Human Rights: Moral or Political?

Adam Etinson (Editor)

A Proposal for Oxford University Press

Synopsis:

Since the publication of John Rawls', *The Law of Peoples,* in 1999, the still nascent field of the philosophy of human rights has become increasingly divided. On the one hand, there are the "political" or "practical" theorists who, inspired by Rawls, believe that human rights should be understood in light of their role or function in modern international politics, e.g., as rights that set limits to national sovereignty, or that serve as the focus of international concern. On the other hand, there is the amorphous group of theorists – variously identified as "orthodox", "humanist", "naturalistic", "traditional", "moral", or "philosophical" – that do not fall into this camp. These thinkers take the international political role of human rights to have a less definitive philosophical significance. So, for instance, rather than identify human rights by their performance of some contemporary political function (or set thereof), such thinkers will typically identify human rights by their distinctive moral features, such as their profound importance and universality.

This volume will be the first to address this ongoing and, by now, well-entrenched philosophical dispute. By the same token, it will also explore new and undeveloped dimensions of that dispute. Up to now, the debate between political theorists and their opponents has revolved around questions about the nature and grounds of human rights, as well as the methodology of human rights theory more generally. But as a debate that is, at core, preoccupied by tensions and quandaries that are generated by the dual status of human rights as both moral rights, on the one hand, and as legally posited and politically practiced rights, on the other, it in fact raises a much broader set of questions. Out of that broader set, this volume will explore a handful of important topics that have not yet been thoroughly addressed in the philosophical literature. These include questions about the relevance of the history of human rights to the philosophical understanding thereof, about the relationship between human rights morality and law, about the value and validity of politically realist critiques of human rights, about the tension between individual and collective human rights, about the feasibility of human rights, and about their alleged "utopian" ideological status.

To discuss these important topics, the volume brings together many of the most respected scholars working in the field of human rights today, including scholars from the United States, Australia, the United Kingdom, Canada, Finland, Norway, Germany, and Switzerland. With an introduction, followed by sixteen newly commissioned chapters, and sixteen attendant commentaries, all focused on a related set of questions that lie at the very center of contemporary philosophical debates about human rights, the volume will

make a major contribution to the philosophical literature. The composition and agenda of the volume is also innovative and markedly interdisciplinary. It brings together many of the most prominent international scholars in the philosophy of human rights and in moral and political philosophy more generally (Benhabib, Besson, Buchanan, Chatterjee, Coady, Donnelly, Forst, Frazer, Jones, Kymlicka, Nickel, Raz, Sangiovanni, Sreenivasan, Waldron, Weinstock, Wellman), several prominent international scholars in human rights law, politics, and history (Brown, Føllesdal, Koskenniemi, Kumm, Letsas, McCrudden, Moyn, Orford, Nesiah, Song), as well as promising scholars earlier in their careers, whose work will shape these fields in future (Brownlee, Cruft, Etinson, Gilabert, Flynn, Mayr).

The chapters fall into seven groups, outlined below. Each main author, chapter topic, and commentator has been carefully selected to ensure coherency of fit between authors and assigned topics, between main authors and commentators, and between assigned topics and the broader theme of the volume. Full chapter abstracts and titles are provided at the end of the proposal.

Section Overviews:

I. The Relevance of History

Both "moral" and "political" theorists consider the contemporary practice of human rights to be an important starting point for the philosophical understanding thereof. But such theorists have been equivocal about how to circumscribe that practice, with some seeing it as beginning in 1948 with the signing of the Universal Declaration of Human Rights (UDHR), and others leaving the question wide open. Moreover, few theorists have been willing to acknowledge the formidable historical roots of the contemporary practice of human rights, and the fact that the latter is unlikely to be well conceived without a thorough understanding of the former (so-called "political" theorists seem especially guilty of this). These two chapters and two commentaries will address this pertinent yet unexplored issue in the philosophy of human rights: the philosophical relevance of the history of such rights. Authors will examine how the various historically contingent roles of human rights may (or may not) shed light on questions about their conceptual nature and theoretical understanding. Among other historical theses, Samuel Moyn's provocative and much-discussed claim that the modern notion of human rights is conceptually distinct from its pre-1948 counterpart will be scrutinized and discussed (Samuel Moyn is contributing a chapter that appears later in the volume, in Section VII).

Main authors: (1) Christopher McCrudden; (2) Martti Koskenniemi

Commentators: (1) Jeffrey Flynn; (2) Wendy Brown

II. The Moral-Political Debate

These four chapters and four commentaries, which directly engage in the contemporary debate between "moral" and "political" conceptions of human rights, are a crucial focal point of the volume. Some of the questions that they will address are conceptual (e.g.,

What, if anything, is really at issue in the debate between these two conceptions of human rights? Are these conceptions really incompatible and distinct?) Some questions are substantive (e.g., Which, if any, conception of human rights is correct?) And others will evaluate the debate in more general terms (e.g., Is the moral-political debate a philosophically productive one? Does the debate rest on some mistaken assumption(s)? Should it be abandoned in the future?) A variety of contrasting answers to all of these questions will be presented and argued for by leading authors in the field.

