimacy of institutional efforts to implement legal human rights. The question is not whether institutional efforts to implement legal human rights are *regarded* as legitimate but whether they *are* legitimate—whether the institutions that wield power in the name of human rights do so with rightful authority.

p. 292 Even if all states ratified all human rights treaties, the legitimacy of institutional efforts to promote compliance with international legal human rights would still be questionable because of doubts about the legitimacy-conferring power of the state consent that creates treaty-based obligations. First, on any reasonable account of legitimacy, many states themselves lack legitimacy, so it is hard to see how their consent could confer legitimacy on institutional efforts to achieve compliance with legal human rights. Second, the asymmetry of power in the international order is so great that it is doubtful that the consent of weaker states would be sufficiently voluntary to confer legitimacy. Third, even in the case of democratic states that satisfy reasonable standards for legitimacy and are powerful enough to give genuine consent, the chains of delegation between citizens and the actors who create legal human rights treaties are disturbingly attenuated.

At least from a broadly liberal perspective, it is now thought that democracy is a necessary condition of state legitimacy. The institutions of the practice, including those that create international legal human rights and wield power to promote compliance with them, are not democratic in anything like the way legitimate states are. If this is correct, then either these international institutions are illegitimate or the requirements of legitimacy for states and international institutions differ (Buchanan and Keohane 2006).

Remarkably, none of the following books that aim to shed critical light on the justification of international legal human rights addresses these issues of institutional legitimacy: Rawls's *The Law of Peoples* (1999), Nickel's *Making Sense of Human Rights* (2007), Griffin's *On Human Rights* (2008), Talbott's *Which Rights*

Should Be Universal? (2005), Beitz's *The Idea of Human Rights* (2010), Pogge's *World Poverty and Human Rights* (2008), and Wellman's *The Moral Dimensions of Human Rights* (2011).

The Questionable Legitimacy of International Legal Human Rights Norms

The legitimacy of legal norms depends in part on the legitimacy of the processes by which they are created and their content is specified. In a liberal constitutional democracy with a developed legal system, a bill of rights is typically the outcome of processes that appear to possess considerable legitimacy, and the legitimacy of the processes lends legitimacy to the norms: These rights are usually embedded in constitutions that enjoy some sort of democratic authorization, both in their origins in representative constitutional conventions and, more important, in the option of constitutional amendment through representative processes. Further, the constitutions in which domestic bills of rights are embedded are supported by a broader democratic culture, by a legal culture and legal institutions that take the principles of the rule of law seriously, and by a structure of liberal social and political institutions, including a civil society that helps to stimulate and inform legal and political developments. Finally, the content of domestic
p. 293 constitutional rights is determined ↳ through the constitutionally structured interaction of a representative legislature and an independent judiciary. Taken together, these features give us reason to have some confidence that domestic constitutional rights enjoy both procedural legitimacy and content credibility.

Human rights treaties, in contrast, emerge from processes that inspire considerably less confidence. They are not embedded in a well-developed legal system, and at present there is neither a democratic global polity nor a global legal culture. So even if *some* system of international legal human rights could be grounded on a theory of moral human rights, this would give us little reason to think that the actual system we have is justified.

The Supremacy Issue

International human rights law claims authority over even the most legitimate states, even within what had previously been regarded as their exclusive domain, namely, the treatment of their own citizens. Among legal scholars there is an ongoing debate about the conflicting claims of legal supremacy of international human rights law on the one hand and the constitutional law of liberal-democratic states on the other. The central question is this: Why should a liberal democracy, with a well-developed constitutional law that already provides admirable legal rights for its citizens, acknowledge the supremacy of international legal human rights, so far as its treatment of its own citizens is concerned? Given the questionable legitimacy of international legal human rights norms already noted, their claim of supremacy seems all the more dubious.

