4

Far from Obvious

The Quest for the Justification of Human Rights

Die Leute glauben, unser Tun und Schaffen sei eitel Wahl, aus dem Vorrat der neuen Ideen griffen wir eine heraus, für die wir sprechen und wirken, streiten und leiden wollten, wie etwa sonst ein Philolog sich seinen Klassiker auswählte, mit dessen Kommentierung er sich sein ganzes Leben hindurch beschäftigte – nein, wir ergreifen keine Idee, sondern die Idee ergreift uns.[1]

Heinrich Heine, *Vorrede zum ersten Band des Salons*

Die Gesammt-Entartung des Menschen, hinab bis zu dem, was heute den socialistischen Tölpeln und Flachköpfen als ihr "Mensch der Zukunft" erscheint, – als ihr Ideal! – diese Entartung und Verkleinerung des Menschen zum vollkommenen Heerdenthiere (oder, wie sie sagen, zum Menschen der "freien Gesellschaft"), diese Verthierung des Menschen zum Zwergthiere der gleichen Rechte und Ansprüche ist möglich, es ist kein Zweifel! Wer diese Möglichkeit einmal bis zu Ende gedacht hat, kennt einen Ekel mehr, als die übrigen Menschen, – und vielleicht auch eine neue Aufgabe! . . .[2]

Friedrich Nietzsche, *Jenseits von Gut und Böse*

We must remember that Fascism and racism will emerge from this war not only with the bitterness of defeat but also with sweet memories of the ease with which it is possible to commit mass murder.

Vasily Grossman, *The Hell of Treblinka*

[1] "People believe that our doings and workings are nought but choice, that from the hoard of new ideas we selected one for which we desired to speak and work, argue and suffer, much as a philologist selected the classics whose commentary was to occupy him for the rest of his life – no, we do not grasp an idea, rather the idea grasps us" (translation M. Hiley).

[2] Friedrich Nietzsche, *Beyond Good and Evil*, trans. Reginald John Hollingdale (London: Penguin Books, 2003), 127 f.: "The *collective degeneration of man* down to that which the socialist dolts and blockheads today see as their 'man of the future' – as their ideal! – this degeneration and diminution of man to the perfect herd animal (or, as they say, to the man of the 'free society'), this animalization of man to the pygmy animal of equal rights and equal pretensions is *possible*, there is no doubt about that! He who has once thought this possibility through to the end knows one more kind of disgust than other men do – and perhaps also a new *task*!" (emphasis in original).

https://doi.org/10.1017/9781316875520.007 Published online by Cambridge University Press

4.1 HOW TO JUSTIFY HUMAN RIGHTS

4.1.1 *An Idle Question?*

The justification of human rights is no straightforward matter. This justification involves various problems that stem from different sources: Some issues are related to the specificities of human rights, some originate in fundamental questions of ethics and metaethics that are relevant for human rights but not limited to their justification, some stem from issues of human epistemology that cut across a range of fields and some even touch upon the question of the limits of human understanding.

To complicate matters yet further, there is some debate as to whether human rights require any justification at all. Maritain's account of the by now proverbial summary of a postwar exchange of opinions on the foundation of human rights – "we agree about the rights but on condition that no one asks us why" – already has been recalled above. This summary could be interpreted as stating something even stronger than mere factual disagreement about the justification of human rights, accompanied rather luckily by a consensus about the list of rights to be protected; it could be interpreted as stating that agreement about their content is *conditioned upon* a lack of engagement with deeper background theories. One of the last decades' most influential theories of political liberalism could be understood as claiming something to this effect: An "overlapping consensus" is all that is needed, and this can be achieved on the basis of different background theories within the framework of reasonable disagreement.[3] Engaging with these background theories is unnecessary and may even impede such an overlapping consensus. Agnosticism about the deeper justification of human rights may turn out to be the high road to consensus about their content, which is all that matters, one could think.

When seeking to address these problems, it is useful to distinguish between *justificatory theories*, which will form the focus of attention in the following, and *explanatory theories*, some of which will be discussed in Part III below.