Main authors: (1) Andrea Sangiovanni; (2) Jeremy Waldron; (3) Allen Buchanan & Gopal Sreenivasan; (4) James W. Nickel.

Commentators: (1) Rainer Forst; (2) Joseph Raz; (3) Erasmus Mayr; (4) Samantha Besson.

III. The Feasibility of Human Rights

When we consider the central dichotomy of the volume – i.e., the fact that human rights are both moral norms (and moral norms of a particular kind: *rights*), on the one hand, and that they have come to take on certain prominent roles within contemporary political and legal practice, on the other – one question that naturally arises is that of how judgments about what is institutionally feasible should affect our judgments about the normative requirements of such rights. These two chapters and two commentaries will examine this topic of the feasibility of human rights. Some of the questions that they will address are: (i) What is the precise nature of the feasibility constraints that govern rights claims? Must a right be currently feasible in *most* or *all* countries and places in order for it to be considered normatively binding? Can a right exist if it is only presently feasible in a few countries, but likely to be feasible in the near future in many countries? (ii) What different aspects of feasibility (e.g., institutional, economic, interpersonal, legal, etc.) are most important for establishing the existence of a human right? (iii) Can human rights constitute mere ideals, goals, or aspirations? As entries that address the issue of how political and practical judgments about what *is* possible should affect our judgments about how things *ought* to be, these chapters and commentaries touch not only on a central strand of the volume's main theme but also on a prominent topic in contemporary political theory itself, i.e., the distinction between, and relative merits of, ideal vs. non-ideal theory.

Main authors: (1) Kimberley Brownlee; (2) Jack Donnelly

Commentators: (1) Rowan Cruft; (2) Daniel Weinstock

IV. Between Morality and Law

Theorists on both sides of the moral-political debate take strong cues from human rights law when constructing philosophical accounts of the nature, grounds, and especially the content of such rights. Human rights law is, after all, a major component of the contemporary practice of human rights, and it is also the most prominent vehicle through which human rights have found formal expression, particularly since the ratification of

major international covenants in the 1960s and 70s. But while such theorists do take such cues, they rarely consider in any detail how moral and legal reasoning about human rights might relate and interconnect. In particular, philosophers rarely examine how current aspects of human rights law might be justified or scrutinized in light of independent normative (i.e., practical and moral) considerations, nor do they consider in any principled way what the intricacies of legal reasoning can tell us about human rights understood as moral norms. These two chapters and two commentaries will do just this. Both essays will, in particular, discuss the justification (or lack thereof) of the increasingly common allowance of a "margin of appreciation" (i.e., a degree of interpretive discretion) in human rights law, which has caught the attention of moral and legal philosophers in recent years. Such interpretive discretion has been lauded for its acceptance of pluralism and diversity but also criticized for its potential to license lax interpretations human rights norms. Moreover, these chapters and commentaries will use the legal practice of human rights to shed light on a number of standardly philosophical topics, including that of the nature of such rights, their alleged role as standards of legal and political legitimacy, and the scope of human rights and the duties they entail.

Main authors: (1) Andreas Føllesdal; (2) Matthias Kumm

Commentators: (1) George Letsas; (2) Carl Wellman

V. The Challenge of Political Realism

Another question raised by the central dichotomy of the volume is that of whether moral reasoning about human rights has any real relevance to the political and legal practice thereof at all. This is the political realist's infamous worry about human rights. Indeed, given their status as international standards of morality and state conduct, some of the most formidable and longstanding criticisms of human rights have been put forward by those committed to some form of political realism, a view that has had a significant influence on the interpretation of international relations, and that is skeptical about the role of morality in politics (i.e., the domain of *power*) in general. These two chapters and two commentaries will assess the value, validity, and ultimate relevance of such realist critiques of human rights. Some of the questions that will be considered include that of whether human rights act as vehicles for unjust international acts (and if so, what this might mean for normative thinking about human rights), and whether human rights reinforce current relations of political power or whether they aim to reform them and serve as instruments of individual empowerment.

