Canadian Journal of Law & Jurisprudence XXXVII No.1 February 2024, 1-29

 doi: 10.1017/cjlj.2023.10

Human Rights, Interpretivism, and the Semantic Sting

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Abstract

What are human rights? What makes a particular human rights claim 'genuine' or 'valid'? These are difficult questions with which current philosophical literature on human rights is concerned. They are also the same kind of questions that legal philosophers asked about Law throughout the 20th century. Drawing from the similarities between the two fields, I attempt to do with the concept of human rights something similar to what Ronald Dworkin accomplished with that of Law in *Law's Empire*. First, I offer a critique of the two dominant perspectives on human rights—the Orthodox and Political views—that is similar in character to Dworkin's Semantic Sting objection to Legal Positivism. Second, I sketch an alternative, Dworkinian-inspired framework that seeks to develop the notion of human rights as an interpretive concept. According to this framework, different accounts of human rights are to be understood as expressing different interpretations of the point (or purpose) of human rights practice.

Keywords: *human rights; interpretivism; Semantic Sting; Orthodox-Political debate*

1. Introduction

People engaged with human rights in ordinary life use a distinct set of normative considerations in order to make claims about entitlements and obligations they possess vis-à-vis other persons and institutions. It is often thought that the main contribution philosophy can make to our understanding of this phenomenon is to shed light on the concept of human rights: that is, to make explicit the kinds of standards by virtue of which any of these particular judgments is to be regarded as true or false—or, in yet other words, to help us determine what constitutes 'valid' or 'genuine' human rights claims. Looking at philosophical literature, however, one finds no such thing as a unified, clear-cut answer on this front. Rather, the question of how human rights should be conceived has divided theorists into two antagonizing groups, the so-called Orthodox Views (OV) and Political Views (PV) of human rights. According to the former, human rights are moral rights possessed by all human beings simply by virtue of their humanity. The latter, in turn, claims that human rights are best understood as modern legal-political constructs that seek to place constraints on the conduct of states. Although each of these views has been analyzed extensively, not enough attention has been paid to the meaning and structure of their dispute considered in and of itself. This is what this article is about: it seeks to explore how the literature has attempted to address the problem of theoretical disagreement about human rights, and then

assess whether any of these solutions provides an adequate framework for understanding the Orthodox-Political debate, and, more broadly, the kinds of disagreements that people have in human rights practice.[1]

The text is structured as follows. In Section 2, I briefly outline OV and PV and explain why common strategies to address their disagreements fail as explanations of their dispute. In Section 3, I offer a general diagnosis of why this is so. Drawing a parallel to Dworkin's Semantic Sting objection to Legal Positivism, I contend that current philosophical discussion on human rights has been distorted by a widespread (but false) view of what language is and how it manifests itself in human rights discourse: namely, that our arguments about human rights can only be meaningful if we share the same semantic rules (or criteria) for applying that concept in particular circumstances. I argue that this assumption must be rejected for two reasons: first, it renders the Orthodox-Political debate, from which and to which this claim is advanced, meaningless; and second, it fits badly with the way the concept of human rights is actually employed in practical deliberation. To make my case as robust as possible, I then go one step further and show that commentators are by no means alone in their mistake, and that this defective picture of disagreement constitutes a core methodological assumption of OV and PV from the outset.[2] In Section 4, I sketch an alternative, Dworkinian-inspired framework that purports to take disagreements about human rights seriously. According to it, different accounts of human rights are to be understood as expressing different interpretations of the point of the human rights enterprise as a whole. This allows us to make sense of theoretical disagreement about human rights, not as 'senseless' or 'merely verbal,' but as an integral part of human rights discourse. Lastly, as an illustration of the interpretive method, I show how OV and PV can plausibly be reconstructed as competing interpretations of a general account of human rights practice which takes its purpose to be the protection and promotion of human dignity, conceived as the high-status of a self-directing agent.

As a preliminary remark, I must stress that, although my arguments in this paper draw heavily from Dworkin's *methodology* (what is known as Interpretivism), it *does not* presuppose nor develop his account of human rights or of rights simpliciter, and it should therefore be assessed on its own.

1. By 'theoretical disagreement', I mean disagreement over the criteria some human rights claim must satisfy to count as genuine or valid—that is to say, disagreement over the concept of human rights itself. See Ronald Dworkin, *Law's Empire* (Belknap Press, 1986) at 5.
2. I am prepared to admit that the interpretation of the Orthodox-Political debate I advance in this paper—which relies on the claim that Griffin, Beitz, and many other theorists share the assumption that the concept of human rights is what I call a 'criterial concept'—is a controversial one, and that it may be false. Still, I do think it is interesting and, at the very least, plausible enough to merit serious consideration.

2. The Orthodox-Political Debate

My goal in this section, as stated in the introduction, is to offer an outline as well as an interpretation of the clash between OV and PV. In doing so, I do not aim at an exhaustive bibliographic review of the subject; instead, I use the opportunity to offer the background and motivation for the argument I develop further down in the text. For the sake of brevity, I shall take my main interlocutors here to be James Griffin and Charles Beitz, as I consider their accounts to be the most comprehensive and persuasive statements of the two views given so far.

In *On Human Rights*, Griffin takes as his ultimate aim to develop the historical notion of human rights that emerges from the longstanding natural rights tradition.[3] He begins this effort by noticing two salient ideas that are, according to him, commonly taken for granted in ordinary human rights discourse: first, that human rights are moral rights that we possess simply in virtue of being human, and second, that human rights derive from the inherent dignity of the human person. Griffin's proposal, in short, is that we understand human rights as "protections of our human standing or . . . personhood."[4] By personhood, Griffin means the distinctively human capacity for normative agency, which comprises the three following basic elements:

> To be an agent, in the fullest sense of which we are capable, one must (first) choose one's own path through life—that is, not be dominated or controlled by someone or something else (call it 'autonomy'). And (second) one's choice must be real; one must have at least a certain minimum education and information. And having chosen, one must then be able to act; that is, one must have at least the minimum provision of resources and capabilities that it takes (call all of this 'minimum provision'). And none of this is any good if someone then blocks one; so (third) others must also not forcibly stop one from pursuing what one sees as a worthwhile life (call this 'liberty').[5]

Out of the notion of personhood, Griffin claims it is possible to generate most of the human rights traditionally recognized in such key international documents as the *Universal Declaration of Human Rights*.[6] However, even though the content of *some* human rights can be sufficiently spelled out solely by reference to their protective role of autonomy, liberty, and/or minimum provision, Griffin recognizes that, in most cases, personhood alone will not be enough to determine which specific protections are included in the content of a given right and which are not.[7] In order to fill in this gap, he introduces the notion of practicalities as a secondary ground to human rights. Practicalities, as he puts it, will be "empirical information about . . . human nature and human societies, prominently about the

3. See James Griffin, *On Human Rights* (Oxford University Press, 2008).
4. *Ibid* at 33.
5. *Ibid*.
6. See *Universal Declaration of Human Rights*, GA Res 217A (III), UNGAOR, 3rd Sess, Supp No 13, UN Doc A/810 (1948) 71 [*UDHR*].
7. As a standard example, Griffin mentions the right not to be tortured. See Griffin, *supra* note 3 at 33.

limits of human understanding and motivation," knowledge of which is required for human rights to be "an effective, socially manageable claim on others" in practice.[8]

Another crucial point in Griffin's account is the distinction between basic and derived rights. In discussing whether his characterization of human rights as the universal rights of personhood is compatible with the more concrete entitlements and obligations recognized in the practice, Griffin suggests we think of rights as being potentially expressed in different levels of abstraction. In this scheme, the highest level emerges from the articulation, in abstract terms, of the three components of personhood, resulting in three corresponding basic rights to autonomy, liberty, and minimum provision. Derived rights, in turn, can be divided into two categories: those derived solely from one or more fundamental rights, thus retaining their universality, and those that come about as a result of their application with increasing attention to circumstances, thus being restricted to particular social and historical contexts.[9]

All the characteristics Griffin regards as essential for human rights are at best secondary or accidental properties of human rights in the practical conception developed by Beitz in *The Idea of Human Rights*.[10] Beitz's proposal, which he sees as an improvement upon John Rawls' remarks on human rights in *The Law of Peoples*, focuses on the more recent practical and doctrinal developments undergone by the concept of human rights in the international arena.[11] Beitz argues that "human rights as we find them in contemporary world politics constitute a public political project with its own distinctive purposes, forms of action, and culture."[12] This enterprise—or, as he puts it, practice—is both political and discursive in nature, and comprises

> a set of norms for the regulation of the behavior of states together with a set of modes or strategies of action for which violations of the norms may count as reasons. The practice exists within a global discursive community whose members recognize the practice's norms as reason-giving and use them in deliberating and arguing about how to act. These norms are expressed in the main international human rights instruments—the Universal Declaration of 1948 and the major treaties intended to give legal effect to its provisions.[13]

On this view, human rights are not to be confused with fundamental natural rights, nor do they necessarily embody any previous philosophical doctrine of the inherent dignity of human beings. Rather, human rights can be seen as a special class of rights insofar (and only insofar) as they play a distinctive *function* within this practice. This role, which Beitz frames in terms of what he calls a

8. *Ibid* at 38.
9. As an illustration, one could say that the right to a free press is an application, in the specific social circumstances of modernity, of the more fundamental right to freedom of expression, which in turn is derived from, as a necessary condition of, the basic right to autonomy.
10. See Charles Beitz, *The Idea of Human Rights* (Oxford University Press, 2009).
11. See John Rawls, *The Law of Peoples* (Harvard University Press, 1999).
12. Beitz, *supra* note 10 at 13.
13. *Ibid* at 8.

two-level model, is twofold: first, human rights set standards that political institutions, i.e., nation-states, must observe in the treatment of individuals under their jurisdictions. Second, if a state fails to fulfill its responsibilities, human rights provide external agents with a *pro tanto* reason to act against the violating party in the international arena. In this way human rights are distinctively "matters of international concern."[14] This particular division of labor between states and international community is by no means an accident. Rather, it is supposed to reflect how human rights practice historically emerged as a way to address one of the main perils of a global political order composed of independent states, namely, the systematic neglect or oppression of important individual interests by political agents, which the experience of Nazi-fascism had shown to be a real and devastating possibility.