Justificatory theories provide normative reasons for the legitimacy of human rights, explanatory theories tell us about the causes of the existence of human rights. Many such causes can be imagined – social, historical, political, economic, anthropological, evolutionary and cognitive. There is theoretical work on the foundations of rights that combines explanations of human rights with statements about their legitimacy or illegitimacy – for example, in the genealogical revisionism discussed above as well as in other approaches that aim to defend the idea of human rights.[4] However, none of the possible causes for the emergence of human rights as such has

[3] Cf. J. Rawls' idea of an "overlapping consensus," not dependent on underlying "comprehensive doctrines," Rawls, *Political Liberalism*, 144.

[4] Joas, *Sakralität der Person*.

https://doi.org/10.1017/9781316875520.007 Published online by Cambridge University Press

any bearing on the justification of human rights, as this justification ultimately is based not upon any causal account of the origin of human rights, but on the normative grounds of their legitimacy – a topic related to the intense debates about the is/ought distinction and thus full of intricacies to which we will return.

There are various justificatory theories of human rights, some with deontological or with consequentialist leanings, others from the quarters of virtue ethics or other philosophical background theories – from Marxism and Critical Theory to post-modern phenomenology. These theories naturally are very different and raise many difficult issues, both as to concrete arguments about human rights and as to theoretical background assumptions. These questions need not be necessarily linked – from a variety of theoretical points of view, conceptions of human rights can be entertained that may be open to criticism, but not because of their underlying theoretical orientation. For example, one can criticize the view that human rights should be understood solely as rights of international law and not also as rights of national constitutional law – a position that may be held from quite different theoretical points of view. Such critical analysis is possible without any need to engage with the theoretical background of this thesis. Other questions are different in kind and only can be answered if one tackles these underlying theories at least to some degree.

Accordingly, the following remarks will discuss not all but some of the currently most influential and (which is not always the same thing) the constructively most promising theoretical approaches to the justification of human rights. We will avoid theoretical overkill if a question can be answered without reference to wider theoretical frameworks, but we will not shy away from difficult philosophical questions if necessary.

The findings of our historical review form a useful starting point for this discussion. Studying the historical development of the human rights idea has given us substantial reason to believe that basic, not arbitrary intuitions about claims to fundamental human goods need to be transformed substantially before they can become ethical, political and legal principles akin to the idea of human rights. This transformation requires both a generalization of issues abstracted from the particulars of a specific case to form the material scope and a universalization of the status of being a rights-holder to establish the personal scope of these rights as moral principles. Their content needs to be determined impartially and thus objectified. Human rights have to be made the explicit objects of critical, reflective deliberation. Finally, they needed to be turned from moral ideas into political demands and finally into justiciable legal norms and working legal institutions.

Given these findings, the question is: *How are we to justify such generalized, universal, objectified, impartial moral claims abstracted from specific cases that have been made explicit and turned into a transformative political agenda and ultimately powerful institutions of the law?*

https://doi.org/10.1017/9781316875520.007 Published online by Cambridge University Press

At least three fundamental problems can be distinguished that a theory of human rights seeking to answer this question has to deal with.

4.1.2 *A Critical Theory of Human Goods*

Human rights are, first, rights to something; they have a scope, an area of protection and a particular content. This protected something is of value, worth or importance to human beings – otherwise protecting it would not make any sense. The right to life, for instance, protects the good of human life, the right to freedom of speech protects the good of unfettered human expression and so on. The things protected by rights are taken (rightly or wrongly) to be important, precious, even of existential concern to human beings. Rights thus protect what this inquiry has called human *goods*. The term "goods" in the sense employed here encompasses anything that is of value for human beings, without any particular theoretical implications.