When acknowledging the supremacy of international legal human rights amounts to changing the domestic constitution of a state, *how* this is accomplished may matter greatly. It can be argued, for instance, that the ordinary process for ratifying treaties is not sufficient for subordinating U.S. constitutional provisions to international legal human rights and that some more fundamental form of democratic authorization, such as a constitutional amendment or a special national legislative act, is required. None of the other philosophers mentioned engage the supremacy problem or the moral issues involved in alternative responses to it, yet these are among the most serious normative challenges to the practice.[13]

The Limits of Traditional Philosophical Theorizing

It should now be clear that attempts to provide moral justifications for international legal human rights that make no reference to the role of institutions cannot succeed in addressing the full range of normative challenges to human rights practice. Even if a convincing philosophical justification for every right listed in every human rights treaty were available, the institutional implementation of these rights would still be of questionable legitimacy. Further, such a philosophical justification would not show that states with well-developed, rights-protecting legal systems should acknowledge the supremacy of legal human rights within their borders.

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The Greater Need: Theoretical Advances or Institutional Development?

I suggest that (a) the most serious institutional challenges can be met only by further institutional development and (b) that if such development occurs, the need for a philosophical justification for legal human rights norms will diminish. The cogency of the first part of this suggestion is clear enough: If the international institutions that create and implement international legal human rights suffer a legitimacy deficit, it will be remedied only through institutional changes. In particular, these institutions will have to become more democratic or at least more resistant to the distorting influences of the great disparities of power that now exist among states, and the states that participate in them will themselves have to become more democratic.

The second part is less obvious, but the key idea is simple: The right sort of institutional development in human rights practice would produce a situation analogous to that which now exists in well-developed domestic legal systems. In such systems, legal rights are morally plausible because they are the products of legitimate institutional processes and enjoy content credibility due to the epistemic virtues of the institutional processes that shape their content. It is true that content credibility is weaker than justification: The idea is that the epistemic virtues of the institutions provide reasonable, though defeasible, assurance that the content of the norms is appropriate, given their purpose. Nevertheless, where legal norms have procedural legitimacy and content credibility, the need for a deep philosophical justification for them seems less pressing.

There are two ways in which international legal human rights could gain moral plausibility through institutional development, independently of whether better philosophical justifications for them are developed. First, international institutions that create and implement international legal human rights could come to have virtues like those that confer procedural legitimacy and content credibility on legal rights in the best domestic legal systems. Second, legal human rights could become more thoroughly incorporated into domestic legal systems, with ever more domestic legal systems achieving the virtues that confer procedural legitimacy and content credibility on their laws. If this second development occurred, then the deficiencies of international institutions would not matter, because the moral plausibility of legal human rights would be assured at the domestic level. At present, much of the concern about the lack of justification for international legal human rights stems from the fact that they are regarded as external legal requirements, imposed through international institutions of dubious legitimacy and an even more doubtful ability to specify the content of laws in morally credible ways.

The claim is not that any legal right created in a commendable institutional context is beyond criticism. Instead, it is that, so long as it does not clearly violate some important moral principle, is compatible with the central idea of the practice, and originates and survives in an institutional context that confers
p. 295 procedural legitimacy and content credibility, an international legal human right does not need a ↳ deep philosophical justification to perform its proper functions in human rights practice. Even if I am wrong about this, however, a weaker though nonetheless interesting conclusion follows from my analysis: If there

is sufficient institutional development in the practice, either through the emergence of better international institutions or through more thorough incorporation of international legal human rights into more developed domestic legal systems, then the need for a philosophical justification for international legal human rights will be no greater than the need for a justification of domestic civil and political rights.

5. Conclusion

My aim has been to assess recent attempts by philosophers to shed light on the justification of international legal human rights and, in the light of this assessment, to indicate the direction that fruitful theorizing should take. My main findings have been as follows:

1. Philosophical discourse that uses the phrase *human rights* to refer both to moral human rights and international legal human rights promotes confusion.