Main authors: (1) C.A.J. Coady; (2) Pablo Gilabert

Commentators: (1) Anne Orford; (2) Elizabeth Frazer

VI. Human Rights and Political Communities

Human rights are classically understood to be the rights of individual human beings against other persons and/or institutions. Since the advent of the anti-colonial movements of the 1960s and 70s, however, such rights have been extended to whole communities in

the form of collective rights to self-determination, cultural preservation, and international political participation. It is fairly easy to see why collective rights of this sort have been granted the status of being human rights by many. For one, granting them such status is a way of acknowledging their profound moral importance. But this extension of the category of human rights also raises questions that touch on the central dichotomy of the volume. For instance, do human rights as moral rights (i) act as a check on the political powers and interests of nation-states (including their frequent interest in ethnic conformity), or do they (ii) serve to support those powers and interests, or (iii) both? These two chapters and two commentaries will examine the complex relationship between human rights and the rights of political communities. In particular, two main topics will be addressed. First, authors will question whether there is a basic normative tension between the human rights of individuals and those of political communities. So, for instance, the human rights to self-determination, to nationality, and cultural preservation appear to justify rigid border control; and yet, the human rights to asylum, freedom of movement, and equal opportunity would seem to justify just the opposite: the opening of political borders. Second, authors will question the status of the collective right to self-determination. For instance, should we understand the collective right to self-determination as itself a collective human right or as a right which, while not itself a human right, shares an affinity with human rights thinking? Or, is the collective right to self-determination wholly separate from human rights in character and foundation? To discuss these issues, this section brings together four of the leading experts in this field.

Main authors: (1) Peter Jones; (2) Seyla Benhabib

Commentators: (1) Will Kymlicka; (2) Sarah Song

VII. Human Rights as Utopia?

Human rights have come to represent not just a set of moral rights that impose obligations on individuals and/or institutions, but also a political *movement* of sorts. Indeed, in recent years, human rights have been referred to more and more in such terms, and even as the leading ideology or "utopia" of our times. This raises questions that are highly pertinent to the central concerns of the volume, since, for one, the lofty political or ideological status of human rights may influence the way we conceive of them in moral and philosophical terms. These final two chapters and two commentaries will engage in reflections of this sort. Authors will discuss the failures, successes, and limitations of the human rights movement as a whole, and in particular the question of what it would take for human rights to redeem the utopian promise that has drawn many to the movement they represent. Moreover, they will analyze the special tensions and contradictions that are generated by the dual status of human rights as both moral rights, on the one hand, and instruments of political transition (e.g., from despotism to democracy, from the rule of violence to the rule of law, etc.), on the other.

Main authors: (1) Samuel Moyn; (2) Vasuki Nesiah

Commentators: (1) Adam Etinson; (2) Deen Chatterjee

The editor will write an introduction that draws on the positions defended in the volume's chapters in order to outline the central philosophical questions at stake in the moral-political debate and its various extensions. Moreover, the introduction will provide a survey of the current state of that debate as well as a brief account of its origins and place in the broader landscape of contemporary moral, legal, and political theory. There is an urgent need for a survey article to guide researchers and students navigating this debate about human rights, and to reflect on its larger philosophical ramifications and future extensions. The introduction is intended to fill this need.

Context and Market:

The book will attract interest from an international audience of both students and professional scholars in philosophy, law, politics, international relations, sociology and related disciplines. Given the centrality of human rights to contemporary debates in each of the disciplines listed above, the volume will prove popular in a wide range of academic departments, as well as among upper-level undergraduates and postgraduates. Furthermore, the international eminence of our contributors (fourteen holding prominent posts in the USA, ten working at prestigious universities in the UK, three at eminent research institutions in Canada, two at leading universities in Australia, and one each at leading universities in Finland, Norway, Germany, and Switzerland) will give the volume worldwide appeal: it will be essential reading for scholars and students in many locations, and an invaluable tool for both teaching and research.

The editor is aware that there is another volume being edited in this subject area, also under OUP's banner – a volume edited by S. Matthew Liao, Massimo Renzo, and Rowan Cruft, and entitled, *The Philosophical Foundations of Human Rights.* The editor has been in close contact with the editors of that volume and all have agreed that there is no significant overlap between the content, agenda, and authorial composition of both volumes. On the contrary, the present volume has been designed to complement the latter by focusing on a particular debate in human rights theory, and one that isn't covered by its counterpart.

Quality Control and Timetable:

Each main author has agreed to a limit of 8,000 words, with commentators agreeing to a shorter (~3500 word) limit. With the introduction, the book as a whole will amount to around 200,000 words.

Main authors have agreed to submit draft chapters by the end of January 2013. Upon receipt of a draft chapter, the editor and the assigned commentator will provide the main author with comments. The final version of all chapters will then be due by April 2013 at the latest. Commentators will have until June 2013 to submit a first draft of their commentary, upon which the editor and the main author will subsequently provide comments. Final versions of all commentaries will then be due by the end of July 2013.

The editor will provide detailed feedback on submitted versions of the chapters, will ensure that commentaries and criticisms are well targeted, and will ensure that the final versions are highly polished and delivered on time. In addition, the editor will apply for funding for a workshop to bring main authors and commentators together, as part of the writing and editing process. The plan is to hold the workshop when the first drafts of the main essays come in at the end of January 2013.