This starting point may seem straightforward enough, but there is a problem lurking in the background. There are important theories justifying human rights that appear to refrain from relying on such substantial theories of goods. This is hardly surprising – after all, it is widely assumed in various quarters of modern theory, not least in economics, that it is impossible to come up with any such theory because there can be no such account (or even an "objective list") of such goods. The first line of argument against this stems from the idea of human beings' historical and social malleability. There is obvious truth to this thesis: Human ways of living have changed radically through history and differ profoundly depending upon social circumstance. The honor of winning a knight's tournament is currently not an important good for many people. There is a normative point as well, namely that any concrete image of what is central to being human, to human existence and to human good wrongly essentializes human beings and ossifies a certain parochial vision of human existence – say, of white male heterosexuals from elite groups of the Global North – and that this has profound illiberal consequences. These wrong conceptions of human life may serve to repress the full unfolding of new ways to pursue happiness and innovative experiments of living. From the point of view of influential theories, the prohibition of images of God thus has normative significance for the secular sphere, too, where not the image of a supreme being but the image of humans is of concern. The secular prohibition against forming a fixed image of human beings serves the demand not to reduce them to something they are not.[5]

[5] Cf. Adorno, *Negative Dialektik*, 293 f.; the standing case law of the Swiss Federal Court includes an explicit reference to the "indeterminable essence" ("*nicht fassbare Eigentliche*") of human beings in its definition of human dignity, Bundesgericht (Federal Supreme Court [BGer]), Judgement of March 22, 2001, BGE 127 I 6 E. 5b, 14 to avoid any essentialist definition of human nature.

The second line of argument against a theory of substantial human goods originates in the respect for human autonomy and diversity: How is a theory of goods possible if humans have very diverse ideas of such goods and by the basic principle of human autonomy are entitled to pursue their particular path to happiness? How can such a theory be constructed, given that this diversity seems to lead inevitably to the assumption that individual conceptions of the good are diverse and incommensurable?

Given these two assumptions of, first, a constantly changing, self-reinventing humanity and, second, the importance of autonomy, how can a theory of substantial human goods be formulated that is more than mere historical contingency and personal idiosyncrasy?

This clearly is a crucial question. What might encourage the inquiry is the recognition that such theories themselves presuppose a substantial theory of the good in their argument – the good of the liberty to invent and autonomously determine oneself. This illustrates the fact that the issue is not whether one needs a theory of human goods for a theory of human rights, but rather what the content of this theory of human goods is.

Undoubtedly, human rights protect not just any good, but a highly selective subset of all imaginable objects that are valuable to human beings in one sense or another. This is true both for moral and for legal human rights. There is neither a moral nor a legal human right to have freshly baked strawberry cake delivered to one's office every afternoon because one (understandably) likes it so much and it fosters one's work in the theory of law considerably, nor a moral or legal human right to see the right side (one's own team, of course, incomparable as it surely is) always win the soccer World Cup, accompanied by a corresponding duty of the other (quite useless) teams to let it happen. Consequently, some kind of threshold criterion needs to be identified in order to determine whether a human concern is of such weight that it is a possible candidate for protection by human rights.[6]

The rights protected by law are subject to further qualifications and may be narrower than moral rights because the specific properties of legal rights need to be accounted for – for instance, institutionalized justiciability and enforceability.

Any theory of human rights therefore needs, first, a *critical theory of human goods* to account for the reasons for including particular goods in the catalogue of human rights in morality and law and not others. More precisely, such a theory must identify the reasons that qualify something as a potential good for protection in the first place as well as the reasons its weight is sufficient to be protected by the special means of human rights.

The details of the scope of human rights are highly contentious. They are shaped and refined daily through the work of thousands of lawyers, court decisions,

[6] Threshold criteria represent a classic theme of human rights theory, cf. James W. Nickel, *Making Sense of Human Rights*, 2nd edition (Malden, MA: Blackwell, 2007), 53 ff.

legislative acts and legal, political and philosophical deliberations about old and new normative challenges. However, their core elements include respect for human beings' particular, supreme and inalienable worth, their physical and mental integrity, freedom, equal treatment and – more controversially perhaps – the means for their physical subsistence and, more ambitiously, the minimum material conditions of a dignified life. A theory of human goods needs to consider closely why these goods are protected (in many cases uncontroversially), whether this protection is justifiable and which other goods could possibly qualify as worthy of protection.