The doctrine of human rights resulting from Beitz's account differs from Griffin's in at least three important ways. First, it does not incorporate any restrictions as to the type of interests or values that may serve as grounds for human rights—such as only those possessed by all human beings as such—requiring only that they be weighty enough for their protection to be deemed a political priority, and thus a matter of international concern. Second, and relatedly, it endorses a list of rights that is broader in scope, one that cannot be accurately described as minimum conditions of any sort.[15] Indeed, Beitz goes so far as to claim that human rights "bear on nearly every dimension of a society's basic institutional structure," and "are not very much more minimal than those [rights] proposed in many contemporary theories of justice."[16] Third, it does away with the assumption that the notion of universality, in the sense of timelessness, must somehow factor into the concept of human rights, offering, in its place, a temporally-restricted understanding that conceives of them fundamentally—as opposed to merely derivatively—as protections against predictable threats that arise specifically "under typical circumstances of life in a modern world order composed of states."[17]

Comparing the two proposals, one cannot help but conclude that Griffin and Beitz seem to have very different things in mind when talking about human rights. The natural question that arises at this point is: 'What should we make of these differences?' Currently, there are two general strategies to which commentators have resorted in order to make sense of OV and PV's conflicting claims.

A first interpretation of the Orthodox-Political debate, and one that is often sponsored by PV theorists such as Beitz, claims that the whole controversy is really one-sided. It is only their approach, they say, that is truly concerned with the idea of human rights as it is actually used in practice. Those like Griffin, in

14. *Ibid* at 109.
15. *Cf* Griffin's "minimum proximally necessary for normative agency." Griffin, *supra* note 3 at 187.
16. Charles Beitz, "What Human Rights Mean" (2003) 132:1 Daedalus 36 at 39.
17. Beitz, *supra* note 10 at 109.

contrast, are described as being stuck in an "unwitting philosophical dogmatism,"[18] thus offering a way of understanding human rights which is so remote from the practice as to be irrelevant to it.[19] In this way, the argument goes, OV smuggles what they believe human rights *ought to be* into a discussion about what human rights *are*.

There are, however, good reasons to doubt this thesis. For one thing, OV theorists themselves employ similar practice-based arguments in order to vindicate their own understanding of human rights. Take, for instance, how Griffin describes his own approach as bottom-up, in that it "start[s] with ethical judgments as applied to the assessment of our societies—the judgments not just of philosophers but also of political theorists, politicians, international lawyers, and civil servants."[20] He makes the point that, if it were the case that his project was anything like an exercise in self-indulgent philosophy, why would he not have chosen to proceed in a top-down fashion, developing first a theory of value, followed by a theory of ethics, and so on, until a level of explanation that would authorize the derivation of human rights from an all-encompassing, hermetically closed, philosophical system? The reason his theory starts with the historical notion, he explains, is precisely because it lies "at the center of an on-going public discourse of human rights now used in ethics, law, and politics," i.e., because this notion is relevant to the practice.[21]

And such an orthodox reading of the practice would not be an outrageous idea. Consider, for example, the opening clauses of the *UDHR*. In its Preamble, the declaration refers to "recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family" as being "the foundation of freedom, justice and peace in the world."[22] Article 1, in turn, says that "[a]ll human beings are born free and equal in dignity and rights" and "are endowed with reason and conscience and should act toward one another in a spirit of brotherhood."[23] Finally, Article 2 claims that "[e]veryone is entitled to all the rights and freedoms set forth in this Declaration without distinction of any kind."[24] OV theorists would be correct to point out that the foundational principles that the *UDHR* takes for granted—inherent dignity, inalienable rights, freedom, equality, universal brotherhood, etc.—can be traced back to the Enlightenment natural rights tradition, and arguably to the older Christian doctrine of natural law.[25] Given these conceptual and historical continuities, it's understandable that many

18. Beitz, *supra* note 16 at 38.
19. See Joseph Raz, "Human Rights Without Foundations" in John Tasioulas & Samantha Besson, eds, *The Philosophy of International Law* (Oxford University Press, 2010) 321 at 323.
20. Griffin, *supra* note 3 at 1.
21. James Griffin, "Human Rights: Questions of Aim and Approach" (2010) 120:4 Ethics 741 at 743.
22. *UDHR, supra* note 6 at Preamble.
23. *Ibid* at art 1.
24. *Ibid* at art 2.
25. See Lynn Hunt, *Inventing Human Rights: A History* (W W Norton, 2008); *cf* Brian Tierney, *The Idea of Natural Rights: Studies on Natural Rights, Natural Law and Church Law 1150-1625* (Scholars Press, 1997).

find themselves attracted to the view that human rights practice is best seen as an extension of older struggles for universal rights, rather than a *sui generis* practice with its own unique aims and culture—and that PV, insofar as it relies on this assumption, is too extreme.[26]

Besides, it is not as if PV expressed an altogether uncontroversial understanding of the practice to begin with. Indeed, authors such as Tasioulas and Barry & Southwood have argued that Beitz's insistence that human rights be triggers of international concern undermines the integrity of human rights as a normative notion by making it contingent upon the existence of an international system of independent states.[27] If Beitz was right, it would follow that acts now universally regarded as heinous human rights violations—say, the genocide of ethnic minorities—would somehow cease to be so if the world, fifty or a hundred years from now, transitioned to an international order composed of one global state, or no states at all. Of course, one need not go so far as to make this point: even in today's world, conditions may change enough so that a rights violation that would normally trigger international concern may cease to do so. Consider, for instance, the hypothetical scenario of a group of human rights activists being tortured in Pakistan.[28] Suppose it has been unambiguously established that any form of international intervention in the region would escalate its ongoing civil war, so that it would not be justified. Suppose now that, a couple of years later, the conflict comes to a sudden (peaceful) resolution, so that intervention becomes once again feasible. Following Beitz, one would have to concede that torture, in this case, was a human rights violation before the fighting began, stopped being so while it was raging on, only to become one again immediately after it ended. Is it really plausible that whether or not we have a human right ultimately depends on arbitrary shifting circumstances such as this one?[29]

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26. Whether the fact that the natural rights tradition has historically influenced the *UDHR* and its drafters is relevant to an account of human rights depends on one's theory of interpretation. On the framework I'm advocating in this paper—'constructive interpretation'—these considerations turn out to be of minor importance. What matters, ultimately, is whether the assertions made in the *UDHR* can be justified from within the practice, in light of an overall purpose which we take it as expressing.

27. See John Tasioulas, "Towards a Philosophy of Human Rights" (2012) 65:1 Current Leg Probs 1; Christian Barry & Nicholas Southwood, "What is Special About Human Rights?" (2011) 25:3 Ethics & Intl Affairs 369.

28. The example comes from Andrea Sangiovanni, *Humanity without Dignity: Moral Equality, Respect, and Human Rights* (Harvard University Press, 2017) at 186-87.

29. One may attempt to rebut this argument by claiming that the existence conditions for a human right do not depend on their providing an *all-things-considered* reason for international action, but only a *pro tanto* one. However, as Sangiovanni observes, it is far from clear what PV theorists mean by the term 'pro tanto'. If it means that a violation would warrant an intervention *under normal circumstances*, then the objection still holds: why should the human rights we have vary with what counts as 'normal' at any given moment? If, on the contrary, it means that, *under ideal circumstances*, intervention would be justified, then a different problem arises: supposing intervention is frictionless—i.e., both costless and sure to succeed—why not extend it to the maximum number of cases one possibly can? In the end, one would be forced to conclude, equally implausibly, that *all* moral rights, even the most trivial ones, provide *some* reason for intervention, and should therefore be considered human rights. See *ibid* at 187-88.