Since agreement to contribute was secured from authors during the Winter, Spring, and Summer of 2012, most main authors have already begun writing their chapters. Indeed, one chapter (that of Pablo Gilabert) has already been submitted for editorial review.

About the Editor:

Adam Etinson is currently a Visiting Assistant Professor in the Philosophy Program at The Graduate Center of the City University of New York (CUNY). He earned his doctorate in philosophy at the University of Oxford, where he studied under Jeremy Waldron, John Tasioulas, and Roger Crisp. During the 2011-2012 academic year, he was a Postdoctoral Fellow at the Center for Research in Ethics at the University of Montreal (CREUM), as well as a Course Lecturer in the Department of Philosophy at McGill University. His main research interests are in the philosophy of human rights and liberal political theory, but he also has interests in a number of related topics in moral and political philosophy, including toleration, cosmopolitanism, and moral epistemology. His publications have appeared in *The Journal of Moral Philosophy, Human Rights Quarterly, Res Publica, Utilitas (Revise and Resubmit), The Utopian, and Dissent.*

List of Contributors:

Main authors:

- Seyla Benhabib*, Eugene Meyer Professor of Political Science and Philosophy, Yale University.*
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- Allen Buchanan, *James B. Duke Distinguished Professor of Philosophy, Duke University*.
- C.A.J. Coady, *Vice Chancellor's Fellow and Professorial Fellow in the Centre for Applied Philosophy and Public Ethics, University of Melbourne.*
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- Pablo Gilabert, *Associate Professor, Department of Philosophy, Concordia University*
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- Matthias Kumm, *Inge Rennert Professor of Law, School of Law, New York University.*
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- Samuel Moyn, *Professor of History, Columbia University.*
- Vasuki Nesiah*, Associate Professor of Practice, The Gallatin School of Individualized Study, New York University.*
- James W. Nickel, *Professor of Philosophy and Law, University of Miami.*
- Andrea Sangiovanni, *Lecturer in Philosophy, King's College London.*
- Gopal Sreenivasan, *Crown Professor of Ethics and Professor of Philosophy, The Trent Center for Bioethics, Humanities, & History of Medicine, Duke University.*
- Jeremy Waldron, *Chichele Professor of Social and Political Theory, Oxford University.*

Commentators:

- Samantha Besson, *Professor of Public International Law and European Law, University of Fribourg.*
- Wendy Brown, *Class of 1936 First Professor of Political Science, the University of California, Berkeley.*
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- Sarah Song, *Professor of Law and Associate Professor of Political Science, University of California, Berkeley.*
- Daniel Weinstock, *Canada Research Chair in Ethics and Political Philosophy, Faculty of Law, McGill University.*
- Carl Wellman, *Emeritus Professor of Philosophy, Hortense and Tobias Lewin Distinguished University Professor in the Humanities, Department of Philosophy, University of Washington.*

The Chapters:

Every contributor (including all main authors and commentators) has confirmed his or her participation in the volume. Main authors, in particular, have already submitted titles and abstracts for their chapters. Chapter titles and abstracts are included below.

I. The Relevance of History

(1) CHRISTOPHER MCCRUDDEN, "The Rise and Fall of Comparative Human Rights Law"

Recent historical debates over the sources of human rights have tended to concentrate on three periods. Some argue that the French and American Revolutionary period of the late eighteenth century is the critical period, whilst others emphasize the 1940s and the development of the Universal Declaration of Human Rights. Most recently, several scholars have emphasized the 1970s as marking a decisive shift in the development of human rights theory and practice. Samuel Moyn, in The Last Utopia: Human Rights in History, *sees the developments in the 1970s as marking a significant break from the past, emphasizing the discontinuities, and resists the notion that the development of human rights should be seen as linear. In particular, he argues that it is mistaken to see the development of human rights in the late twentieth century as inevitable, resisting a teleological explanation, and pointing to the many contingencies and choices that arose along the way when a different road could have been taken. In this extended consideration of Moyn's argument, I suggest various flaws in his analysis, in particular his failure to grasp the importance of comparative reasoning in the development of human rights in the nineteenth century, and his underestimation of discourse about dignity. I also offer some thoughts on how the debate on historical sources matters to the larger question of the nature of human rights, in particular recent philosophical debates about the political nature of human rights.*

Commentator: JEFFREY FLYNN

(2) MARTTI KOSKENNIEMI, "Invoking Rights: The Powers of a Ubiquitous Political Language"

Rights are an inextricable part of contemporary domestic and international legal speech. They are used as part of professional vocabularies and appear at political rallies to defend agendas of reform and retrenchment alike. This reflects, in part, the hegemonic position of Anglo-American traditions in legal training, in part the global predominance of a culture of individualism that sets the rules for the expression and critique of relations of power. But the idiom of (subjective) rights has a long pedigree in Western legal and political thought. Its content and significance have varied by reference to the needs of the moment, its malleability making it useful to defend and attack the most varied types of public and private power. The examination of rights has often been obstructed by the political appeal of rights language; this may have led to unhistorical and ideologically committed treatments. Recently, efforts have been made to contextualise the use of rights as part of Western politics and law. This enables viewing the expansion of rights-talk as inextricable from the globalization of Western political languages and universalisation of typical Western preferences. This essay will examine some of those uses. The idea is not to find the "origin" of rights (for there is no such single origin) but to enquire into the meaning, power and limits of a ubiquitous form of politico-legal speech.