4.1.3 *A Political Theory of Human Rights*

Human goods, including those that qualify as possible objects of protection as human rights, can be secured by more than one means, not only rights. Sometimes, rights are not even an option to achieve a given end, because the enjoyment of many goods very important to human beings obviously cannot be fostered by the specific normative tool of rights. For example, it is very important to be loved, but love cannot be secured by rights. The obligation of the addressee of the right and the correlative claim of the rights-holder presupposes the possibility of voluntary control of the obligatory act: *ultra posse nemo obligatur*. Therefore, nobody can have a duty to do something that is not a matter of their choice – as falling in love is not, if one is among the many unfortunate (or perhaps fortunate) individuals who do not possess Puck's magic flower.

For the justification of rights, this means that we need a convincing account of the *possibility* and, if the possibility exists, the *reasons* to secure certain important goods of human beings by the particular means of rights. This is obvious for freely created, positive legal rights, which by their very nature imply a conscious choice on the part of the lawmakers. For moral rights the problem takes a slightly different turn, at least if one believes (as many do) that they are not freely created as positive legal rights but are somehow the object of cognition by thought bound by reasons and arguments, and that they are valid even if people do not think they exist – just as Jewish people's right to life certainly existed even though many people around them in the Third Reich thought otherwise. But in the case of moral rights, too, one needs to answer the question of whether a supposed right serves morally justified ends or, on the contrary, defies such ends.

In many cases, the fact that rights do serve justified aims is not obvious. For example, one can be of the opinion that important democratic institutions should not be subjected to vilifying critique that is not based on facts. The integrity and stability of such institutions is an important good for human life – quite clearly so. But this does not mean that citizens should have a moral or legal right that others do not utter this kind of baseless, vilifying critique – at least, this is a thought upon which much of current free speech doctrine is based. One reason for this is the argument (given its canonical form by Mill) that reasonable decisions in a

democracy in the long term are best served by the free exchange of ideas[7] and not by their suppression, even if they "shock, offend and disturb," as the ECtHR has put it.[8] Another argument stems from the normative weight of free speech, which speaks – at least in many cases – against any control of the content of human expression because of its importance for human life.

This example shows that human rights imply prudential considerations, as in the first-mentioned argument for free speech based upon the instrumental value of the free exchange of ideas, and normative arguments – for instance, arising from the question of how to balance the normative value of individual freedom of expression and the normative value of democracy. The latter aspect already points to a problem to be discussed below: the problem of the normative principles implied in the justification of human rights.

These questions are far from trivial. In addition, on a more fundamental level, important theories forcefully deny that human rights contribute to the achievement of human goods. This is obvious for authoritarian theories of various ilk, vividly illustrated, for instance, by the critique of the ideas of the *Déclaration des Droits de l'Homme et du Citoyen*. This line of argument can be found in other contexts as well, however. Theories with a considerable impact on world history, such as Marxism, argued (at least in some classical forms) that freedom is an important good, even the ultimate aim of a unalienated society, but at the same time offered a radical critique of rights that still resonates today: Rights are held to be tools not for the liberation but for the repression of the working class in capitalist societies. Radical proceduralist democratic theory argues that the best way to secure human liberty is unfettered democracy, not a realm of rights. Deconstruction theories interpret rights as at best ambiguous tools to foster justice (among other reasons because of the abstract generality of rights), while at worst as forms of unjustified violence, if only in the sublimated residual form of performative force.

Given all this, the point of rights needs to be made. For legal rights, furthermore, the particularities of the legal form, such as justiciability and enforceability, need to be taken into consideration. This is even more obvious if one is familiar with the realities of legal rights in practice: Much hinges on the argument that a particular public good is actually fostered by specific legal rights, which is by no means always clear, even if one endorses the underlying moral right. Certain social rights are classic examples of this kind of difficulty. There is a very good case for a moral right to work. It is, however, an entirely different question whether the underlying aim – income and meaningful work – would be fostered if courts were entitled to allocate jobs on the basis of a fully-fledged subjective right of guaranteed employment. More complex mechanisms are therefore often sought to operationalize social rights as

[7] Mill, "On Liberty," 228 ff.