2. Philosophers tend to assume, rather than argue, for the GV, the thesis that to justify international legal human rights it is necessary to show that they are grounded, at least in significant part, in moral human rights. The GV requires a justification, however.

3. The assumption that legal human rights are best seen as attempts to help realize moral human rights fits well with the justificatory language of the core human rights documents and with the actual history of the development of international legal human rights through treaties following the ratification of the Universal Declaration of Human Rights. Moreover, the attempt of "political" theories to bypass the task of constructing a theory of moral human rights fails.

4. Current theories that attempt to ground international legal human rights in moral human rights have assumed that, when realized, moral human rights protect certain morally important interests or needs of individuals. It is not clear, however, that existing accounts of the relevant interests or needs can make sense of the prominence in the practice of strong rights against discrimination on grounds of gender or race.

5. Although philosophers have largely ignored them, the institutional dimension of human rights practice is subject to several serious normative challenges, and these would remain potent even if it were shown that all existing international legal human rights are grounded in moral human rights.

6. Some of the most serious normative challenges to the practice can be met only by institutional development, not better philosophical theories.[14]

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Notes

1. The qualifier "at least in significant part" is meant to leave open the possibility that some international legal human rights are grounded in other moral considerations.

2. Carl Wellman (2011, 71–84) endorses GV.

3. The preamble also includes the idea that respect for human rights is needed for international security, but it is the idea that human rights are grounded in the inherent dignity or equal worth of the human person that distinguishes the Charter, the UDHR, and the Covenants from traditional international legal discourse, marking the beginning of the modern human rights era. The language of inherent dignity or equal moral worth is also found in the Racism Convention, the Migrants Convention, the Vienna Declaration, the Children's Convention, and the Torture Convention.

4. Morsink's (1999) rigorous and widely acclaimed analysis of the intellectual origins of the UDHR and the processes by which it was drafted strongly supports this reading of the document. In particular, he provides impressive evidence that the

dominant view among the drafters was that their task was to formulate a list of moral rights possessed by all people, on the assumption that these rights would in the future be given international legal effect, and that these rights were conceived as being possessed equally by individuals on their own account, independently of social or legal recognition or being bestowed by God (what he calls the "inherence idea").

5. I thank Tony Cole for this point.

6. See, for example, the Convention on Eliminating All Forms of Discrimination Against Women, para. 1 (General Assembly of the United Nations 1979).

7. For more on Rawls on human rights, see the chapter "Rawls" by Leif Wenar in this volume.

8. Beitz suggests briefly and tentatively that a theory that grounds legal human rights in a short list of natural rights would face a dilemma: either the natural rights will be sufficiently lean to be plausible, in which case it will be hard to generate the full list of international legal rights from them; or they will be rich enough to generate the full list but at the expense of plausibility. Apart from the fact that grounding views need not construe moral human rights as natural rights (i.e., as preinstitutional), Beitz does not support his surmise by examining any attempts (such as the work of Nickel 2007, Griffin 2008, and Tasioulas 2010) to execute the grounding strategy.

9. Griffin does not distinguish clearly between moral and international legal human rights. However, he does think that his theory of moral human rights provides a critical perspective on international legal human rights: He criticizes particular international legal human rights by arguing that they cannot be grounded in moral human rights properly understood.

10. I develop this point in detail, with further examples, in Buchanan (2010b).

11. The same is true for capability theories: Being relegated to an inferior status need not undermine one's capabilities: Being relegated to an inferior status need not undermine one's capabilities for "central functionings."

12. I take up this issue in Buchanan (in press).

13. For an investigation of the supremacy issue, see Buchanan and Powell (2008).

14. For their comments on earlier versions of this chapter, I thank Samantha Besson, Matthew Braddock, Tony Cole, David Estlund, Nicole Hakimi, Kristen Hessler, Whitney Kane, Steven Ratner, Gopal Sreenivasan, and John Tasioulas.

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