Commentator: WENDY BROWN

II. The Moral-Political Debate

(3) ANDREA SANGIOVANNI, "What, If Anything, Distinguishes Political from Orthodox Conceptions of Human Rights? (And Why Does It Matter?)"

What distinguishes so-called 'orthodox' and 'political' conceptions of human rights? It is often said that orthodox conceptions assert that our humanity alone is sufficient to grasp the meaning, content, and grounds of human rights. Political conceptions deny this, claiming that the meaning, content and grounds of human rights must be understood in terms of their contingent social and political function in current international affairs. But to what extent do political and orthodox views really separate in these ways? After all, orthodox conceptions often hold that fidelity to the history and current practice of human rights is central to any adequate theory (Tasioulas; Griffin). And political conceptions do not deny that a normative account of our mere humanity—whether understood in terms of our rational nature or agency, some set of fundamental institution-independent interests, or some more determinate conception of our intrinsic dignity—is an essential component of any successful view (Rawls; Raz; Beitz). The two views appear to blur even further when we ask advocates of the 'political' conception: Where does the normativity of human rights come from, given that it cannot come from the mere existence of the practice itself? Here 'political' views inevitably point (as they should) to deeper, practice-independent grounds for the human rights they champion. A similar blurring happens when we turn to advocates of 'orthodox' views, and ask: How do we distinguish, in a normatively relevant way, the domain of human rights from the domain of moral rights simpliciter? Here 'orthodox' views inevitably point (as they should) to the social and political uses governing human rights practice. It is tempting to conclude that there is really no important difference between the two camps. In this paper, I shall argue that there is, but, so far, it has been drawn in the wrong place. This has had the unfortunate effect of obscuring a more nuanced set of contrasts between the two views, which emerges when we query the way each conceives of the relation between the higher-level moral principles that give human rights their normative force, on one hand, and their reflection in current human rights practice, on the other. My paper will try to reconstruct this set of contrasts and explain their importance.

Commentator: RAINER FORST

(4) JEREMY WALDRON, "From Individual Rights to Political Intervention"

This essay criticizes the view that human rights are best understood as considerations relevant to international intervention. Though of course the prevalence of rights violations is an indispensable part of the case that can sometimes be made for humanitarian intervention, we should refrain from regarding this as in any way definitive of the idea of human rights. Human rights like all rights are to be understood in individual terms--i.e., in terms of the wrongness of an assault upon some important individual interest or liberty irrespective of whether the assault is isolated or endemic in

a given society. Identifying rights in these strictly individualistic terms does not prejudice the argument that there must be many rights violations before intervention is appropriate. But it has the advantage of not inducing us to deny that rights have been violated in cases where intervention would be clearly inappropriate. The essay also argues that that the most important function served by human rights is not to address the question of international intervention but to provide a framework and perhaps a template for ordinary observance of rights in a given society. We should not be seduced by all the excitement surrounding the prospect of international intervention into neglecting the work that human rights conventions do in helping form the basis of ordinary rights observance in non-dramatic cases. For this purpose, the emphasis on individual cases (even isolated cases that fall far short of the threshold for international intervention) is all-important.

Commentator: JOSEPH RAZ

(5) JAMES W. NICKEL, "Against Functionalist Definitions of Human Rights"

This paper explores methodological issues in philosophical human rights theory and argues against defining human rights in terms of some specific function(s) that they currently perform. Functionalist definitions are found in both "orthodox" and "political" conceptions of human rights—and have similar problems. Both Rawls and Griffin come in for criticism. Picking one or several functions as the ones that define human rights always seems arbitrary—and akin to the Speech Act Fallacy identified by Geach and Searle. Uses and functions are always multiple and evolving, even within a particular era. I also argue that we do not need functionalist definitions because we can define human rights in terms of their elements--both the relatively unchanging ones seen over millenia and the ones that vary on a scale of centuries or decades. Further, to add thickness to a description of human rights at a particular time we can identify characteristic uses that are illuminating but not definitional. Although the paper does not offer a history of the idea of human rights, it does sketch a possible conceptual framework for writing such a history.