[8] ECtHR, Handyside v The United Kingdom, Judgement of November 4, 1976, appl. no. 5493/72, para. 49.

legal rights – for example, government action that fosters employment, institutions that secure sufficient benefits in case of unemployment and the availability of measures to assist reintegration into the workforce through vocational training and the like. Even if one is convinced that, despite all obstacles, courts should have the competence to decide on employment, this conclusion certainly requires more argument than the thesis that courts legitimately decide on problems of free speech.

As a consequence, one needs – and this is the second fundamental problem of a theory of human rights – a theory of the proper conditions for the realization of human goods in human societies and, in particular, a theory of the role of moral and legal rights in achieving this end. This theory of the possibility and desirability of the realization of human goods by means of rights will imply answers to intrinsically political questions and thus constitutes a *political theory of the role of rights in a well-ordered society*.

4.1.4 A *Theory of Fundamental Normative Principles*

The third problem is the problem of the normative principles constitutive for the justification of rights. There are two dimensions to this problem. The first dimension concerns the *normative structure of rights*. Rights are normative *relations* between persons and, more precisely, between a plurality of intricately connected persons and other rights-holders such as legal persons. Rights create a highly subtle web of such normative relations between agents – claims and privileges of the rights-holder towards the addressee, correlated duties and no-rights of the latter towards the former, powers and immunities, disabilities and liabilities, as explained above. The question that any theory of human rights has to answer is: What is the normative source of these intricate normative relations? How and why do they come into being? How, for example, are principles of justice related to rights? The answer to these questions is relevant for both moral and legal rights. In order to make sense of moral rights, one needs to be able to clarify the ground on which they come into existence. Otherwise, they may be regarded as metaphysical illusions, mere fictions without significance, nonsense upon stilts, as skeptics argue.

For legal rights, the answer may seem easier because they constitute positive law. The normative relations between rights-holder and duty-bearer(s) exist because the law posits them, one could say. The law, however, does not create the notions constituting a subjective right *de novo* and regularly either fails to define them or does so only in a highly limited, sometimes openly tautological manner.[9] Instead, it presupposes the meaning of the term *right*, which is the very reason why the current analytical theory of rights developed: The practice of the law was insufficiently clear on what it understood as a *right* in different contexts. It is thus necessary to clarify the

[9] For an example from a famous code: The German Civil Code (BGB) defines claims in Art. 194 (1) as: "The right to demand that another person does or refrains from an act (claim)."

meaning of terms such as *claim* or *obligation*, *privilege* or *no-right*, and to establish whether this meaning is similar or the same as in in the moral domain. This is not a banal question. Terms like "obligation" are, after all, crucial concepts, the meaning of which "haunts legal reflection."[10] This analysis helps to solve the next problem, namely to determine whether these normative relations and concepts are mere legal artifacts or the legal equivalent of underlying fundamental moral notions turned into law. Ascertaining whether the positive law mirrors some deeper principles of a plausible theory of rights that clarifies in particular the relation between the fundamental normative categories constitutive of rights and normative principles like justice would be an insight of great interest.

The second dimension – unlike the first question, which relates to the normative structure of rights as a formal category independent of their content – is at the forefront of many debates. It concerns the *material content of those normative principles that justify the ascription of rights to human beings*. Human rights imply the idea of a justified distribution and allocation of central goods such as respect, status, freedom and resources. Which normative principles give rise to the particular kind of rights that persons possess and that justify the allocation of goods realized by rights? Can they be identified? If so – what are they? In particular, what is the role that basic principles of morality such as justice and altruism play in this respect? What about human dignity? Are these moral principles a key to the question of the origin of human rights? Or are other principles at play? Agency, perhaps? There seems to be something special about moral principles, as other principles do not lead to rights. For instance, the principle that everybody should strive to fulfill their wishes in order to be happy does not give rise to the right to see one's wishes fulfilled. The principle that everybody should treat equals equally does create the right to such a treatment. Why?

