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Kenneth Baynes

Toward a political conception of human rights

Abstract Human rights have become a wider and more visible feature of our political discourse, yet many have also noted the great discrepancy between the human rights invoked in this discourse and traditional philosophical accounts that conceive of human rights as natural rights. This article explores an alternative approach in which human rights are conceived primarily as international norms aimed at securing the basic conditions of membership or inclusion in a political society. Central to this ‘political conception’ of human rights is the idea of human rights as special (in contrast to general) rights that individuals possess in virtue of specific associative relations they stand in to one another. This view is explored and defended through a critical review of four recent political conceptions – Michael Ignatieff, John Rawls, Thomas Pogge and Joshua Cohen.

Key words Joshua Cohen · human rights · Michael Ignatieff · law of peoples · natural rights · Thomas Pogge · political conception of rights · John Rawls

The last several decades have witnessed a dramatic increase in the attention given to human rights. There are clearly many reasons for this, including the exponential rise in the number of governmental organizations and NGOs within the international arena, debates about the role of the nation-state in a ‘post-Westphalian order’, the post-cold war debates about the grounds and limits of ‘humanitarian intervention’ and the emergence of a ‘global civil society’ as one important aspect of the wider process of globalization. These and other factors have contributed to a condition in which human rights discourse has become the ‘lingua franca’ of the international community.¹ In this article, I want to explore the philosophical interpretation of this human rights phenomenon. In particular, I want to examine a more recent approach to human rights that has been called a ‘political conception of human rights’ and my aim

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is to address two broad concerns that have been raised in connection with it. The first concern is that at least some who have argued for a political conception – I am thinking especially of Michael Ignatieff – have correspondingly proposed a rather thin and limited account of the content of these rights. The idea is roughly as follows: we can only have any hope of securing broad political agreement on human rights if we adopt a minimalist approach regarding their content. This is sometimes referred to as the ‘lowest common denominator’ approach: in order to secure broad political agreement, one looks to the content of various traditions in order to find where they intersect or overlap with one another on basic values and it is this overlapping set – the lowest common denominator – that is then presented as at least the core set of human rights.² A second concern is sometimes raised in response to the first: The objection is that a ‘political conception of human rights’ must be based on a compromise that will inevitably be suspect. Human rights, however, should not be the product of a compromise but should rather be based on the best (or even truest) philosophical account that can be given.³ In some cases, however, these two concerns can be combined: it is then argued that the politically most appealing account of human rights is minimalist but that this is also the most philosophically satisfying account as well. This widespread position generally equates human rights with natural rights. By contrast, the political conception of human rights I wish to defend resists this identification of human rights with natural rights.

As I just noted, within philosophy – and within much popular understanding as well – human rights are viewed as ‘natural rights’ or ‘the rights of man’ or at least as the direct heirs to this tradition of rights.⁴ There are certainly good historical reasons for this association and there are other considerations that speak in its favor as well: for example, like natural rights, human rights are taken to be rights whose existence does not depend upon any legal or political recognition. On the contrary, they provide an independent standard or measure for judging the success or legitimacy of any particular political society. However, in this article I want to consider the view that this identification of human rights with natural rights is mistaken and can lead to significant misunderstandings about the nature and the function of human rights. Various labels for this alternative view can be found in the literature, but I shall refer to it as a political conception of human rights.⁵

An initial puzzle posed by the identification of human rights with natural rights becomes evident as soon as one reflects on the wide discrepancy between the set of human rights found in many leading human rights documents (such as the Universal Declaration of Human Rights [UDHR] or the twin 1966 Covenants on Civil and Political Rights and on Economic, Social and Cultural Rights) and the set of rights that has traditionally been called natural rights. Of course, many others have

noted this discrepancy as well and the frequent response, at least by many philosophers, has been to conclude that most of the rights contained in human rights documents are indeed not genuine human rights.⁶ A favorite example here is article 24 of the UDHR which lists a right to 'periodic holidays with pay' and the suggestion is that we should return either to the tradition of natural rights or some other philosophical account in order to settle which of the listed rights are genuine. In this same context, it is often suggested that since all natural rights are negative rights one important test for a genuine human right is whether that right is indeed a negative right: a right to periodic holidays with pay is certainly not a negative right.

However, simply because one finds this dismissal of existing human rights discourse too hasty, one is not thereby obliged to take onboard every right listed in the leading human rights documents as a genuine human right. Many human rights that have a more secure and established standing in human rights practice cannot be understood as negative rights – the right to a standard of living adequate for the health and well-being of the person (art. 25.1) or the right to a fair and public trial (art. 10) are prominent examples. Other tests are available than the test of whether the supposed human right is a negative and hence natural right.⁷ So, unless a separate argument is given for why human rights should be conceived as negative rights – and this argument must again confront the discrepancy with human rights discourse and practice – the traditional identification of human rights with natural rights should not be uncritically accepted.⁸

The discrepancy between natural rights and the rights found in human rights discourse extends beyond the fact that all natural rights are negative rights. There are other significant differences as well. According to the traditional conception, natural rights are rights that an individual possesses apart from and prior to membership in any political society, they are 'general' in nature and they are ones individuals possess 'simply in virtue of their humanity'. Similarly, natural rights are rights possessed equally by all, universal in scope, and they have a timeless and ahistorical character. Thus, the right to liberty belonged to the Greek slave as much as to John Locke and the right to property belonged to Robinson Crusoe even though no political authority existed to recognize it. A. John Simmons, a contemporary natural rights theorist, offers the following characterization:

Human rights are rights possessed by all human beings (at all times and in all places), simply in virtue of their humanity. . . . They will have the properties of universality, independence (from social or legal recognition), naturalness, inalienability, non-forfeitability, and imprescriptibility. Only so understood will an account of human rights capture the central idea of rights that can always be claimed by any human being.⁹