Commentator: SAMANTHA BESSON

(6) ALLEN BUCHANAN & GOPAL SREENIVASAN, "Human Rights: Moral, Political, and Legal"

The debate between proponents of "moral" versus "political" conceptions of human rights has largely been misguided, unproductive, and unappreciative of the character of the task of providing a philosophical theory of human rights. Proponents of the "moral" view have assumed, rather than argued that a moral conception of human rights is the "central" or "focal" or "primary" conception and that "political conceptions" are derivative. They have also failed to appreciate how much of a philosophical theory of human rights would remain to be developed even if it were the case that a moral conception of human rights was somehow primary relative to the conception of human rights employed in the practice of international human rights. In particular, they have

overlooked the enormous gap between establishing that there is a moral human right to R and showing that there ought to be not just a legal right to R but an international legal right to R (a right to R in international law). They have also failed to take seriously the possibility that in some cases it may be justifiable for there to be an international legal right to something even if there is no corresponding moral right. Consequently, their attempts to show that there is international legal human rights inflation fail, because they beg the question when they assume that if there is no moral right to R, then there should be no international legal right to R. Proponents of "political" views have either failed to acknowledge the fact that modern human rights discourse and practice was founded in part on a conception of pre-existing moral rights or have neglected the central role that law, both domestic and international, plays in modern human rights practice. Both those who espouse "moral" conceptions of human rights and those who espouse "political conceptions" have underestimated the scope of a philosophical theory of human rights because they have not recognized the need for an account of the normative underpinnings of a human rights practice in which legal rights and legal institutions play a central role.

Commentator: ERASMUS MAYR

III. The Feasibility of Human Rights

(7) KIMBERLEY BROWNLEE, “It Always Seems Impossible Until it is Done”

One putative test for human rights is feasibility. According to James Nickel, the feasibility test is whether it is possible today to implement a given right successfully in a majority of countries. If a right cannot be implemented in a majority of countries today, then it is not presently a human right that can be claimed universally. In this chapter, I question the merits of this test. First, I distinguish two different notions of feasibility. One is that of in principle practicability. The other is that of easy present practicability. Both of these notions are distinct from the broader notion of in principle possibility. Second, I argue that there are reasons to be sceptical about the easy-practicability notion of feasibility. For one thing, such a notion implies a binary distinction between what’s feasible and unfeasible, which allows governments to let themselves off the hook if they can only partially secure a given basic need or interest. For another thing, such a notion leaves open the loophole of willful disablement. If securing people’s basic needs is not feasible in a given country because that country’s government has willfully disabled itself by spending its resources on churches or bad investments, those basic needs do not lose their human rights status. In cases of willful disablement, the government has breached its citizens’ human rights by misallocating resources. Third, I show that, to the extent that feasibility (i.e. in principle practicability) is a credible test for human rights, it must take a non-state-centred form that highlights the role that international institutions now play in human rights protection. Instead of taking ‘what is feasible in a majority of countries’ as the standard, I recommend a calculation of feasibility based upon the coordination and pooling of global resources. In relation to social and economic rights, in particular, we may look beyond states’ resources to international bodies, NGOs, and human rights champions like Amnesty International and the Red Cross when considering what is feasible. This feeds into a final observation that ‘feasibility’ should not be understood

strictly in terms of legal implementability since there are numerous official and unofficial ways to implement and honour human rights other than through legal entrenchment. As Amartya Sen notes, these ways include non-binding Declarations such as the UDHR, grassroots activism and publicity, and governments checking themselves in policy and general practice.

Commentator: ROWAN CRUFT

(8) JACK DONNELLY, "The Feasibility of Universal Human Rights"

The Universal Declaration of Human Rights presents itself as "a common standard of achievement for all peoples and all nations." Can all states realistically expect to be able to implement all the enumerated rights, if not immediately, then within a politically plausible timeframe of one or two generations? Is such a goal, and thus the project of universal human rights, really feasible? I argue that it is – because universal human rights do no impose identical requirements on all states. The demands of internationally recognized human rights are graduated in a particular way. Even the poorest and most burdened state can, through its own efforts and with available international assistance, implement every internationally recognized human right in a way that is feasible for it. But even the richest and highest achieving states have more to do to meet the demands of universal human rights, as they apply to their level of resources and achievement. In other words, human rights are for all states both demanding and feasible, giving a particular, very practical, twist to the idea of a realistically utopian project.