Still, PV advocates do have a point in drawing attention to the discrepancies between the natural rights tradition and the practice. One influential critique, for instance, rightly notes that OV theorists face a threshold problem.[30] On the one hand, a broader statement of OV—'human rights are universal moral rights, period'—finds difficulty explaining why some universal moral rights are considered human rights but others are not. This would be the case, for example, of the plausible rights not to be insulted or personally betrayed, all of which are universal moral rights—in the sense that they are possessed by all human beings as such—but still do not figure in a traditional list of human rights. On the other hand, a narrower version of OV such as Griffin's—'human rights are the subset of universal moral rights required to sustain normative agency'—inevitably falls short of the more robust protections afforded by contemporary human rights doctrine such as the rights to equality before the law and to equal political participation.[31]

By comparison, PV, having defined human rights in terms of their political functions, faces no such problem—or, at least, not to the same extent as OV. For one thing, if human rights are only those moral rights that satisfy Beitz's two-level model, they clearly do not include such things as the rights not to be insulted or personally betrayed, be that because they cannot be properly enforced or protected by state agencies,—thus failing the model's first condition; or because they do not meet a certain threshold of importance so that their widespread violation would be deemed a matter of international concern—thus failing the model's second condition. At the same time, by explicitly taking as its starting point the rights contained in the *UDHR* and the legal documents that stemmed from it, which include the rights to equality before the law and to equal political participation, PV is also able to avoid the problem of positing conditions that are too narrow, or otherwise incapable of living up to the standards that make up the contemporary human rights doctrine, of which these documents are an integral part.

All in all, the discussion so far indicates that, despite what their proponents may say, both OV and PV have at least *some* foothold in the practice of human rights—the former with its emphasis on the moral dimension of human rights as protections of fundamental human interests, and the latter with its emphasis on the political roles that human rights have come to play in contemporary society. Likewise, the two views cannot be said to perfectly mirror the practice in all its aspects.

If this first strategy fails, so that one cannot dismiss either approach from the outset, perhaps the answer to our problem will turn out to be that OV and PV are not disagreeing at all. This thesis has gained traction in recent years with the emergence of the so-called Mixed or Conciliatory Views, which have been proposed in somewhat different ways, and with varying degrees of success, by a

30. See e.g. Allen Buchanan, "The Egalitarianism of Human Rights" (2010) 120:4 Ethics 679; Raz, *supra* note 19.

31. See Buchanan, *supra* note 30 at 693ff. Griffin himself acknowledges this difficulty in Griffin, *supra* note 3 at 194ff.

number of scholars.[32] Though a comprehensive review of these accounts is beyond the scope of this article, I will attempt in this section to engage with the version of the argument I believe is the most sophisticated one, namely, that of Andrea Sangiovanni.

Let us approach this second strategy, as Sangiovanni does, with a thought experiment. Imagine two theorists discussing whether or not there is a human right to education. The first one, an avid reader of Griffin, claims that the right in question does exist, because having access to certain kinds of information and instruction is a necessary condition for one to be able to choose and pursue one's path through life. The other one, influenced by Beitz, claims that there is no such thing as a human right to education, for a state failing to provide its citizens with a public education system does not provide foreign agents with reasons to intervene in that society's internal affairs. What are the two parties disagreeing about? According to Sangiovanni, nothing at all. Why is that? Suppose now that a third person joins the discussion. This third person could easily claim, without falling into contradiction, that:

(1) there is an individual moral right to education that generates third-party duties on states to provide it;
(2) this right is ultimately grounded in personhood, and hence is possessed by all human beings as such;
(3) despite its importance, a violation of this moral right would not justify, in current circumstances, international intervention against the violating state to secure it.

Thus, Sangiovanni concludes, "[t]he only thing that the two parties would be disagreeing about ... is whether to *call* that moral right a human right. This suggests ... that they are engaged in a merely verbal dispute."[33]

At first glance, Sangiovanni's argument appears to be sound, but I believe his conclusion should be resisted, lest we risk missing the point of the Orthodox-Political debate altogether. For starters, it is simply not true that OV and PV, despite disagreeing on what a human right is, converge on the substantive judgments that follow from (1), (2), and (3). If they did, it would be an agreement only in name, unless we suppose that they also converge on the judgments implied by all concepts contained in these propositions, such as 'duties', 'personhood', 'human beings', 'violation', and 'intervention', as well as on all further judgments implied by these concepts, and so on. This, of course, is too big a pill to swallow. In fact, I would go so far as to say this represents a conclusive argument against the idea, which is taken for granted by Conciliatory Views, that it is possible to find a set of criteria for the concept of human rights that is universally

32. See e.g. Laura Valentini, "Human Rights, Freedom, and Political Authority" (2012) 40:5 Political Theory 573; Sangiovanni, *supra* note 28; S Matthew Liao & Adam Etinson, "Political and Naturalistic Conceptions of Human Rights: A False Polemic?" (2012) 9:3 J of Moral Philosophy 327.
33. Sangiovanni, *supra* note 28 at 190 [emphasis in original].

agreed upon. There is no such thing, no matter how general or abstract it may be. This point will become clearer, perhaps, if we take a look at the Broad View of human rights that emerges from Sangiovanni's reflection on the Orthodox-Political debate:

> According to the Broad View, human rights are not those moral rights *possessed* in virtue of our humanity, but those moral rights whose systematic violation ought to be of universal moral, legal, and political *concern*. Any violation of a moral right that ought to garner universal moral, legal, and political concern is a human right.[34]

Does this definition express an understanding of human rights shared by OV and PV alike? The answer, once again, is no. Among other things, they would disagree as to what counts as relevant criteria of violation and universal concern—the latter would claim that violations of human rights are those capable of garnering, in modern circumstances, universal concern among the members of the international community, while the former would insist that, since a violation of human rights is a violation of interests possessed by human beings as such, it must be a suitable object of concern in all human societies in all times and places. Note, however, that the discussion would likely not even get to this point to begin with, as OV advocates would outright reject the claim that human rights *are not* those possessed in virtue of our humanity. This is not to mention further disagreements that would emerge *within* OV and PV, such as what it means for a right to be 'possessed in virtue of our humanity,' or what counts as valid expressions of universal 'moral, legal, and political concern.'[35] In the end, all Sangiovanni's definition would accomplish is to point to these further disagreements, whose nature as genuine disagreements one would still need to explain.[36]

Now, I concede that, in a sense, Sangiovanni's assessment of the Orthodox-Political debate is right: what theorists like Griffin and Beitz are disagreeing about is, ultimately, whether or not to 'call' a particular moral right a human right. Indeed, even if some version of OV and PV *could* converge on propositions (1), (2), and (3), this would not change their current stance on the Debate at all, given that their point of contention lies, not on the *truth* or *falsity* of any of these propositions, but whether or not they are *relevant* to determine what a human right is. Sangiovanni's claim, then, is no more than a restatement of the fact that their disagreement is *theoretical* in nature—i.e., a disagreement about the concept

34. *Ibid* at 191 [emphasis in original, footnotes omitted].

35. For instance, Griffin and Tasioulas disagree about which human interests or values are capable of grounding human rights. See Griffin, *supra* note 3 at 51ff; *cf* John Tasioulas, "Human Rights, Universality and the Values of Personhood: Retracing Griffin's Steps" (2002) 10:1 European J Philosophy 79. For a discussion on the different meanings PV theorists assign to the notion of concern, see John Tasioulas, "Are Human Rights Essentially Triggers for Intervention?" (2009) 4:6 Philosophy Compass 938.

36. There are also other reasons why Sangiovanni's definition is objectionable. For one, it makes no distinction between human rights and other moral rights that are not possessed by human beings, but whose systematic violation could still plausibly garner universal moral, legal, and political concern. This would be the case, e.g., of some animal rights, and the rights of collective entities such as peoples, minorities, and corporations.

of human rights itself—and it does not warrant the claim that the whole controversy is illegitimate, as he seems to imply by calling it a "merely verbal dispute."[37]

All this being said, it is simply not the case that we could choose, as Sangiovanni hopes to do, to bypass the concept of human rights altogether and argue directly about, say, what states ought to do to protect personhood, or when it is justified for foreign agents to interfere in a society's internal affairs. People have reasons to think about these matters that are not reasons of human rights, so that we cannot treat every claim about personhood or international intervention as claims about human rights. By definition, it would be impossible to even begin explaining what is distinctive about the sorts of arguments theorists have in mind when they talk about human rights without having first introduced—or, in this case, reintroduced—the idea of human rights as its own distinctive concept.[38]

3. The Semantic Sting

Having analyzed why these strategies fail individually, I should now say something about them as a whole. Notice that, fundamentally, they all share the same overarching view of what disagreement is like and when it is possible: they assume, to paraphrase Dworkin, that people may sensibly argue with one another if and only if they accept and follow the same criteria for deciding when their claims are sound, even if they cannot state exactly what these criteria are.[39] It is not difficult to see where the appeal of this view comes from, as a large number of concepts in our linguist repertoire do seem to fit such a picture of disagreement quite nicely. Following Dworkin, I shall call them "criterial concepts."[40] Think, for instance, of the noun 'book.'[41] We share this concept, and can safely employ it in conversation, because we all follow certain linguistic rules regarding its use, rules which set out criteria that supply the word's meaning and thereby provide an ultimate test for identifying instances of it. If someone was to claim their definition of 'book' somehow excluded such obvious cases as *Moby-Dick*, the rest of us would be forced to simply laugh it off and conclude that, either this person has no idea what a book is, or they have completely misread the context of the conversation—say, assuming we are talking about 'book' the verb instead of the noun, as in the phrase 'I need to book a flight to London.'