Again, it would be odd to describe many of the rights in the leading human rights documents as 'pre-social' or as rights individuals possess 'simply in virtue of their humanity'. Many of these rights are rather claims that only make sense within the context of definite social and political institutions: thus, the UDHR states that 'everyone has the right to take part in the government of his country, directly or through freely chosen representatives' (art. 21.1), the right to employment, the right to form and to join trade unions (art. 23), the right to education (art. 26), as well as 'the right to recognition everywhere as a person before law' and to the equal protection of the law (arts 6 and 7). These rights require social institutions for their fulfillment and are based on an understanding of the history and practice of specific institutions, so it seems strange to refer to them as 'pre-social'. It might be argued that these more concrete 'institutional' rights, at least if they are genuine rights, can nonetheless be viewed as a specification of a more natural right – such as the right to life or liberty. I do not wish to argue that it is impossible to interpret some human rights in this way. However, I do want to claim that it is not the most natural way to interpret the rights found in the leading human rights documents. And it does not appear to be a plausible strategy for some widely recognized human rights, such as a right to nationality (or membership in a political society) (art. 15). Similar considerations apply to the claim that human rights are 'general' rights, that is, rights individuals possess 'simply in virtue of their humanity' and apart from any (special) relationship they stand in to others.¹⁰ Again, this is a peculiar claim to make concerning many established human rights and it seems much more plausible to view them as '*special*' rights that individuals acquire on the basis of specific associative relations they have to others. In other respects, of course, the features of human rights favored by the political conception do coincide with the features found in more traditional accounts, e.g. urgency, weightiness, universality and broad shareability.¹¹ However, the fact that these features of human rights are shared with natural rights should not lead us to identify the two.

As I mentioned above, in recent years an alternative interpretation of human rights has been proposed that has been called a 'political conception' of human rights.¹² In general, this approach looks first to the treatment of human rights within the already existing discourse and practice of human rights or what has been called the 'human rights regime'.¹³ The guiding idea is not to assess this regime by its conformity to the tradition of natural rights or some other philosophical conception, but rather to clarify the understanding (or understandings) of human rights with respect to its own aims and purposes. Despite differences among individual theorists within this alternative approach, there is a shared conviction that human rights are not usefully conceived as natural rights. Rather human rights are understood primarily as international norms

that aim to protect fundamental human interests and/or secure for individuals the opportunity to participate as members in political society.¹⁴ These international norms also provide a standard for assessing the conduct of political societies and other governmental and non-governmental bodies. As such, the account of human rights is not simply a description of the practices of the human rights regime, but a normative framework of its own assessment. According to some theorists, human rights are to be viewed as part of a 'realistic utopia', according to others as constraints obligating any coercive social institution, and others still as basic conditions for membership in any political society. I refer to each of these approaches as political for several loosely related reasons. According to each, human rights are primarily (though not exclusively) claims against political institutions and their officials as opposed to claims against arbitrary individuals; secondly, human rights are understood primarily in connection with the basic conditions of membership in a political society (rather than as 'general' rights individuals possess 'simply in virtue of their humanity');¹⁵ and, finally, and most importantly, human rights are political in that the type of justification given for them is determined by their political role or function. Since they are norms for the assessment or evaluation of political societies and, possibly, even for the justified imposition of sanctions on them, it is important that the norms be ones that it is reasonable for political societies to acknowledge. To be sure, this is perhaps the most controversial claim in the political conception and one that is tied to what Rawls calls the fact of reasonable pluralism and I will offer some support for it below. Now I want to consider in turn four political conceptions – Ignatieff, Rawls, Pogge and Joshua Cohen.

In a highly informative review of several books marking the 50th anniversary of the UDHR, Michael Ignatieff offers some reflections on the contemporary discourse and practice of human rights that aim to avoid both of two extremes.¹⁶ On the one hand, he rejects the view that the UDHR has become the sacred text of what Elie Wiesel has called a 'world-wide secular religion'. On the other hand, he also dismisses an opposing position which claims that human rights cannot stand on a secular foundation alone but require 'transcendent moral laws'. According to the legal theorist Michael Perry, for example, the idea of human rights is 'ineliminably religious' and any notion of the dignity of the human person is at risk if its religious origins are denied.¹⁷ For Ignatieff, by contrast, it is a noteworthy feature of the UDHR that it remains silent on the question of the deeper foundations of human rights. This silence was no doubt in part the result of political compromise on the part of the drafting committee (headed by Eleanor Roosevelt), but it has its own virtues as well.¹⁸ One practical consequence is illustrated by what another legal theorist, Cass Sunstein, has called an 'incompletely

theorized agreement': by refraining from the search for agreement on a single overarching theoretical account of human rights, the drafting committee made it possible for member nations to agree to the document even though they may have given different rationales for the list.¹⁹ On this view, it is a strength and not a weakness that the UDHR does not attempt to provide one single deeper rationale for the rights that are contained in it. Rather, anticipating Rawls' own idea of an overlapping consensus, the signatories to the Declaration could each do so from within the framework of their own more comprehensive viewpoints. As such, Ignatieff argues, the UDHR makes it possible for human rights to become 'less imperial' and at the same time 'more political' (*Human Rights as Politics and as Idolatry*: 20). It is not an attempt to proclaim ultimate truth, or even a definitive and comprehensive list of all the desirable ends of human life' (ibid.), and it is certainly not presented as a new credo for a 'secular religion'. Rather, it creates a 'common framework' for deliberation among parties who might otherwise disagree (ibid.). According to Ignatieff, human rights should accordingly not be seen as 'moral trumps' that are above politics, but rather as a continuation of politics by other means. They may serve to establish a 'common ground' for argument and debate about political conflicts, but they are also thoroughly political themselves and so not able to bring political disputes to any definitive closure or conclusion (ibid.: 21). With these last remarks, Ignatieff seems to imply that human rights are part of a *modus vivendi*, an expedient and perhaps temporary compromise, rather than as a potentially more stable moral agreement as suggested by Rawls' notion of an overlapping consensus. (I will return to this point below.)