Commentator: DANIEL WEINSTOCK

IV. The Morality of Human Rights Law

(9) ANDREAS FØLLESDAL, "The Margin of Appreciation"

The European Court of Human Rights (ECtHR) has a practice of granting states a 'Margin of Appreciation' when assessing whether they are in compliance with their obligations under the European Convention on Human Rights. The Margin of Appreciation doctrine merits philosophical attention, not least because it seems to be spreading: Several authors note that this practice is no longer limited to the ECtHR, but is also found in the International Court of Justice. Some argue that it should be adopted for international law more generally ({Shany, 2005 #49156}). What is this practice, why did it arise, and is it or can it be made normatively legitimate? The chapter addresses several issues, including the following arguments: The rampant value pluralism and variations in natural and social conditions across states counsels a certain leeway concerning how states should best respect and promote various objectives – including human rights. The room for discretion is especially important with several partly conflicting objectives, ranging from conflicts among human rights to conflicts between human rights and other important objectives. Many may argue that international or regional courts and treaty bodies should be particularly hesitant in reviewing the legislation of well functioning democracies, out of respect for the citizens' autonomy. On

the other hand there are several reasons to constrain such a margin. Firstly to ensure the objectives of the treaties – in the case of human rights treaties: the protection and promotion of individuals' human rights against state inaction or worse. A second reason to constrain the margin of appreciation is precisely to reduce the scope of discretion and hence risk of domination by the courts and treaty bodies. Flexibility in interpretation and adjudication by these bodies can be abused in the absence of mechanisms to ensure that their authority is exercised in pursuit of the stated objectives. A third reason to maintain a narrow margin is to protect the courts and treaty bodies against more powerful states.

Commentator: GEORGE LETSAS

(10) MATTHIAS KUMM, "Institutionalizing a Right to Justification: Three puzzling features of global human rights practice and how to make moral sense of them"

There are three puzzling structural features of global human rights practice – the interlinked rights practices that exist as a matter of positive law across liberal constitutional democracies, regional and global human rights regimes – that have fostered scepticism concerning its philosophical respectability. First, the scope of recognized rights is often extremely broad, rather than being more narrowly focused on things fundamental or basic to human existence (call this the problem of rights inflation). Second, many rights may be limited by any laws that meet the proportionality requirement, thereby undermining the idea that rights are trumps or fire walls that have priority over competing policy concerns (call this the problem of casual override). And third, the kind of things that can be found on lists in international, regional or national human rights documents vary considerably between jurisdictions and instruments. And even when provisions are worded similarly, they are often interpreted differently (call this the problem of variance). This article explains how a rights practice that has such a structure can be made sense of within the liberal rights tradition. Drawing on Rainer Forst's recent reconceptualization of liberal rights theory, it argues that a practice that has such a structure effectively institutionalizes a general right to justification in a way that is sensitive to relevant differences across different contexts. It is geared towards empowering individuals to have impartial and independent tribunals assessing whether burdens placed on them by acts of public authorities in particular circumstances are susceptible to plausible justifications in terms of reasons that are appropriate among free and equals.

Commentator: CARL WELLMAN

V. The Challenge of Political Realism

(11) C.A.J. COADY, "Political Realism versus Morality and Moralism in Human Rights Discourse: The Case of Armed Humanitarian Intervention"

This paper argues that human rights are universally valid moral norms, rather than grounded in political interests and contingent social practices, as some proponents of political realism have suggested. Nevertheless, the paper concedes that political realism

(in certain respects) has an enduring relevance to our understanding of human rights, since the implementation of human rights in concrete, varying circumstances involves nuanced political and cultural judgments. This opens up the possibility, even probability, that such judgments will be flawed by various forms of what I call 'moralism.' I will examine these possibilities with special reference to the role of human rights in justifying armed humanitarian intervention and to the global justice (or injustice) environment in which the discourse of human rights and of humanitarian intervention is necessarily located.

Commentator: ANNE ORFORD

(12) PABLO GILABERT, "Reflections on Human Rights and Power"

Human rights are particularly relevant in contexts in which there are significant asymmetries of power, but where these asymmetries exist the human rights project turns out to be especially difficult to realize. The stronger can use their disproportionate power both to threaten others' human rights and to frustrate attempts to secure their fulfillment. They may even monopolize the international discussion as to what human rights are and how they should be implemented. This paper explores this tension between the normative ideal of human rights and the facts of asymmetric power. It has two objectives. The first, pursued in section 2, is to reconstruct and assess a set of important power-related worries about human rights. These worries are often presented as falsifying the view that human rights exist, or at least as warranting the abandonment of human rights practice. The paper argues that the worries do not support such conclusions. Instead, they motivate the identification of certain desiderata for the amelioration of human rights practice. The paper proceeds to articulate twelve such desiderata. The second objective, pursued in section 3, is to propose a strategy for satisfying the desiderata identified in the previous section. In particular, the paper suggests some ways to build empowerment into the human rights project that reduce the absolute and relative powerlessness of human rights holders, while also identifying an ethics of responsibility and solidarity for power wielders in contexts in which power asymmetries will not dissolve. Power analysis does not debunk the human rights project. Properly articulated, it is an important tool for those pursuing it.