As we will see, an explicit theory of normative principles as the foundation of human rights is of considerable importance. There are influential theories that do not address this problem, instead assuming that the identification of something as a legitimate, important concern for individuals suffices to give rise to rights (given that certain further conditions are satisfied, which are – and this is crucial – not related to normative principles). This is not the case, however. The fact that any concern of individuals creates claims towards others and related duties on their side – and that these individuals may enjoy privileges and are shielded from the demands of others because these others have no claim that they do or forbear something and thus only have no-rights – is something that can be explained only on the basis of normative principles. These principles are the reasons that oblige others in normative terms to act in certain well-defined ways that respect the interests of others and enable their actions. The fact that one person's interest in

[10] Herbert Lionel Adolphus Hart, *The Concept of Law* (Oxford: Oxford University Press, 2012), 87.

free expression, for instance, is of such normative relevance for another person that the first person enjoys a right such as freedom of speech with the normative incidents implied can be explained only on the basis of normative principles that turn the concerns of others into the material of their rights and our obligations. It should be noted that not every normative principle gives rise to a right, however. Supererogatory acts are good examples of this. This is because such an act, which benefits others beyond the call of duty, while highly laudable in moral terms, is not required. The patient of this act has no claim to it. This example already indicates that rights do not exhaust the domain of morality. The task is therefore to identify not only justified normative principles, but also the members of that subset of justified normative principles that give rise to rights. Consequently, third, there is no full theory of human rights without a *normative theory of the foundational principles of rights*.

Thus, in sum, the first question is: What is a promising basis for determining the selective, highly qualified goods protected by human rights? The second is: Is there a convincing account of the political point of human rights? The third is: What are the normative foundations of human rights?

As a first step, we will turn now to core elements of current debates about the *justification* of human rights. This review should help us to ascertain whether these questions really direct reflection to the core of the matter, miss important points or already have been answered convincingly. For the sake of accessibility, we will distinguish *affirmative* human rights theories from *revisionist* human rights theories, the former making a case for, the latter against human rights. The former will be discussed first, and subsequently the Chapter 5 will turn to the possible sources of critique of these affirmative claims in the framework of political theories of human rights, thus addressing the question: Are human rights the proper tools of human liberation or, to the contrary, elements of humanity's persistent repression?

In order to maintain an overview of the somewhat heterogeneous debate on human rights, it may be equally useful to group the affirmative theories according to certain theory clusters: Human rights are theorized with a focus on their *functions*, in particular for social differentiation, the efficient allocation of goods, the accommodation of bounded rationality and the maximizing of aggregate happiness. They are legitimized by *procedures*, such as by consensus or contract, if only in counterfactual thought experiments. Another approach is to refer to *substantive elements of human existence* as sources of legitimacy – autonomy, needs, interests and capabilities are examples of these. A *political conception* turns to the practice of human rights to clarify their point, whereas a *eudemonistic* perspective derives their importance from their role for a life lived well. These clusters serve expository purposes and do not possess deep theoretical meaning. As a whole, they promise to cover if not all, then at least a sufficiently wide range of topics that a critical theory of human rights needs to address.

4.2 THE FUNCTIONS OF HUMAN RIGHTS

4.2.1 *Human Rights as Tools for Social Integration*

One way to look at the justification of human rights is to deny that they protect goods for the sake of individuals. Influential theories assert that human rights can only be understood as means to serve certain *functions of society*. The fact that they serve the interest of individuals is a mere by-product. The attraction of this view stems from the fact that it sidesteps questions about normative foundations and furthermore explains in functional terms why these quarrels about normative foundations occupy people in the first place. Marxist theory of law is a paradigmatic case, seeing human rights as a functional tool to preserve and perpetuate power both in concrete social terms and in the realm of epistemic regimes. More recent examples include post-structuralist theories of human rights. As these theories predominantly are critical of human rights, they will be discussed as part of our review of the critique of human rights.