On the basis of this observation that human rights are a product of political compromise, Ignatieff also defends the view that they should be minimal in content. He defends what above I called the 'lowest common denominator' approach. There is, he claims, a tendency to inflate the language of human rights so that it begins to look like a laundry list of human aspirations – indeed, this is Ignatieff's view concerning many of the rights in the UDHR. The danger is that this inflation will weaken the value of rights language. Ignatieff thus proposes that the list of human rights should be restricted to a minimum – the protection of human life and liberty more or less as found within the natural rights tradition and as outlined by Isaiah Berlin in his defense of negative liberty. Thus, in order to bring as many people on board as possible, and in order to preserve the stronger condemnation associated with a human rights violation (including the real threat of military intervention as a response) human rights should be based on what Ignatieff calls a 'minimalist anthropology'. They should be limited to the protection of the very basic conditions of agency and based on a thin conception of moral reciprocity: the idea that others should be protected from the pain and humiliation that we could not imagine having inflicted on ourselves.

Though I find Ignatieff's attempt to develop a political conception of human rights appealing, I want to mention two related problems in his particular approach. First, his suggestion that his minimalist set of rights should be construed as a *modus vivendi* makes his political conception 'political in the wrong way' (to borrow Rawls' phrase) and diminishes the likelihood that his rights could be supported for diverse but recognizably moral considerations. Such an appeal to a political compromise also threatens the stabilizing role human rights might play as a 'common ground' for debate. Ignatieff himself seems to recognize this point when he defends his set of rights by appeal to a 'minimalist anthropology'. However, this move itself runs contrary to the idea of an undertheorized agreement in that it appeals to a particular (and controversial) account of human nature. On the other hand, Ignatieff's 'lowest common denominator' approach seeks to gain wide support by looking for an empirical or *de facto* consensus on rights among the dominant traditions. However, this strategy is not likely to succeed as there is no guarantee that such a consensus exists or that its content would be especially compelling. As Joshua Cohen convincingly argues, the aim for broad agreement by appeal to a justificatory minimalism should not be confused with a substantive minimalism about the content of human rights.²⁰ Ignatieff's lowest common denominator approach leads in the end to an unnecessary substantive minimalism and to a justificatory strategy that reflects a compromise to existing political powers. Thus, I think Ignatieff's political conception should be rejected.

The best-known political conception of human rights is the one presented by John Rawls in *The Law of Peoples*. In that work Rawls also defends a fairly minimal set of basic rights (though *not* as minimal as Ignatieff's). However, the method by which he arrives at his preferred set of rights differs importantly from Ignatieff's. Rawls does not view his set as the 'lowest common denominator' that reflects an existing overlapping consensus. Such an approach would be for Rawls 'political in the wrong way' (*Political Liberalism*: 142). It would be precisely a compromise with the status quo or existing power relations and, according to Rawls, objectionable for that reason. Though Rawls indeed proposes a 'realistic utopia', the realism is focused on what is feasible given human nature as we know it – a clear reference to Rousseau – and not on a compromise with existing power relations.²¹ Nonetheless, it remains a political (and not metaphysical) conception and the originality of his account lies in seeing how (or whether) he can avoid the charge of compromise raised against him by Pogge and others.

Central to Rawls' approach is what he calls the 'fact of reasonable pluralism' or the fact of reasonable disagreement. The phrase can be misleading though for it is not simply an empirical fact to which he appeals, but rather a claim about our (normative) reasoning capacities given certain background conditions. In the absence of coercive social

institutions, people will disagree with one another about matters of deep moral and religious value, and this disagreement cannot be chalked up to error or objectionable bias: even people reasoning in good faith and with a commitment to basic principles of sound reasoning, etc., will continue to disagree. Rawls thinks this feature of our human condition has important political consequences; in the political arena we need to find a different common ground or basis for dialogue than a 'search for truth' or a belief that one's view is true. The further details of his argument are not important here. The upshot, however, is that for purposes of public political reasoning, the framework for debate in a liberal democracy should be a set of political values that are constitutive for liberal democracy and not a deeper claim about the truth of those values. This is not skepticism, for Rawls does not deny that there may be a truth; but it is an exercise in self-restraint, given the fact that citizens who argue in good faith will disagree.

Rawls' defense of a limited set of basic human rights in *The Law of Peoples* has been the target of much criticism and confusion. In that work, he introduces a second use of the original position at the international level that parallels its role in the domestic case. However, according to his proposal, at the international level the deliberating parties are representatives of 'peoples' (or, roughly, liberal nation-states) rather than representatives of individual citizens and the 'veil of ignorance' imposed on them is less thick. The representatives, for example, are aware of their own respective domestic conception of justice and their aim is to find a set of foreign policy guidelines for a liberal polity so that their own domestic conception of justice will be secure and their own political independence or capacity for collective self-determination protected (*Law of Peoples*: 34). Given that design and aim, Rawls claims that the parties will agree to only a fairly minimal set of basic human rights (e.g. rights to subsistence, physical security, personal property, formal equality under the law and freedom of religion and thought) as well as to a duty of assistance to 'burdened societies', and not to a more robust set of liberal and democratic rights (see *Law of Peoples*: 65). Rawls is often criticized at this point for making an unacceptable compromise to what he calls non-liberal but 'decent societies' – that is, societies that realize some conception of their common good but which are nonetheless not liberal.²² (As an example, he seems to have in mind a form of constitutional theocracy where a common good conception is widely shared but where full liberal and democratic rights are not recognized.) However, that this interpretation is mistaken is, I think, clear given that he believes that even a society of only *liberal* peoples will agree to the same set of basic human rights as a society that includes non-liberal but decent societies as well.²³ Or, at least if there is an unacceptable concession to the viewpoints of non-liberal societies, it must somehow be built in at a deeper level.