Commentator: ELIZABETH FRAZER

VI. Human Rights and Political Communities

(13) SEYLA BENHABIB, "Self-Determination, Borders, and Democratic Exclusion"

The right to self-determination is enshrined in Article 1 of the International Covenant on Civil and Political Rights (ICCPR). But what exactly is the scope of this right as far as the unilateral control of borders is concerned? Article 12 of the ICCPR recognizes the right of individuals to leave their countries, i.e., to emigrate. Articles 13 and 14 of the Universal Declaration of 1948 also anchored the right to emigrate, as well as the right to seek asylum from persecution under certain conditions. But how are these rights to

emigrate and to seek asylum to be reconciled with the right to self-determination of peoples, insofar as this right seems to imply unilateral control over borders? Since the surface of the earth is "territorialized," i.e., covered by nearly 193 states with their own jurisdictions, is there a contradiction between the right of peoples to self-determination and other individual rights? Every time one leaves a country, one enters another jurisdiction, so all emigration is eo ipso also "immigration," or legal or illegal entry into the territory of another. The tensions among these various rights-claims, already contained in some of the most important public law documents of our world, have given rise to various proposals among contemporary theorists. Some argue that there is "no unilateral right to control one's borders," and that there can be "no democratic justification of border controls," (Arash Abizadeh and earlier Joe Carens); others argue for a more cosmopolitan perspective and seek to ground the right of immigration upon "the common possession of the surface of the earth" (Matthias Risse); still others try to establish linkages between migration controls and a global resource tax (Thomas Pogge) or a "birthright privilege levy" (Ayelet Shachar). Theorists of national self-determination, such as David Miller, maintain, however, that the right to control one's borders is fundamental to the right of a collective to live freely. This essay will examine the scope of the right to self-determination by focusing on this tangled question of border controls.

Commentator: SARAH SONG

(14) PETER JONES, "Human Rights and the Right to Collective Self-Determination"

The doctrine of human rights (HRs) has been closely associated with the right to collective self-determination (CSD). In particular, the right of peoples to self-determination is written into the first articles of the two International Covenants (1966) through which the UN sought to give legal effect to its Universal Declaration of Human Rights (1948). How should we conceive the relationship between the right to CSD and HRs? Should we understand the right to CSD as itself a collective HR or as a right which, while not itself a HR, shares an affinity with HR thinking, particularly with HR values? Or is CSD a right that is wholly separate from HRs in character and foundation? HRs have been traditionally conceived as constraints upon political power; CSD describes a people's right to exercise power over its own members which might, in turn, imply that HRs will function as shackles on CSD. So should we see the two sorts of rights as antagonistically rather than benignly related? Finally, how do the moral or legal character of the rights at stake bear on these issues? HRs are commonly, if controversially, conceived as moral rights. But 'Peoples' are legal creations. So must their rights be legal rights or can peoples, as legal entities, possess moral rights and rights that inhabit the same moral world as HRs?

Commentator: WILL KYMLICKA

VII. Human Rights as Utopia?

(15) SAMUEL MOYN, "Human Rights, Realism, and Utopia"

This chapter considers international human rights as they have emerged in their current form and asks what it would take for them to redeem the utopian promise that has drawn many to the movement they represent. My main claim is that human rights need to be interpreted less as a moral check on politics (both domestic and international) and more as a contestatory political program with transformative ambitions. Along the way, the chapter examines how international human rights fit (both in their current and my proposed future versions) with demands for "realism" in political philosophy. Are human rights best considered what John Rawls dubbed a "realistic utopia" or do they need to take on board Raymond Geuss's calls for even more realism than liberal political philosophy typically allows?

Commentator: ADAM ETINSON

(16) VASUKI NESIAH, "Transitional Justice: The Political Futures Market and its Discontents"

Human rights have gained remarkable traction in diverse arenas of the international public sphere: from courtrooms adjudicating war crimes in Liberia to street protests against Al-Bashir in Darfur. Moreover, if human rights constitute the ascendant sector in "the political futures market" (to use Ian Brownlie's terminology), the subfield of transitional justice is blue chip. The Libyan transition from the Gaddafi era was accompanied by calls for transitional justice initiatives and ICC indictments; Serbian membership in the European Union has been intertwined with the capture of Radovan Karovic for trial in the ICTY. This paper seeks to examine the utopias called forth by this marriage of human rights accountability mechanisms on the one hand, and arguments about the practical significance of these initiatives as preconditions for development, democracy, and political society, on the other. Transitional justice is seen to marry the ethical charge of human rights with an instrumental potential of facilitating transition from dictatorship to democracy, from the rule of violence into the rule of law, etc. This dual ethical and instrumental thrust has brought about a transformation in the place of human rights in global governance mechanisms, but in many ways it has also heightened the tensions and contradictions internal to the pieties of the human rights field. This chapter will identify and analyze the stakes that attend this marriage of 'ethics' and 'expertise' in constituting the utopian political imagination in transitional justice.

Commentator: DEEN CHATTERJEE