Affirmative social functionalist theories argue instead that human rights are best understood on the basis of their function in successful social integration.[11] The most recent and arguably currently most influential theory of this kind stems from systems theory, which conceptualizes society as an autopoietic social system. It is regarded as autopoietic because the elements of this system reproduce themselves through the means of the system itself. In the case of the law, for instance, there are legal norms that regulate the creation of new law or court decisions that determine the content of law. In a systems-theoretical analysis, law creates law and thus is autopoietic.[12] The basic elements making up social systems – the atoms, so to speak, of society in general and of its subsystems like the law – are taken to be "communications," not in the sense of meaningful human utterances, but as social incidents that convey meaning.[13] The evolution of systems is driven forward by increased social differentiation – that which augments social differentiation is incorporated into the social system over the course of its historical evolution. This is the reason why things such as the rule of law or constitutional states evolved: They are functional tools that allow for social differentiation.[14] Human rights, too, are held to have a particular function in such systems: They keep "the future open" for the self-reproduction of the autopoietic social system.[15] They have this desirable effect, it is argued, because

[11] Cf. on social integration driven by the interdependence of persons from the perspective of legal sociology, Émile Durkheim, *De la division du travail social* (Paris: PUF, 2007); Eugen Ehrlich, *Grundlegung der Soziologie des Rechts* (Berlin: Duncker & Humblot, 1989), 65.

[12] Niklas Luhmann, *Das Recht der Gesellschaft* (Frankfurt am Main: Suhrkamp, 1995), 41.

[13] Niklas Luhmann, *Soziale Systeme* (Frankfurt am Main: Suhrkamp, 1987), 346.

[14] Luhmann, *Recht der Gesellschaft*, 239 ff.

[15] Cf. e.g. Niklas Luhmann, *Die Gesellschaft der Gesellschaft Vol. 1 and 2* (Frankfurt am Main: Suhrkamp, 1998), 1094 ff.

they give individuals space to act and thus to change the social system, which allows it to evolve.

This function of human rights is regarded as a powerful analysis of the reasons for the emergence of human rights. Human rights are interpreted as modern complex societies' functional answer to the need for differentiated organization, and not as the renaissance of Natural Law or other forms of human societies' normative orientation. Making individuals the normative center of legal systems means to engage in old-fashioned metaphysics of the person. In systems theory, individuals instead are regarded as "*Funktionsträger*," as the "function bearers" of society.[16] The social system allocates a function to the individual, namely to initiate social development, and provides the crucial tools required to fulfill this function, which are fundamental rights. Individual rights are protected not for the sake of the individual but for the functional sake of society – to enable its differentiated development. The classical idea of the relation between rights and society – that rights are secured because of the justified normative claims of the individual – is turned upside down or, as systems theorists would claim, is turned from its metaphysical head onto its social-functionalist feet.

The traditional view that anchors human rights in the goods of the individual is not only incorrect according to this perspective, however. In systems theory, this traditional view is regarded as a necessary product of social mechanisms and thus as the object of functionalist explanations *itself*. It is part of the "self-descriptions" created by social systems in the form of their members' beliefs about the justification of the elements of the social world in which they live.[17] These beliefs include, for example, the idea that human rights are justified by substantial, rationally defensible, valid reasons. According to systems theory, however, the belief that human rights are justified is false. From the point of view of social theory, there are no valid justifications, only social constructions that erroneously are regarded as reasons for the justification of human rights. In fact, these apparent reasons are nothing but contingent beliefs that depend on the given evolution of the social system. As it is useful for the system's functioning that people entertain these beliefs – for instance, the belief that human beings enjoy human rights because of their human dignity – the system reproduces these beliefs. Human rights theorists and activists unwillingly and unwittingly are serving the functional needs of differentiated social systems. Accordingly, this theory is comparable to Marxist theories of a false consciousness that the class structure of society necessarily produces and that serves the functional purpose of preserving this society but has no claim to justification.

We need to address this argument, for if it is true, the aim of formulating something like a normatively relevant theory of human rights would fail to grasp the functional point of human rights. Moreover, the theory itself might be nothing

[16] Niklas Luhmann, *Grundrechte als Institution* (Berlin: Duncker & Humblot, 2009), 50.
[17] Luhmann, *Gesellschaft der Gesellschaft*, 886 ff.

more than the offspring of social mechanisms that normative human rights theory has failed to understand.