Rather, Rawls seems to have two different arguments for the more minimal set of human rights, neither of which obviously relies on an unacceptable concession to non-liberal societies. First, there is an argument based on the particular *function* of human rights: since the parties to the international original position already know that their basic interests are secured by their own domestic conception of justice, this is not what motivates them. Rather, their interest is to find a set of 'international norms' for governing the interactions between 'peoples'. On this view, the function of human rights is not to provide a list of basic human entitlements necessary, for example, to achieve an adequate level of human flourishing or well-being. Rather, a primary function of human rights is to specify the limits of internal sovereignty (*Law of Peoples*: 79). And Rawls' argument at this point (whether convincing or not) is that even liberal peoples will set the limits to their sovereignty at a threshold lower than a full set of liberal democratic rights.

There is also, I believe, a second and initially more compelling argument to be found in the text. Rawls states that human rights specify a 'necessary, though not sufficient standard for the decency of domestic political and social institutions' (*Law of Peoples*: 79). He also seems to think that insofar as a political society is a genuine system of social cooperation, rather than a society based on command by force, the political authority must be committed to some common good conception and make some reasonable claim to govern in the name of its members (*Law of Peoples*: 68). Were that not the case, no genuine moral obligations could arise among its members. Further, in such a society at least some principle of reciprocity must be at work in which the terms of cooperation are justifiable to its members for reasons they can accept. Rawls' position, then, seems to be that a minimal set of human rights specifies the conditions for membership in a society conceived as a system of social cooperation and that only such a society is able to make a plausible claim to political self-determination.²⁴ So, another way to view Rawls' account of human rights is that they set the necessary conditions for the right to collective self-determination as found in article 1 of the International Covenant on Civil and Political Rights. Further, a political society that is based on mutual cooperation and not force must have reasonably broad support among its citizenry and must possess some 'common good' conception; as such, it is not likely (or at least less likely) to present a threat to peaceful international relations and so can be tolerated by a liberal people.

Among the many criticisms directed at Rawls, as this point, I want to mention only two (more or less familiar) concerns about Rawls' political conception of human rights since others will be addressed in my discussion of Cohen below. First, as many critics have noted, although Rawls' *Law of Peoples* does move beyond a Westphalian world order

in some respects – for example, in its recognition of limits to internal sovereignty and to a right of assistance – his conceptual framework nonetheless is committed to a ‘thin statism’.²⁵ This is, of course, most visible in his decision to make the parties in the second original position peoples rather than individuals. However, it also appears in other contexts as well, as in his assumption that the interests of a political society with a common good conception and the interests of individuals sufficiently coincide so that a further concern about individual human rights need not play any significant role. The rationale for this commitment is disputed and can be passed over here.²⁶ What is less in dispute, however, is that this commitment has a clear impact on the set of human rights that the parties will agree to even in the first stage of agreement between liberal peoples. The result is that, once a liberal people is assured of its peaceful relation with other peoples, there is no motivation to secure further rights for individuals. Indeed, although Rawls moves beyond Ignatieff’s minimalism, his account of human rights does not seem to leave much room for the emergence of new rights and obligations on the political terrain beyond the nation-state.²⁷ This objection to Rawls’ ‘thin statism’ is not simply the claim that he assumes that nation-states will continue to be major players in the new global order – this assumption is widely shared by many cosmopolitans as well. Rather, the objection is that, by assuming ‘thin statism’ in his theoretical construction, his account of human rights is unjustifiably compromised.

Second, more briefly, as we saw in the first argument above, Rawls links his account of human rights to a very specific function: they set the limits of internal sovereignty. The account of human rights is meant to provide a standard for the imposition of sanctions (or even intervention) on those societies that violate human rights. Although this is arguably an important function, it is not the only one. Human rights also play an important role in social critique and in social persuasion in global civil society, and they play an important role as a resource in international debate and discussion. Thus, without a compelling argument for restricting rights to this function, it is not clear that the account of human rights should in turn be restricted in this way.²⁸

A third political conception of human rights has been proposed by Thomas Pogge in connection with his argument for a basic human right to be free from poverty. His approach begins with a distinction between an ‘interactional’ and an ‘institutional’ account of morality. On an interactional account, moral obligations apply directly to individuals, whereas on an institutional account they initially apply to institutions and their corresponding practices. (The idea here is close to Rawls’ view that the basic structure of society can be a primary subject of justice and that the relevant account of social justice need not be the same as the account of justice between individuals.) Individuals then have a derivative obligation

not to participate in (the imposition of) unjust institutions and, when they do, they also have further obligations to work toward its reform and/or to aid those who are harmed by the institution.²⁹ Human rights, on this account, are primarily claims that individuals make on institutions and those who participate in them – they are then a form of special rights that are, to use Pogge's term, 'activated' by the presence of specific social institutions.³⁰