People who successfully share a criterial concept may nonetheless fall into disagreement about its proper use in some circumstances. This is especially true when the concept in question, like 'book,' contains a considerable degree of vagueness, such that, even though people agree about the criteria for its correct

37. I will come back to the question of whether or not theoretical disagreements of this sort can be legitimate in section 4.
38. For a similar argument regarding the concept of justice, see Ronald Dworkin, *Justice for Hedgehogs* (Belknap Press, 2011) at 167.
39. See Dworkin, *supra* note 1 at 45.
40. Dworkin, *supra* note 38 at 158.
41. This example comes from Dworkin, *supra* note 1 at 45-46.

use, they differ over a range of applications that each regard as borderline (or marginal). This would be the case, for example, of two people arguing over whether a very slim book is actually best referred to as a pamphlet. Still, even in these circumstances, it would make little sense to press the disagreement further, as those taking part in the conversation should have no problem realizing that their apparent disagreement is illusory—or, to use Sangiovanni's words, "merely verbal"—and continue upholding the concept as a general rule.

If this simple model of disagreement applies to all concepts, then it applies to all moral and political concepts, and, therefore, to the concept of human rights. One is then left with two options: either (1) theorists do share the same criteria for identifying instances of human rights after all; or (2) their dispute must be a pretense, be that because (2.1) their disagreements are best seen as marginal, or (2.2) they are, as in the example of 'book' (n.) *versus* 'book' (v.), using the same word with different meanings. These alternatives, however, are precisely what we already rejected in Section 2. To reiterate: with regard to (1), I argued that there is no single decision procedure for identifying instances of human rights, however abstract, that the OV and PV may be said to share. Rather, their disagreement is precisely about what these criteria are. In turn, (2.1) is false because the two views do not conceive of their differences—the scope and content of the human rights they endorse, the values they admit as potential grounds for human rights claims, and so on—as peripheral or borderline in the same way people think of the question of how many pages a work must have to be considered a book or a pamphlet. On the contrary, their disagreement also extends to pivotal (or central) cases that are at the heart of current public human rights discourse, and they have no temptation to accept, once they realize how different their criteria are, that their disagreement is not genuine.[42] Finally, regarding (2.2), I showed that OV and PV are equally concerned with the concept of human rights as it is used in contemporary human rights practice, and thus cannot plausibly be seen as talking past one another in such a silly manner.[43]

Now, it may still be argued that this model of disagreement applies to human rights because, even though it is incompatible with the kinds of disagreements that exist between *theories* of human rights, it nonetheless accurately reflects

42. To mention two examples: whether or not there is a human right to democracy, and the extent to which non-state actors—most prominently, transnational corporations—can bear responsibilities to respect and promote human rights norms.

43. One reviewer pointed out that Griffin and Beitz may be talking past one another in the sense that they may be asking different questions about the same phenomenon. For instance, one could sensibly argue that Beitz is mainly concerned with the problem of the *nature* of human rights, while Griffin is concerned with the problem of the *justification* of human rights. I believe this is false. To me, the two authors are essentially concerned with the first problem: they want to understand what human rights are, and they hope that doing so will constrain our judgments on which human rights exist and what their content actually is. The false impression that Griffin is concerned with the second problem is caused by his specific approach: for reasons I will explain below, he thinks that the best way to go about accomplishing this task is to link the concept of human rights with the value of personhood. For textual support of these claims, see Griffin, *supra* note 3 at 1; Griffin, *supra* note 21 at 741; *cf* Beitz, *supra* note 10 at 10-11, 103-05, 126-27.

the way the concept is used by regular people in human rights *practice*. But this assumes too sharp a distinction between what philosophers and ordinary practitioners are doing when they argue about human rights. True, philosophers' arguments tend to be more abstract and self-consciously articulated, yet this can only be a superficial difference. Theoretical disagreements also occur in the practice; and besides, any practical argument about human rights, no matter how narrow and limited, assumes *some* abstract idea of what human rights are while simultaneously rejecting others. At bottom, both types of argument are pieces of moral philosophy, and as such share the same overarching structure.[44]

Let me substantiate these claims with a real-life example from the jurisprudence of the European Court of Human Rights. In *Pretty v The United Kingdom,* the Court was faced with the difficult task of determining, among other things, whether the human right to life also includes a right to choose to terminate one's own life.[45] The applicant, Ms. Diane Pretty, suffered from motor neuron disease, an incurable and progressively degenerative disorder that had left her paralyzed and completely dependent on others to carry out even the simplest of daily activities. Her situation became direr when her breathing muscles started to fail, leaving her with the prospect of an agonizing death by suffocation. Since her condition made it impossible for her to take her own life, she submitted a request to the United Kingdom's Director of Public Persecutions to grant her husband immunity from persecution should he assist her to commit suicide in accordance with her wishes. This request was denied three times at the domestic level. Ms. Pretty appealed to the Court, alleging that this refusal was a violation of her human rights as guaranteed by the *European Convention on Human Rights*.[46] Her case rested on two main allegations:

1. That her plea did not conflict with Article 2 (1) of the *Convention*[47] because the latter "protected the right to life and not life itself, while the sentence concerning deprivation of life was directed towards protecting individuals from third parties, namely the State and public authorities, not from themselves."[48] It therefore "acknowledged that it was for the individual to choose whether or not to go on living and protected her right to die to avoid inevitable suffering and indignity as the corollary of the right to life."[49]
2. That the suffering that she had faced and would face in the future qualified as degrading treatment under Article 3 of the *Convention*[50] because "[w]hile the

44. See Dworkin, *supra* note 1 at 90, making the same point regarding the distinction between legal philosophy and legal practice.
45. No 2346/02, [2002] III ECHR 155 [*Pretty*].
46. See *Convention for the Protection of Human Rights and Fundamental Freedoms,* 4 November 1950, 213 UNTS 221 (entered into force 3 September 1953) [*ECHR*].
47. "Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law." *Ibid* at 6.
48. *Pretty*, *supra* note 45 at 185.
49. *Ibid.*
50. "No one shall be subjected to torture or to inhuman or degrading treatment or punishment." *ECHR*, *supra* note 46 at 7.

> Government were not directly responsible for that treatment, it … owed to its citizens not only a negative obligation to refrain from inflicting such treatment but also a positive obligation to protect people from it," which in this case included an obligation "to take steps to protect her from the suffering which she would otherwise have to endure."[51]

The Court ruled against Ms. Pretty's application. As justification for its verdict, the judges asserted that Article 2 was "one of the most fundamental provisions of the Convention," as it safeguards the right to life, "without which enjoyment of any of the other rights and freedoms in the Convention is rendered nugatory," claiming, moreover, that the provision in question "cannot … be interpreted as conferring the diametrically opposite right, namely a right to die; nor can it create a right to self-determination in the sense of conferring on an individual the entitlement to choose death rather than life."[52] And so, they concluded that the applicant's human rights had not been violated by the Government's refusal to grant her request.

Can the disagreement between Ms. Pretty and the Court's judges be explained in terms of the solutions we considered in Section 2? I believe it cannot. Upon closer inspection, it becomes clear that, while the parties also disagreed about the correct ruling of the case, the real source of their disagreement was about what human rights actually are: according to the Court, human rights—or at least some human rights such as the right to life—are essentially inalienable rights, and thus cannot be forfeited, even if it would be in the right-holder's best interest to do so. Ms. Pretty's claim, in turn, was precisely the opposite: that human rights *are not* inalienable, but rather those rights required to live an autonomous, dignified life, which includes, among other things, the right to choose to terminate one's own existence—which is to say, to alienate those rights—in order to avoid a painful and humiliating death. Yet, despite the fact that they did not share the same criteria for identifying whether the supposed 'right to die' is indeed a human right, at no point did any one of them attempt to claim that their dispute was not genuine—at least if we take their opinions at face value. Quite the contrary, they all agreed that their dispute concerned the applicant's rights under human rights practice, and none denied that, if the *Convention*, properly interpreted, was (in)compatible with her request, then the Court should rule accordingly. It would be an entirely different matter if Ms. Pretty's claim had been, for instance, that she *did not* have a right to die, but nevertheless she wanted human rights practice to be *altered* so as to recognize it, which is certainly not the case here.