According to Pogge, this institutional approach has several advantages over other accounts. To begin, it is able to sidestep the age-old debate between positive and negative rights and duties. On the one hand, the primary moral obligation is an obligation not to participate in unjust institutions; on the other hand, it creates special obligations on the part of those who do toward those who are harmed by those institutions – and, in this respect, the account parallels negative rights theorists, like Nozick, who defend a principle of rectification. Further, at least in principle, it has the advantage of specifying more directly who has responsibility for fulfilling rights claims. Finally, though I will not pursue the topic here, Pogge also argues that his institutional account has the additional virtue of underscoring the interconnectedness of basic rights.³¹

In support of his institutional account, Pogge also offers a novel interpretation of article 28 of the UDHR which states: 'everyone is entitled to a social and international order in which the rights and freedoms set forth in this declaration can be fully realized'.³² Pogge does not interpret this article as specifying a further right but rather as a more general background condition. On the 'weak' version (which he endorses) individuals have a claim that social institutions imposed on them should secure access to their human rights. He contrasts this with a stronger reading according to which individuals have a claim to establish a social order in which human rights would be secure. Pogge rejects this stronger reading because, in such a supposed 'state of nature', it would again be unclear on whom the responsibility to bring about such an order fell. In any case, given the presence today of a global institutional order or 'global basic structure' (as he claims there is) the obligation to secure human rights now falls on everyone who collaborates with it.

Pogge's argument that human rights – including, in particular, the right to be free from poverty – are claims on institutions and those who participate in them is powerful and appealing. It has the advantage of providing a basis for broad shareability and more clearly delineating lines of responsibility for their fulfillment. Government leaders and other officials bear the greatest responsibility for securing rights for those affected; but significant responsibility also falls to those who participate in them. Moreover, what makes them distinctively human rights (as opposed to the political rights that citizens can claim against their respective governments) is that they are rights 'activated' by the presence

of a *global* unjust institutional order (*Law of Peoples*: 177). Nonetheless, some questions can be raised in connection with his analysis.

Although Pogge makes a strong case for the claim that we have a duty not to participate in unjust social institutions, it is not clear that this duty provides the best basis for understanding what rights individuals are entitled to claim. Rights to an adequate standard of living, to health care or even to be free from poverty can equally be seen as conditions for membership in a society and not primarily as claims activated by the imposition of an unjust institution. This is even more the case for many of the other rights in the UDHR such as rights to legal standing, participation and association, etc. Similarly, a more straightforward reading of article 28 would also be to see it as a demand for inclusion and not primarily as a remedy for the consequences of unjustly imposed institutions. One strength of Pogge's analysis is that it more clearly defines lines of responsibility for human rights fulfillment: those in official positions bear primary responsibility, and others share responsibility based on the extent of their own collaboration. However, it might be that a good answer to the question 'Who are the agents of human rights?' – 'who bears responsibility?' – is not at the same time the best approach for answering the question of what human rights we have (and why). In fact, I would suggest that these questions can be somewhat distinguished from one another, even if an answer to one provides some guidance for an answer to the second. (I will return to this 'claimability objection' in my discussion of Cohen below.) Finally, although Pogge is also correct to claim that an account that reveals the interdependence of human rights strengthens the claim for each, it is again less clear that the interconnected effects of the imposition of unjust institutions is the most straightforward way to argue for this interdependence. If human rights are indeed interconnected, then it will not be surprising that the imposition of unjust institutions will have an impact on many of them. But it is not obvious that the best explanation of the interdependence of human rights is the fact of the combined impact of unjust institutions upon them. I now turn to what I believe is ultimately a more satisfactory account, though one that is consistent with many of Pogge's insights.

A final political conception of human rights I would like to consider has been proposed by Joshua Cohen and Charles Beitz. Both of these theorists place a priority on fidelity to the leading human rights documents and the developing human rights regimes. One important task of philosophy is to clarify the place of human rights and their rationale in this wider discourse and sets of practices. Both also accept, like Pogge, a broadly associational account of human rights: rights and corresponding duties are created by the special relationship that individuals stand in to one another, rather than as claims individuals have 'simply in virtue of their humanity'. The development of new global institutions with

definite consequences for the opportunities and welfare of others creates new relations that transform the normative terrain beyond the borders of the nation-state. Unlike Ignatieff and Rawls, however, Cohen and Beitz argue for a more expansive set of human rights and, indeed, suggest that as the global terrain is altered, different conditions for effective inclusion in the political community are likely to follow in its wake. I will limit myself here to Cohen's account.

On Cohen's view, human rights are, *inter alia*, international norms that specify the basic conditions for membership or inclusion in a political society ('Minimalism about Human Rights': 197; and *ibid.*: 237). This view can be understood in either of two ways. On the one hand, the norms appear to specify (minimal) conditions of membership in a political society which any political society must satisfy if it is to be entitled to recognition as a member within the international community. This reading is close to Rawls' position that treats human rights as minimal conditions for a society that makes a plausible claim to political self-determination. Also like Rawls, this set of rights is less demanding than the full set of rights required for a liberal-democratic society. However, Cohen also seems to understand inclusion in a second sense: human rights specify not only terms of inclusion in this more traditional, territorially limited notion of political society, but also conditions of membership for individuals (and perhaps other moral persons) in an international political society.³³ Indeed, it could be argued that the specifically cosmopolitan aspect of human rights only emerges at this point: they are then global norms that protect individual interests and to which individuals can appeal. On this second reading, the idea is that, beyond the traditional nation-state, transnational institutions have created associative relations with others that in turn give rise to normative obligations more demanding than basic humanitarian concerns.³⁴ These global or supranational complexes of institutions or 'regimes' (including regional organizations, transnational corporations and economic institutions, various governmental organizations and an increasingly influential and vast array of NGOs) implicate individuals – through the consequences of their activities and through the involvement of their wills – such that specific rights and corresponding obligations are established. Further, these rights are human rights in the sense that they are (or should be) recognized as international norms that bind the respective regimes. Although these two senses of membership or inclusion are not incompatible, there are possible points of tension between them. The first, for example, largely conforms to the Westphalian idea that the territorial nation-state is responsible for and accountable to those living within its territory and that it must satisfy conditions to be a member in good standing of a society of societies. The second reading, by contrast, allows for a much more differentiated notion of (political) sovereignty

in which the state is one important actor among others, but is not solely responsible for the welfare of its citizens nor accountable only to those living within its borders.³⁵