This argument, I believe, applies to other controversial human rights issues, and, more broadly, to moral and political disagreement as a whole. For example, people who argue in favor of corporate responsibilities for human rights do not assume, as PV theorists claim, that human rights are by definition only applicable to states, and then discuss, in a separate level of discourse, whether or not that is

51. *Pretty*, *supra* note 45 at 188.
52. *Ibid* at 185-86.

ultimately a good thing. Rather, they claim that human rights norms, *properly conceived*, have no such restriction, and apply to states and corporations (and potentially other non-state agents) alike. Similarly, in other realms of morality, people who argue about democracy do not all agree that it simply means, as many philosophers believe, majority rule, so that practices such as judicial review are *a priori* undemocratic, with the only question left to be decided being whether they are nonetheless justified. On the contrary, they argue about what democracy really is: some, it is true, genuinely believe that it is majority rule and nothing more, and thus oppose judicial review as being against the will of the people. Others, however, reject this view and adopt a more complex definition of the term, according to which democracy is majority rule subjected to a system of checks and balances, including (but not limited to) judicial review.[53] As Dworkin notes, if it were the case that concepts such as human rights and democracy were criterial concepts, and their definition, a neutral, threshold issue,

> then why should politicians and citizens waste time arguing about it? Why hasn't common sense taught ordinary people simply to converge on a standard definition of these concepts—that democracy means majority rule, for example—so that they can save their energies for the genuinely substantive issues, like the issue of whether democracy should sometimes be compromised for other values?[54]

All this taken together leads me to conclude that the set of assumptions that underlie criterial concepts is plainly inadequate to explain the existence of theoretical disagreement in the theory and practice of human rights, of which the Orthodox-Political debate and Ms. Pretty's case are illustrative examples. To deny their reality would require us to accept what seems ludicrous: "that the most fervent and passionate of our political arguments are just silly misunderstandings."[55] Following Dworkin, I shall call this widespread, but ultimately false, view—that all concepts are criterial concepts—the Semantic Sting. Once we recognize it as fallacious, however, there is no reason why we should continue holding on to it. Why not adopt the opposite approach instead, and suppose that language is complex enough to yield different kinds of concepts, each one with its own distinctive features? This allows us to make sense of the way the concept of human rights, and moral and political concepts in general, function in practical deliberation by postulating the existence of a second family of concepts, a family that we share despite not having a decisive test for their correct use. These are what Dworkin called "interpretive concepts."[56] As he puts it, "we share these concepts ... not because we agree in their application once all other pertinent facts are agreed upon, but rather by manifesting an understanding that their correct application is fixed by the best interpretation of the practices in which they figure."[57]

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53. See Ronald Dworkin, *Justice in Robes* (Belknap Press, 2006) at 147ff.
54. *Ibid* at 148.
55. Dworkin, *supra* note 38 at 162.
56. *Ibid* at 160 [footnotes omitted].
57. *Ibid*.

3.1. Applying the 'Sting' to Griffin and Beitz

Up until now, I focused on how, in holding too crude a picture of what disagreement is like, commentators have failed to make sense of the Orthodox-Political debate and what it actually reveals about the concept of human rights. Now, I want to take the critique one step further and offer an interpretation of Beitz and Griffin which suggests that commentators are by no means alone in this mistake, but that the pernicious influence of the 'sting' is present in philosophical reflection on human rights from the outset as an integral part of the methodology of OV and PV.

Let us start with Beitz. Recall that, according to his two-level model, human rights are a set of norms that play a distinctive political role in global political life: in the first instance, they regulate the relationship between states and individuals; in the second, they set out the conditions for permissible foreign intervention. We have not discussed how, methodologically, Beitz justifies moving from a *description* of international human rights practice to a particular *proposal* of how these rights should be conceived. This is an important question, as these are dissociable parts of his theory; it would be perfectly possible for someone to depart from the exact same factual premises as he does, and yet arrive at an entirely different account of the concept of human rights, and vice-versa.[58]

As a first approximation, Beitz reasons, "[w]e understand the concept of a human right by asking for what kinds of actions, in which kinds of circumstances, human rights claims may be understood to give reasons."[59] By forming an inventory of such judgments, one is then able to *infer* the general discursive role of human rights from its various concrete uses in practical deliberation. This, in turn, informs an account of the meaning of its concept.

Of course, it is not likely that all practitioners will agree in their assessment of what the practice 'really' requires, nor is it true that the source materials that form the basis of these judgments will be entirely free of inconsistencies and ambiguities. Beitz is well aware of this and goes on to list four criteria that his inferential procedure ought to observe in order to navigate these difficulties. First, a model of the concept of human rights should seek to reflect a consensus among participants over the central elements of the practice (Condition 1). Consensus, in this sense, need not imply unanimity, but simply "common patterns of usage and a continuity of discursive experience."[60] Second, when such an agreement is not available, a general account of the practice's aims or purposes should be used to arbitrate the conflicting claims found within it (Condition 2). Third, the model should present itself solely as an answer to the question 'What are human rights?', avoiding incorporating into itself any view on substantive matters such as their content and justification (Condition 3). Finally, and relatedly, it should

58. For just such a different account, see J K Schaffer, "The Point of the Practice of Human Rights: International Concern or Domestic Empowerment?" in Reider Maliks & Johan K Schaffer, eds, *Moral and Political Conceptions of Human Rights* (Cambridge University Press, 2017).
59. Beitz, *supra* note 10 at 9 [footnotes omitted].
60. *Ibid* at 107.

allow for disagreement on these further issues to be an integral part of the practice's structure, rather than a sign of defect or incompleteness of it (Condition 4).

It is my contention that Beitz shares the assumption that human rights is a criterial concept. Note that the core of his proposal, which figures prominently in Condition 1, is that we take certain functions of human rights as basic *because* they are accepted as such by the bulk of participants in the practice. Of course, his proposal is more sophisticated than that, as he does not claim that people actually have a firm grasp of these functions in the conduct of their daily lives, but rather that they have to be arrived at through laborious analysis of the practice's source materials and abstracted away from apparently intractable differences of opinion as to the content and justification of these rights. In any case, this does not undermine the point I am making here, namely, that Beitz appears to believe (1) that the bulk of participants in human rights practice share, even if unknowingly, the same criteria for using the concept of human rights; (2) that this agreement is what underlies and enables further disagreement about the content and justification of these rights; and (3) that his two-level model constitutes an attempt at articulating these criteria—this latter point being further corroborated by his claim that the model "would make explicit the kinds of *linguistic commitments* one would undertake if one were to participate in good faith in the discursive practice."[61]

Now, one may challenge this interpretation by saying that it flies in the face of Condition 2, which after all acknowledges the need of incorporating into the model a general account of the aims or purposes of human rights practice. Isn't this precisely what I hinted earlier is supposed to distinguish an interpretive understanding of the concept of human rights from a criterial one? This would indeed be true, but alas, this particular reading of the text does not seem to be endorsed by Beitz himself. There are two reasons for this: first, while Beitz does appeal to the notion of 'purpose'—and even to that of 'interpretation'[62]—he does not at any point elaborate on how exactly such an account would fit into the model beyond the vague idea that it should "adjudicate among conflicting beliefs about the practical significance of [the practice's] central terms or to resolve ambiguities about their meanings."[63] Second, and most significantly, treating human rights as an interpretive concept, as I will elaborate on later, is incompatible with Beitz's insistence on a rigid separation between "the problem of conceptualizing human rights and that of understanding their authority"—or, in other words, between the problems of the *nature* and *justification* of human rights.[64] This is because an interpretation in the sense I am advocating is simultaneously a descriptive and a prescriptive process, and in such a way that one aspect cannot be disentangled from the other. An interpretation of the concept of human rights

61. *Ibid* at 106 [emphasis added].
62. See *ibid* at 117: "The two-level model is an *interpretation* of the idea of a human right found in contemporary human rights practice" [emphasis added].
63. *Ibid* at 108.
64. *Ibid* at 103.

practice will necessarily involve a reconstruction of its meaning in light of substantive, and therefore controversial, moral principles of precisely the kind Beitz wants to avoid.[65]

It may be useful at this point to draw a parallel between Beitz's methodology and that of H. L. A. Hart in *The Concept of Law*, to which the Semantic Sting objection was originally meant to apply.[66] According to Hart, Law is a social practice that emerges from the union of two types of norms: primary rules, which assign legal practitioners their rights and obligations within a juridical system, and secondary rules, a set of meta-norms regulating the creation, alteration, and extinction of primary rules, among which we find the most important rule of all, the so-called 'rule of recognition'. In simple terms, the rule of recognition specifies, for a given legal system, the conditions of validity for all particular statements and claims that judges, lawyers, and so on make about what the Law requires, forbids, or allows them to do. It serves as the system's ultimate foundation, as it sets up the linguistic backdrop that makes it possible for practitioners to meaningfully engage with one another in legal discourse. As such, its existence can only be, as Hart puts it, a "statement of fact" established in reference to the "complex, but normally concordant, practice of the courts, officials, and private persons in identifying the law by reference to certain criteria."[67]

One could plausibly reframe Beitz's account of human rights practice as a sort of Hartian proto-legal system. In it, ordinary human rights norms would operate essentially as primary rules, assigning practitioners their rights (in the case of individuals) and obligations (in the case of states and international community) vis-à-vis one another. The two-level model would then act as a stand-in for the rule of recognition, setting out the "linguistic commitments" that practitioners must undertake if they are "to participate in good faith in the discursive practice." To be sure, it would be a particularly complex rule of recognition, not only in the sense of being comprised of multiple criteria, but also in that it would incorporate, in addition to mere convention, moral and practical considerations—which are needed, for instance, to decide which responses to human rights violations are justifiable and feasible at any given moment. These complications, however, are consistent with Hart's theory, and should not be overstated.[68] What is important here is that the two perform essentially the same function and can thus be

65. See Section 4. Also, note that Beitz explicitly states in a footnote that he does not believe that the method of constructive interpretation—i.e., Dworkin's method—is entirely suitable to the task of interpreting human rights practice. See Beitz, *supra* note 10 at 107, n 19.

66. See HLA Hart, *The Concept of Law* (Clarendon Press, 1961). I am not the first to notice the similarity between Beitz's and Hart's approaches. In a recent text, Davidovic claimed that "[w]e can, and I think should, think of Beitz's account very much like trying to accomplish the same thing HLA Hart was trying to do with the concept of law in his *[The] Concept of Law*." Jovana Davidovic, "A Practical Account of the Concept of Human Rights" in Tom Campbell & Kylie Bourne, eds, *Political and Legal Approaches to Human Rights* (Routledge, 2017) 40 at 55, n 39.

67. Hart, *supra* note 66 at 110.

68. I am referring here to one interpretation of Hart's theory called 'inclusive positivism'. On the difference between 'inclusive' and 'exclusive' legal positivism, see Leslie Green & Thomas

seen as an indication that Beitz and Hart had similar methodological assumptions when developing their theories.[69]

Matters are not quite the same, however, when it comes to Griffin. His account, as we have seen, very much takes on the challenge of conceptualizing human rights in terms of a substantive moral principle, namely, personhood. In fact, at least one commentator has gone so far as suggesting that Griffin's methodology in *On Human Rights* may as well be treated interchangeably with Dworkin's.[70] At first glance, this claim appears to be supported by the text, as, for instance, when Griffin asserts that he is "looking for the notion of human rights that fits into the best ethics that we can establish."[71] And yet, I must insist Griffin is another victim of the Semantic Sting.

Why is that? To make sense of this claim, we must go back to the very first pages of Griffin's work, when he puts forward a telling diagnosis of the practice, centered on the notion that human rights discourse has become "seriously debased."[72] How exactly he thinks this has come to pass is not particularly relevant here; what I want to focus on is his explanation of what it means for a term to be "debased":

> The term 'human right' is nearly criterionless. There are unusually few criteria for determining when the term is used correctly and when incorrectly—and not just among politicians, but among philosophers, political theorists, and jurisprudents as well. The language of human rights has, in this way, become debased .... Determinateness of sense is, admittedly, a matter of degree; one can live with some indeterminateness. It is a rare common noun that has criteria allowing us to determine in all cases whether it is being correctly or incorrectly used; there are usually at least borderline cases. But if, quite apart from the generally recognized borderline cases, there are very many other cases in which nothing is available to us to settle whether a term is being correctly or incorrectly used, then the term is seriously defective.[73]

Here again we find the core assumptions that characterize the Semantic Sting: that the meaning of a concept is fixed by shared semantic rules (or criteria) determining its correct or incorrect use; that these criteria provide a test of validity for identifying instances of that concept, borderline cases aside;

Adams, "Legal Positivism" in Edward N Zalta, ed, *The Stanford Encyclopedia of Philosophy* (Winter 2019), online: https://plato.stanford.edu/archives/win2019/entries/legal-positivism/.

69. On a side note, this analogy is also useful for thinking about one important difference between the practices of human rights and law, namely, that the former does not seem to incorporate the other kinds of secondary rules—rules of change and rules of adjudication—that one would expect to find in a mature legal system. This reflects one way in which international human rights is, as Beitz describes it, an emergent practice.

70. See David J Karp, "The Location of International Practices: What is Human Rights Practice?" (2013) 39:4 Rev International Studies 969 at 982.

71. Griffin, *supra* note 3 at 2.

72. James Griffin, "First Steps in an Account of Human Rights" (2001) 9:3 European J Philosophy 306 at 306.

73. Griffin, *supra* note 3 at 14-15.

and that, if people for some reason do not share these criteria, then their disagreements are bound to be senseless—or, as Griffin puts it, "debased" or "defective."[74]

Still, even though Griffin and Beitz appear to share this core methodological assumption, their theories differ widely with regard to their ultimate aims. As we have seen, Beitz, like Hart, wants to find ground rules embedded in the practice that, once unearthed, will yield a definitive answer to the question 'What are human rights?' Griffin, however, takes a more pessimistic stance on the matter: while he concedes that such criteria do in fact exist, he worries that, as they stand, they are simply not determinate enough for the term to be sensibly used in practical deliberation. His theory is offered, then, not so much as a description of the concept of human rights as it is currently understood in the practice, but as a suggestion to improve public discourse by suggesting new criteria that practitioners can adopt.

Understanding Griffin in this way sheds light on many otherwise puzzling passages of his theory. It explains, for instance, why he insists that his account of human rights as protections of normative agency "is not a *derivation* of human rights from normative agency," but "a *proposal* based on a hunch that this way of remedying the indeterminateness of the term will best suit its role in ethics."[75] To say that human rights are derived from normative agency would be an interpretive claim of the kind I am advocating, one that requires a truth-oriented judgment in morality about whether the value at hand grants us access to something fundamental to the reality of human rights that could not be grasped otherwise. The notion of proposal, however, runs in the opposite direction: it suggests that there is no necessary connection between human rights and normative agency, "no one truth to find," as Griffin puts it, but only a "stipulation" to be made according to one's theoretical purposes.[76] It also explains why he attempts to justify controversial features of his theory, such as his claim that human rights are possessed only by human *agents*—infants, the mentally disabled, patients in a vegetative state, and so on excluded—not based on any moral reasons, but because he believes the stricter alternative is more likely accepted and followed in the practice, as if the question of who has human rights was a borderline issue that could be settled by convention alone.

Ultimately, the effects of the Semantic Sting in Griffin and Beitz's theories are the same I have been arguing against all along: by assuming that the concept of human rights is criterial, they overlook the possibility that people may hold

74. Further evidence that Griffin thinks of all concepts as criterial in the sense I define it can be found in the following passage from one of his earlier works: "A word has meaning only in virtue of there being rules for its use, rules that settle whether the word is correctly or incorrectly used. And Wittgenstein argues that the rules cannot, in the end, be satisfactorily understood as a mental standard—an image, say, or an articulable formula—but only as part of shared practices." James Griffin, *Value Judgment: Improving Our Ethical Beliefs* (Clarendon Press, 1996) at 7.

75. Griffin, *supra* note 3 at 4 [emphasis in original].

76. James Griffin, "Replies" in Roger Crisp, ed, *Griffin on Human Rights* (Oxford University Press, 2014) 206 at 221, 220.

different views of what human rights are and nonetheless argue meaningfully with one another. It is my belief that this is inconsistent with the way human rights discourse operates in the real world. Moreover, holding such a view inevitably creates an unbridgeable gap between OV and PV insofar as they put forward different criteria for the concept of human rights, forcing them to conceive of each other as outright failures of analysis, as opposed to (more amicably) different interpretations of the same practice.

All that said, it would be unfair on my part to conclude this section without also highlighting the similarities between Dworkin's method and those of Griffin and Beitz. As far as Griffin is concerned, he is right to attempt to explicate the concept of human rights in light of substantive moral principles, just as he is right to claim that a theory of human rights must be able to simultaneously account for those paradigmatic rights already recognized in the practice *and* "fit into the best ethics that we can establish." My complaint is that, due to the influence of the 'sting,' he is forced to conceive of his own project as a *proposal* or *stipulation* imposed upon the practice, rather than an *interpretation* of the practice arising from within it. This difference may seem slight, but it has major consequences: it precludes him from using the truth-oriented language characteristic of interpretive claims, leading to awkward assertions such as 'there is no necessary connection between normative agency and human rights' and 'there is no fact of the matter whether human non-agents have human rights.' These arbitrary elements can be eliminated, as I will show in Section 4, by reformulating his account as an interpretation of human rights practice.

And the similarities between Dworkin and Beitz, despite my previous tone, may be even greater.[77] Beitz's key insight—that, to understand the concept of human rights, we should proceed by trying to explicate the practice it is embedded in "from the inside out," giving local priority to its source materials and to participants' judgments about concrete cases, only resorting to more abstract considerations about the practice's purposes when the need for them arises during the course of argumentation—is perfectly in accord with the interpretive method. And so is his intuition that we can sensibly argue about human rights without our needing to resort to a prior philosophical doctrine or metaphysical foundation. Rather, to paraphrase Dworkin—and as I will try to show below—the practices of interpretation and morality give our human rights claims all the objectivity and meaning they need or could have.[78] These positive features of

77. I would like to thank the reviewer of this paper for changing my mind on this point. For a reading of Dworkin which treats him as an 'inferentialist', see Thomas Bustamante, "Is Protestant Interpretation an Acceptable Attitude Toward Normative Social Practices? An Analysis of Dworkin and Postema" (2021) 66:1 Am J Juris 1.

78. See Dworkin, *supra* note 1 at 83. Incidentally, Dworkin would, for this very reason, take issue with Griffin's distinction between basic and derived rights. Setting aside the metaphysical issue of whether moral facts can be said to be 'basic' and 'barely' true, an interpretivist account would reject the view that one needs to appeal to abstract, non-historical, and immutable goods in order to fix/justify the concrete human rights recognized in the practice. Instead, the account would proceed by showing that this specific claim can be integrated with other human rights claims—and more broadly, other normative claims—in a larger, interpretive web of beliefs.