Cohen's account raises a number of important and difficult questions. To begin, in viewing rights as norms that secure conditions of membership or inclusion, Cohen moves beyond the minimalism of Ignatieff while at the same time addressing his concern that human rights should be articulated apart from deeper metaphysical commitments. The distinction between substantive minimalism and justificatory minimalism, introduced by Cohen and mentioned above, is centrally important here. The idea is that membership in a political society is a concern that can be embraced from the perspective of many different comprehensive views and, indeed, is also one that can stand on its own. That is, considerations that appeal to conditions of membership can be embraced either for a variety of more comprehensive reasons or for (proper) political considerations alone. On the other hand, Ignatieff's substantive minimalism, where the concern is to restrict basic rights to the de facto overlap among comprehensive views, does not look promising in its own right. There is no particular reason to suppose that other influential comprehensive views already contain even minimal liberty rights let alone minimal conditions for membership in political society. Cohen's task, by contrast, is to challenge comprehensive views to find a way from within their own respective traditions to embrace the good of political membership. The hope is that by focusing on conditions of inclusion or membership, the justification of human rights can find a wider basis – and one that can be supported from a variety of different viewpoints – than it can by appeal to the inviolability or inherent dignity of the (pre-social) individual alone.

Second, and again in ways analogous to Ignatieff's conception, according to Cohen, human rights provide 'a terrain of deliberation and argument':³⁶ different accounts of human rights do not necessarily mean people are talking past one another, nor should human rights talk be viewed as mere 'window-dressing' for different power constellations. Rather, human rights have a practical role, on Cohen's view, in that they can be the focus of debate on the necessary or minimal conditions for membership in political society. As such, human rights also 'represent a partial statement of the content of an ideal of global public reason' ('Minimalism about Human Rights': 195). By this, Cohen means that human rights are part of 'a broadly shared set of values and norms for assessing political societies' (ibid.). Consequently, though the aim is to build a convergence on them, human rights should not be seen as 'a determinate and settled doctrine awaiting acceptance or rejection' (ibid.). Rather, deliberation and argument about human rights have an inherently reflexive character. In broad outline, the debate will be over the basic conditions for membership in a political society (in either of the

two senses I noted above). Such a debate, however, will appeal to the nature and function of the particular institutions (and their interrelations) that emerge, in particular, at the international level. It will involve consideration about the nature of the associations in question and the kinds of special obligations to which they give rise. However, there is no reason not to think that, as the terms of membership and inclusion become more demanding and complex, the set of human rights will need to be modified as well. Perhaps even, in contrast to Cohen's own position, human rights will eventually include a right to democracy itself.³⁷

Various objections can be raised against this political conception of human rights. I will briefly consider three, none of which, I think, ultimately presents a decisive challenge. One objection is that a 'political' account of human rights such as those considered here, simply misses the point of human rights – the protection of basic or fundamental human interests. Traditionally, human rights have been defended on the grounds that they secure basic human liberties or fundamental interests. And the good or value of these liberties or interests in turn rests on some appeal to the inviolability of the person or a claim about the basic dignity or worth of the person. Indeed, the preamble of the UDHR itself makes reference to the 'inherent dignity' of all members of the human family. So, the objection continues, a 'political, not metaphysical' account, which expressly avoids appeal to the moral dignity or worth of the individual and prefers instead to focus on conditions of membership, must lose sight of the fundamental point of human rights. In short, it takes the human out of human rights.³⁸ In response, I believe that this criticism misses the point of a political conception. On the one hand, it is certainly true that the point of human rights is to secure basic human needs and interests and Cohen, for example, is quite clear that inclusion or membership is important because it will protect basic human interests.³⁹ On the other hand, however, this objection itself loses sight of the idea of justificatory minimalism. If a focus on conditions of membership offers a basis for reflection and debate on basic human rights that in turn is capable of achieving wide political agreement, then a way has been found to protect fundamental human interests while remaining silent on the deeper metaphysical story to be told about human interests. This, to repeat, is an example of an 'undertheorized agreement' and not a denial that a deeper truth might exist. It might be possible to provide a justification of rights that secure basic human interests without its being necessary for that justification to appeal directly to the 'inherent dignity' of the individual or some other contested value.

A second objection to a political account, especially one like Cohen's, is that it runs afoul of the 'claimability condition'. Onora O'Neill, among others, has argued that for a human right to be a *bona fide* right, it must be possible to identify clearly those against whom the right may

be claimed. 'Unless obligation-bearers are identifiable by right-holders, claims to have rights amount only to rhetoric: nothing can be claimed, waived or enforced if it is indeterminate where the claim should be lodged, for whom it may be waived or on whom it could be enforced.'⁴⁰ Applied to Cohen, the objection would be that in the post-Westphalian scheme of differentiated sovereignty, the question of who bears the obligation to fulfill a right simply remains too indeterminate. O'Neill is certainly correct to point out that, once the list of human rights is not restricted to universal (negative) liberty rights, the question of who bears responsibility for their fulfillment becomes more complicated. (Although it should also be noted that even in the first case of negative rights, the answer is not always obvious: who, for example, is responsible for providing for a police force to protect against the violation of rights and how far does that responsibility extend?)⁴¹ At the same time, the view that a right is only a bona fide right if it is claimable seems too strong: it is possible that, under different institutional arrangements, different lines of responsibility could be devised and it does not seem to be the case that a determinate agent has to be identified in advance to establish a right. Rather, what the claimability condition does show, on a more modest reading, is that mechanisms or processes for assigning responsibility should be in place (or at least be reasonably conceivable) if a right is claimed. The membership account would seem to be in a good position to meet that constraint.