Beitz's account can be preserved, and its methodological shortcomings overcome, once it, too, is reconstructed within the interpretive framework.

4. Towards an Interpretive Account of Human Rights

Having spent the majority of this paper criticizing the way in which current theories have attempted to approach the problem of understanding what human rights are, I would like to conclude it with a brief constructive commentary on an alternative approach that purports to take seriously the notion of human rights as an interpretive concept: how one would go about constructing it, and the challenges it may entail.

It is part and parcel of certain social practices that participants take a critical stance towards their central elements. They see the practice as having an aim or purpose, as expressing some important value, but disagree about what this value is, or, less radically, what it requires in specific circumstances. When this happens, as we have seen, there will be no ultimate shared test of validity to which they may appeal in order to settle their disputes. And yet, despite such a profound level of disagreement, those engaged in these practices have no urge to claim that their quarrels are meaningless; rather, they understand that, even though their conclusions are ultimately different, they are still all interpretations of the same thing. What makes this possible is that, while the parties involved do not share criteria for applying the concepts they seek to interpret, they do nonetheless share one crucial thing, which is the critical (or interpretive) attitude itself.

Notice that, if this is so, then any sharp distinction between theory and practice breaks down; in particular, there will be no fundamental difference between the types of first-order judgments made by regular people in everyday life, and the 'conceptual' claims that are usually thought of as being the exclusive property of philosophers; rather, both will be, as I have said, interpretive claims about the practice. And the implications here run both ways: neither can the practitioner successfully engage with the practice without relying on their own account, piecemeal as it may be, of the central concepts it embodies, nor can the theorist offer an analysis of these concepts that is altogether divorced from their substantive value and significance within the practice.

In this framework, a theory of human rights can only be an *interpretation* of human rights practice, no more, no less—albeit admittedly a very general one.[79] One can start understanding what human rights are, then, by interrogating what an interpretation of the sort we are looking for would look like. To my mind, the most comprehensive statement of such an account is the method of constructive interpretation, which can be found in Ronald Dworkin's *Law's Empire*.[80] According to Dworkin, interpretive claims can be envisioned as obeying a

79. It will also be, accordingly, an exercise in substantive political morality.

80. See Dworkin, *supra* note 1 at 65ff. A good summary of the method can be found in Laura Valentini, "Global Justice and Practice-Dependence: Conventionalism, Institutionalism, Functionalism" (2011) 19:1 J Political Philosophy 399 at 403ff.

general structure of three analytically distinct stages. First, there is a *pre-interpretive stage,* in which the raw data of the interpretation, i.e., the tentative boundaries and content of the practice to be interpreted, is identified. Second, there is a de facto *interpretive stage,* in which the interpreter settles on some value they consider would serve as the best overall justification for the practice. This assessment need not include every single one of the practice's elements, but, insofar as it is to count as an *interpretation* as opposed to a mere *invention*, it must meet a certain degree of 'fit' with its salient features as identified in the preceding stage. Finally, there is a *post-interpretive stage*, in which the interpreter revises their initial beliefs and assumptions about what the practice is and what it 'really' requires in specific circumstances so as to best serve this newly found purpose.

How much consensus one should expect to find in each one of these steps remains to be seen. Naturally, we may infer that it will be greater in the first stage; after all, it makes little sense to even speak of an interpretive community if its members do not share a minimum level of agreement about what it is that they are supposed to be interpreting to begin with. With regard to the other two, it may be helpful to think of practices as being on a spectrum, with mature practices at one end, and emergent practices at the other. With time, enough consensus may be reached so that people start seeing their conflicting claims as shared within a larger structure and reach a common understanding of the underlying purpose of the practice. When this happens, we may say that the many different interpretations of the practice constitute rival *conceptions* of the same *concepts*, in that they can be seen as attempts at refining this initial, (provisionally) uncontroversial understanding.[81] An illustrative example would be that of the concept of Law. According to Dworkin,

> Our discussions about law by and large assume ... that the most abstract and fundamental point of legal practice is to guide and constrain the power of government in the following way. Law insists that force not be used or withheld, no matter how useful that would be to ends in view, no matter how beneficial or noble these ends, except as licensed or required by individual rights and responsibilities flowing from past political decisions about when collective force is justified.[82]

> It should now be clear what value that is: it is the value of legality—or, as it is sometimes more grandly called, the rule of law. ... Conceptions of legality differ, as I said, about what kinds of standards are sufficient to satisfy legality and in what way these standards must be established in advance; claims of law are claims about which standards of the right sort have in fact been established in the right way. A conception of legality is therefore a general account of how to decide which particular claims of law are true.[83]

Interpretive concepts, thus, operate in practical reasoning essentially as "abstract plateaus of agreement," in that they reflect the fact that, in spite of disagreement

81. See Dworkin, *supra* note 1 at 90ff.
82. *Ibid* at 93.
83. Dworkin, *supra* note 53 at 169-70.

in other areas, we agree sufficiently about what we take to be paradigm instances of the concept to permit us to argue intelligibly with others who share the concept with us that a particular characterization of the value in question best justifies these shared paradigms.[84] This is why sharing an interpretive concept is consistent with widely different, and even intractable, differences of opinion regarding its meaning, including skepticism about whether the practice in question instantiates any value at all.

Now, it should be said that there are a number of potential difficulties in applying Dworkin's method to human rights practice that one does not find in the case of Law—its applicability to human rights is by no means self-evident. To begin with, one must work with a pre-interpretive understanding of human rights that is considerably looser than the one existent in any mature legal system. This is especially the case because, as I mentioned before, human rights practice does not contain, as a general rule, institutionalized global procedures responsible for overseeing the creation, alteration, and extinction of human rights norms, nor a single body of officials with the authority to arbitrate disputes involving human rights or to carry out their implementation. Still, the fact that the practice exists, and not only that, has grown at an increasing pace in the last decades, suggests to me that there is enough agreement at this preliminary stage for the interpretive attitude to take hold. In fact, I believe that, adopting a rich enough account of the practice's source materials, one has a somewhat solid basis from which to speculate about the scope and content of contemporary human rights doctrine.[85] In this sense, the following classification, due to René Cassin, may prove useful, if only as a starting point for further discussion:

1. Rights of the individual as such (*UDHR*, Articles 3-11): such as life; security of person; equality before the law; due judicial process; prohibition of slavery, torture, and cruel and degrading punishment.
2. Rights of the individual vis-à-vis society (*UDHR*, Articles 12-17): Privacy; freedom of movement and residence; asylum; nationality; gender equality between men and women; ownership of property.
3. Spiritual, public, and political liberties (*UDHR*, Articles 18-21): freedom of conscience and religion; freedom of expression; freedom of assembly and association; equal political participation.
4. Economic, social, and cultural rights (*UDHR*, Articles 22-27): social security; employment; rest and leisure; adequate standard of living; free elementary education.[86]

84. *Ibid* at 148. See also Dworkin, *supra* note 38 at 160-61.

85. These would include, among other things, the main instruments and mechanisms in international human rights law; key observations of critical public discourse, scholarly work, and political activism; comparative analysis in domestic law; and one's own intuitions as a member of the broader human rights culture. A similar, though more restrictive, list is offered in Beitz, *supra* note 10 at 107.

86. See Mary A Glendon, *A World Made New: Eleanor Roosevelt and the Universal Declaration of Human Rights* (Random House, 2001) at 174.

Another difficulty concerns the judgment of whether or not the practice embodies a value that is widely regarded as expressing its most fundamental purpose or point. This must be a value with real moral weight, like justice, liberty, equality, and the rest. It must also be an *interpretive* value, allowing for different viewpoints on its content and practical implications to coexist within the interpretive community. But most significant of all, it must be a distinct value of human rights practice, something so fundamental as to count, in terms of explanatory power, as one of those ideas "so simple, so beautiful, so compelling that when—in a decade, a century, or a millennium—we grasp it, we will all say to each other, how could it have been otherwise?"[87]

I am not entirely sure whether an overall justification of the practice of this sort is currently available.[88] There is, of course, an obvious candidate, namely, the value of human dignity. I am aware, however, that dignity is an elusive concept to work with; as many before me have noted, it is, notwithstanding its rhetorical power, a highly abstract term whose application covers a wide range of situations and purposes, and one which is more often than not used with little philosophical rigor. Still, in the interpretive framework I am advancing, none of this is an *a priori* impediment for the concept to serve the justificatory role we seek. Though I can offer no definitive answers on this topic, I can at least point to one promising attempt that could bring us closer to such a unifying account.

In *Dignity, Rank, and Rights*, Jeremy Waldron sketches an account of human dignity that seeks to integrate contemporary human rights discourse with the historical uses of the concept of dignity in Law.[89] He explains that, for many centuries, 'dignity' (*dignitas*) was primarily used to denote a high-ranking legal, political, and social status comprising a package of rights, powers, and obligations which were accrued to a person by virtue of his condition or situation—for instance, by being married, being a nobleman, or holding a public office.[90] Waldron's hypothesis, in short, is that "the modern notion of *human* dignity emerged as part of a process of upwards equalization of rank" that sought to accord every human being something like "the dignity, rank, and expectation of respect that was formerly accorded to nobility."[91]

But what does it mean to be treated as if one was a nobleman? One possible interpretation is this: in the age of nobility, social life was organized in such a way that only a small fraction of the population could aspire to live a life free from

87. J A Wheeler, "How Come the Quantum?" (1986) 480:1 Annals of the New York Academy of Sciences 304 at 304.

88. It should be said at this point that the arguments I am advancing in this section are not contingent upon us finding a general statement of the practice of this sort, though it would certainly be desirable. No such convergence is available, for instance, in the case of the concept of justice, and yet, despite these difficulties, the theory and practice of justice have been flourishing for millennia.

89. See generally Jeremy Waldron in Meir Dan-Cohen, ed, *Dignity, Rank, and Rights* (Oxford University Press, 2012).

90. See Jeremy Waldron, "Dignity and Rank" in Meir Dan-Cohen, *supra* note 89 at 24.

91. *Ibid* at 34.

domination and control by others.[92] In this context, 'respect' was shown, among other things, through the social acceptance of a system of norms that enabled these 'first-class' individuals to develop and effectively exercise their capacity for agency in spite of various predictable obstacles. If human dignity is, as Waldron suggests, a generalization of this special status to all, then perhaps we could understand *human* rights—the package of entitlements appropriate to *human* status—as a set of norms that "enable and protect the effective exercise of the capacity for self-direction by everyone."[93] Seen through these lenses, the ultimate message of human rights practice is that of *empowerment*: it invites regular people to leave behind a condition of social fragility and start conceiving of themselves (and others) as potential makers of claims, and, in this way, stand proud, and look up to each other from a position of upright equality.[94]

The most powerful case for the distinctive moral force of this value was made, surprisingly, by Beitz—though, for the reasons we have seen, he does not believe that any such value must factor into the concept of human rights:

> A practice that articulates a system of rights, conceived as public bases of claims, might be seen to have a particular kind of value. It can empower individual agents to demand respect for urgent interests under circumstances in which these interests are subject to predictable threats. This empowerment is in part a result of the change in self-conception that the practice of human rights can induce among those who participate in it: they are encouraged to conceive of themselves, and to act, as "makers of claims." This is most obvious when legal enforcement is possible, but there is also a reflection of it in the political practice of human rights. We see this, for example, in the role of ideas of human rights in legitimating and mobilizing efforts to resist gender violence.
>
> Someone might think that the idea of dignity as the status of a self-directing agent is superfluous here—that the value of empowerment can be fully accounted for instrumentally, as a means to ensure protection of the underlying interests. But this seems to me to miss a step, for we might regard empowerment, for those empowered, as significant independently of the particular values their empowerment helps defend. To paraphrase Feinberg, these individuals learn to act with the dignity of persons who can stand on their own feet.[95]

One of the main strengths of Waldron's proposal is that it is general enough to plausibly operate as an organizing notion—an abstract *concept*, if you will—from which rival *conceptions* of human dignity, and, accordingly, human rights, can be said to emerge. A theory of human rights, in this sense, will be an account about

92. See Charles Beitz, "Human Dignity in the Theory of Human Rights: Nothing But a Phrase?" (2013) 41:3 Philosophy Public Affairs 259 at 286ff.
93. *Ibid* at 286.
94. I borrow the expression 'makers of claims' from Feinberg: "What is called 'human dignity' may simply be the recognizable capacity to assert claims." Joel Feinberg, "The Nature and Value of Rights" (1970) 4:4 J Value Inquiry 243 at 252. One may call it the value of human dignity or human empowerment. See Jeremy Waldron, "Law, Dignity, and Self-Control" in Meir Dan-Cohen, *supra* note 89 at 60.
95. Beitz, *supra* note 92 at 288-89 [footnotes omitted].

what human interests ought to be universally recognized and protected as rights in order to satisfy human dignity, conceived as the high status of a self-directing agent. It will therefore also be, in the third and final stage of interpretation, an account of how to decide what particular human rights claims are true.

To illustrate this point, let us go back, one last time, to Griffin and Beitz. As we have seen, their theories come to different conclusions about what human rights practice, properly construed, 'really' requires. Prominently, they disagree, first, about whether human rights are best seen as universal or temporally restricted standards, and second, about which interests are capable of grounding them. In the framework I am advocating, one can make sense of these differences as originating from differing attempts at further developing the value of human dignity sketched above. In particular, I believe the two theories can be reconstructed as bringing to light and advancing two different aspects of human dignity: the capacity for self-direction taken in itself, and the recognition of this capacity by others. Griffin, on the one hand, is mainly concerned with the former. Accordingly, he approaches the problem of conceptualizing human rights by means of a general theory of human agency, which leads to his characterization of them in terms of the universal interests that form the backbone of this capacity—autonomy, liberty, and minimum provision. Beitz, on the other hand, thinks that human rights, considered as a system of public norms, is best seen as an expression of the latter. This is why, when explaining what these rights are, he places special focus on their political dimension, and, especially, on how modern institutions have allowed, perhaps for the first time in history, for urgent individual interests, timeless or not, to be recognized by everyone as matters of universal concern.

Which of the two approaches will prove to be the superior interpretation of human rights practice remains to be seen. What I can say for now is that the outcome of their dispute will largely turn on their ability to satisfy two desiderata that any successful interpretation in the sense I am advancing must meet. There is, first, a fidelity (or fit) criterion: Can the theory in question account for paradigmatic instances of human rights claims such as those enumerated in the classification I sketched earlier? And, in case of discrepancies arising between the two, are they well justified? Second, there is a normativity (or justification) criterion: Does the theory paint the practice in the best light possible, and, therefore, offer the most illuminating explanation of what those engaged in human rights discourse, theorists themselves included, do? The ultimate aim of a theory of human rights will be, in short, to achieve an equilibrium between the two desiderata, a balance between the practice as we find it and the best version we can conceive it to be.

As a final remark, I wish to address a potential objection regarding this last point which was recently brought to my attention. It goes as follows: the test of fidelity in *Law's Empire* is tailored to accommodate legal doctrine, and this is because adherence to past legislative and adjudicative decisions is something required by the value of legality, which is a distinctive value of legal practice.[96]

96. See Dworkin, *supra* note 1.

Such constraints do not apply to a moral theory of human rights. Therefore, Dworkin's method does not apply; theories of human rights need only satisfy the normativity criterion.

It is true that the method of constructive interpretation was originally developed with legal practice in mind—*Law's Empire* is, after all, a book about Law. But to conclude from this that the method cannot be applied to other social practices is simply wrong. Indeed, Dworkin himself used it on several occasions to analyze the practices of equality, liberty, and democracy.[97] What warrants these various uses is that, ultimately, fit and justification are simply names for the two dimensions of interpretation; this is why they constitute criteria that *any* successful interpretation (regardless of its object) must satisfy.[98] The criterion of fidelity, as I said, is needed to ensure that an interpretation is indeed an interpretation rather than an invention. What is distinctive about legal practice is that its connection with the value of legality makes fidelity especially pressing for legal interpretation. An interpretation of human rights practice does not face such a strong requirement, but *some* degree of fidelity is still needed. We would hardly consider a theory of human rights successful if it failed to account for most paradigmatic instances of human rights—say, if it claimed that most rights recognized in the *UDHR* are in fact not human rights at all. So, to reiterate: fidelity and normativity are both crucial desiderata that a theory of human rights must satisfy.

5. Conclusion

My aim in this article has been to challenge a key methodological assumption underlying current philosophical discussion on human rights: namely, that all concepts, including the concepts of human rights, are criterial concepts. Those who hold this view are led to believe that sensible disagreement is only possible on the condition that people share an ultimate test of validity for deciding when their claims are sound. I argued, however, that this crude picture of disagreement is incompatible with the way the concept of human rights is used in both the theory and practice of human rights. In particular, such a view cannot account for the existence of theoretical disagreement about human rights, which it must then implausibly attempt to dismiss as nonsensical or illusory.

We can rescue human rights from the Semantic Sting, I proposed, by conceiving of it as an interpretive concept. In this alternative framework, we treat different views on the concept of human rights such as the OV and PV as expressing different interpretations of the point (or purpose) of the human rights enterprise as a whole. What such a general statement of the practice will turn out to be, or even whether it currently exists, is something that is open for debate. One promising candidate, which I offered as an illustration of the interpretive method, is Waldron's account of human dignity as high status. If my suggestion is correct, one could then attempt to reconstruct theories such as Beitz's and Griffin's as

97. See e.g. Dworkin, *supra* note 38.
98. See Dworkin, *supra* note 1 at 231.

articulating rival conceptions of this initial, provisionally uncontroversial, understanding. This, in turn, allows us to finally see their disagreements for what they actually are, namely, genuine interpretive disputes.

Acknowledgements: I would like to thank Gabriel Salgueiro, Rômulo Caldas, Marco Antônio Alves, Alexandre Travessoni, and the reviewers and editors of CJLJ for helpful comments on early and advanced drafts of the article.

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