Finally, there are difficult questions that must be addressed about the relationship between the function of rights and the preferred set of human rights. Cohen himself seems to be somewhat ambivalent on this issue: on the one hand, he expresses some sympathy for the view that human rights provide a set of limits on internal sovereignty ('Minimalism about Human Rights': 195). However, as we saw in our discussion of Rawls, assigning this function to human rights tends to weigh in favor of a more restrictive list. On the other hand, as we just noted, Cohen also speaks of human rights as part of the content of an ideal of global public reason. So conceived, it is clear that human rights can have a much broader role than that of a standard for determining when sanctions might legitimately be imposed. This wider role for human rights is also clearly an important part of current human rights discourse and practice: human rights provide guidance for the proper conduct of political societies, they shape the development of international law, they serve as norms for monitoring and shaping the behavior of transnational corporations and other international organizations, they are 'weapons of critique' in a transnational civil society – a 'third force' in the words of Thomas Risse, and they also can serve as an aspirational and motivational resource.⁴² Indeed, this latter has clearly been one important role of the UDHR itself. Unfortunately, then, I do not have a ready answer

to the question about the proper function of human rights, perhaps because I harbor the hope that these functions can, if not converge, at least work in tandem. At any rate, noting the wider function of human rights, I think, supports the virtues of a political conception and weighs against any identification of human rights with the more traditional and limited set of natural rights.

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Notes

- 1 See Michael Ignatieff, 'Human Rights: The Mid-Life Crisis', *New York Review of Books* (20 May 1999).
- 2 See R. J. Vincent, *Human Rights and International Relations* (New York: Cambridge University Press, 1986), pp. 48–9; A. Milne, *Human Rights and Human Diversity* (Basingstoke, Hants: Macmillan, 1986); and, for convincing criticism, Joshua Cohen, 'Minimalism about Human Rights: the Most We Can Hope for', *Journal of Political Philosophy* 12 (2004): 190–213.
- 3 There are many versions of this response. A particularly clear and forceful case is found in John Tasioulas, 'The Moral Reality of Human Rights', in *Freedom from Poverty as a Human Right* (New York: Oxford, 2007), pp. 75–102.
- 4 See, for example, Maurice Cranston, *What are Human Rights?* (London: Bodley Head, 1973), p. 1; Maurice Cranston, 'Are There Any Human Rights?', *Dadaelus* 112 (1983): 1–17; and A. John Simmons, 'Human Rights and World Citizenship', in *Justification and Legitimacy: Essays on Rights and Obligations* (New York: Cambridge University Press, 2001).
- 5 Charles Beitz and Leif Weinar prefer the label of a 'practical' conception of human rights.
- 6 See, for example, James Griffin, 'Discrepancies Between the Best Philosophical Account of Human Rights and the International Law of Human Rights', *Proceedings of the Aristotelian Society* CI (2001): 1–28.
- 7 See, for example, Alistair Macleod, 'The Structure of Arguments for Human Rights', in *Universal Human Rights*, ed. D. Reidy and M. Sellers (Totowa, NJ: Rowman & Littlefield, 2005), pp. 17–36, who proposes a 'fairness' test and the 'public reasons' test recently proposed by Amartya Sen, 'Elements of a Theory of Rights', *Philosophy and Public Affairs* 32 (2004): 315–56. See also William Talbott, *Which Rights Should be Universal?* (New York: Oxford University Press, 2005).
- 8 One such argument, sometimes called the 'claimability objection', has been made by Onora O'Neill. The idea is that to be a valid right it must be claimable against identifiable agents, and only negative rights clearly have this feature. See discussion below.
- 9 Simmons, 'Human Rights and World Citizenship', p. 185.

- 10 The idea that natural (or human) rights must be 'general' in kind was defended by H. L. A. Hart in 'Are There Any Natural Rights?' (in *Theories of Rights*, ed. J. Waldron [New York: Oxford University Press, 1984]); this view is strongly rejected by Charles Beitz in 'What Human Rights Mean', *Daedalus* 132 (2003): 36–46.
- 11 For a discussion of these features of human rights, see Thomas Pogge, 'Human Rights and Human Responsibilities', in *Global Justice and Transnational Politics*, ed. C. Cronin and P. DeGreiff (Cambridge, MA: MIT Press, 2002), p. 159.
- 12 Recently, see, especially, Charles Beitz, 'Human Rights and the Law of Peoples', in *The Ethics of Assistance*, ed. D. Chatterjee (New York: Cambridge University Press, 2004), pp. 193–214; Cohen, 'Minimalism about Human Rights'; and Peter Jones, 'International Human Rights: Political or Metaphysical?', in *National Rights, International Obligations*, ed. S. Caney, D. George and P. Jones (Boulder, CO: Westview, 1996), pp. 183–204; for earlier political conceptions of rights see Attracta Ingram, *A Political Theory of Rights* (Oxford: Oxford University Press, 1994), Claude Lefort, 'Politics and Human Rights', in *The Political Forms of Modern Society* (Cambridge, MA: MIT Press, 1986) and Kenneth Baynes, 'Rights as Critique and the Critique of Rights', *Political Theory* 28 (2000): 451–68.
- 13 On the idea of a 'human rights regime', see, for example, A. Moravcsik, 'Explaining International Human Rights Regimes: Liberal Theory and Western Europe', *European Journal of International Relations* 1 (1995): 157–89; Charles Beitz, 'What Human Rights Mean', *Daedalus* 132 (2003): 36–46 (40); John Ruggie, 'Human Rights and the Future International Community', *Daedalus* 112 (1983): 102–4; and Thomas Risse, 'The Power of Norms versus the Norms of Power', in *The Third Force* (Washington, DC: Carnegie, 2000), p. 190.
- 14 John Rawls, *The Law of Peoples* (Cambridge, MA: Harvard University Press, 2001), pp. 27 and 78–81; and Beitz, 'Human Rights and the Law of Peoples', pp. 193–214.
- 15 On this point, see, especially, Beitz, 'Human Rights and the Law of Peoples'.
- 16 Ignatieff, 'Human Rights: The Mid-Life Crisis'; see also Michael Ignatieff, *Human Rights as Politics and as Idolatry* (Princeton, NJ: Princeton University Press, 2001), hereafter page references to this work follow in parentheses.
- 17 Michael Perry, *The Idea of Human Rights* (New York: Oxford University Press, 1998).
- 18 For a history, see Mary Ann Glendon, *A World Made New: Eleanor Roosevelt and the Universal Declaration of Human Rights* (New York: Random House, 2001).
- 19 Cass Sunstein, *Legal Reasoning and Political Conflict* (New York: Oxford University Press, 1996).
- 20 Cohen, 'Minimalism about Human Rights'.
- 21 Rawls, *The Law of Peoples*, pp. 13 and 6, n. 8; John Rawls, *Political Liberalism* (New York: Columbia University Press, 1993).
- 22 See, for example, Thomas Pogge, 'An Egalitarian Law of Peoples', *Philosophy and Public Affairs* 23(3) (1994): 195–224; and Allen Buchanan,

- 'Rawls's Law of Peoples: Rules for a Vanished Westphalian World', *Ethics* 110 (2000): 697–721.
- 23 See David Reidy, 'Political Authority and Human Rights', in *Rawls's Law of Peoples*, ed. Rex Martin and David Reidy (Oxford: Blackwell, 2006), p. 171 and Samuel Freeman, 'The Law of Peoples, Social Cooperation, Human Rights and Distributive Justice', in *Justice and Global Politics*, ed. E. Paul *et al.* (Cambridge: Cambridge University Press, 2006), p. 36 for a similar reading of Rawls.
- 24 A similar interpretation of Rawls can be found in Reidy and Freeman (above).
- 25 Andrew Kuper, 'Rawlsian Global Justice', *Political Theory* 28 (2000): 640–74.
- 26 See, for example, the conflicting interpretations of Pogge, 'An Egalitarian Law of Peoples', and Freeman, 'The Law of Peoples, Social Cooperation, Human Rights, and Distributive Justice'.
- 27 See the exchange between Thomas Nagel, 'The Problem of Global Justice', *Philosophy and Public Affairs* 33 (2005): 113–47, and Joshua Cohen and Charles Sabel, 'Extra Rempublicam Nulla Justitia?', *Philosophy and Public Affairs* 34 (2006): 147–75.
- 28 See James Nickel, 'Are Human Rights Mainly Implemented through Intervention?', in *Rawls's Law of Peoples*, ed. by Martin and Reidy; and John Tasioulas, 'From Utopia to Kazanistan: John Rawls and the Law of Peoples', *Oxford Journal of Legal Studies* 22 (2002): 367–96.
- 29 Thomas Pogge, *World Poverty and Human Rights* (Cambridge: Polity Press, 2002), p. 66 and 171; and Thomas Pogge, 'Human Rights and Human Responsibilities', in *Global Justice and Transnational Politics*, ed. Pablo De Greiff and Ciaran Cronin (Cambridge, MA: MIT Press, 2002), p. 166.
- 30 Pogge, *World Poverty and Human Rights*, p. 170.
- 31 'Human Rights and Human Responsibilities', p. 181; on the importance of the interconnectedness of rights, see also James Nickel, 'Human Rights' (Stanford Encyclopedia on-line) and Henry Shue, *Basic Rights* (Princeton, NJ: Princeton University Press, 1980), pp. 74 ff.
- 32 For Pogge's discussion, see 'Human Rights and Human Responsibilities', pp. 164 ff.
- 33 See Cohen and Sabel, 'Extra Rempublicam Nulla Justitia?'.
- 34 See *ibid.*
- 35 On the idea of differentiated (or dispersed) sovereignty, see Thomas Pogge, 'Cosmopolitanism and Sovereignty', in *World Poverty and Human Rights*; David Held, *The Global Covenant* (Cambridge: Polity Press, 2004); and Jürgen Habermas, *The Divided West* (Cambridge: Polity Press, 2006).
- 36 Cohen, 'Minimalism about Human Rights', p. 195.
- 37 Joshua Cohen, 'Is there a Human Right to Democracy?', in *The Egalitarian Conscience*, ed. Christine Sypnowich (Oxford: Oxford University Press, 2006), pp. 226–48.
- 38 See Allen Buchanan, 'Taking the Human out of Human Rights', in *Rawls's Law of Peoples*, ed. Martin and Reidy.
- 39 See Cohen, 'Minimalism about Human Rights', p. 197.
- 40 Onora O'Neill, *Towards Justice and Virtue* (Cambridge: Cambridge University Press, 1996), p. 129.

- 41 Tasioulas, 'The Moral Reality of Human Rights'.
- 42 See Nickel, 'Human Rights', p. 270, for a list of the various roles human rights fulfill.