Social-functionalist theories are open to various forms of critique – from the idea that the atoms of social theory are "communications" (and not, as, for instance, Weber thought, the meaningful social action of individuals) to the idea that social systems such as the law are autopoietic. Is the law not rather the purposeful creation of human beings, applied by identifiable agents, institutionalized as social fact by the coordinated meaningful social action of persons, such as creating law, accepting certain norms by a legislature, applied by another institution called courts, as valid, binding and enforceable law?[18]

For the purpose of the theory of human rights, the following points are central, however: Systems theory claims to be purely explanatory. Because of its radical constructivism, it argues that there is no valid justification of normative propositions; every normative stance is taken to be historically and socially contingent. What remains are functional explanations of social institutions and accompanying justificatory beliefs. At first view, systems theory thus does not formulate any claims about legitimacy. However, the development of the preconditions for social differentiation is regarded as an essential tool of complex social organization. Societies with this level of differentiated organization can thus claim something like functional legitimacy: Living in a more differentiated society clearly is preferable to life in a less differentiated society, according to systems theory. This functional superiority then – against its own theoretical stance – tends to turn into a normative claim of the legitimacy of functionally differentiated societies organized around human rights – which brings us back to our question of the normative legitimacy of these rights.

Moreover, systems-theoretical approaches misunderstand the true function of human rights in wedding them to social functions of the kinds described. Human rights are about protecting central individual goods, irrespective of whether this serves a function for the differentiation of society or not. Free speech can be used for purposes that are quite dysfunctional in social terms but is rightly protected in principle even in such cases. This is because human rights are instruments to protect persons, not instruments to protect functions of society abstracted from the concerns of individuals. Regarding human rights as tools that instrumentalize individuals for social purposes is a profound misunderstanding of the function of human rights in modern societies. Their central function is the very opposite: to protect individuals against the intrusion of public authorities and other actors into their lives and ultimately to shield human beings against being used for purposes that denigrate their autonomous subjectivity.

[18] Cf. Mahlmann, *Rechtsphilosophie und Rechtstheorie*, 301 ff.; Matthias Mahlmann, "Katastrophen der Rechtsgeschichte und die autopoietische Evolution des Rechts," *Zeitschrift für Rechtssoziologie* 21, no. 1 (2000): 247 ff.

There is a further fundamental problem for any social-functionalist theory of human rights. The aims of society are not simply a given. Societies are not natural kinds with fixed purposes. The word "society" is a term used for a variety of reasons. Usually, it designates associations of human beings who are connected in some kind of qualified manner – for instance, by the shared institutions of a state. Societies in the latter sense have one central kind of purpose – the purposes their members define. Rights formulate yardsticks, limiting conditions for these chosen aims of a society – whatever the aims are, they must not violate human rights in the first place. Erecting such limits to its own decision-making can in itself be a defining part of the wider aims of society – the protection of human rights signals human beings' decision to take their humanity seriously. This is – at least in principle – the point of the project of creating public authorities bound by national, regional and international human rights. Human rights in this sense *constrain and determine the purposes of society*; accordingly, they are not just functional tools for achieving some given non-normative aim of social organization, such as the high-level differentiation of social interaction. Rather, they define the legitimate aims of society itself.

Because of this misconception, functionalist theories fail to address, let alone specify the normative principles underlying the allocation of rights and determining the social purposes these rights serve, which include the normative calibration of what societies are there for. The question of the criteria for the proper identification of the goods protected remains unanswered likewise because these are the goods of individuals, not of society as such. Whether there is an epistemologically convincing justificatory theory of human rights or not is something that the following discussion will reveal.

4.2.2 *Engineering Social Efficiency?*

Arguments for human rights from the perspective of the *economic analysis of law* point out that certain forms of human rights increase efficiency,[19] based on a conception of human beings as utility maximizers who make rational choices.[20] Efficiency is defined as an allocation of resources in which value is maximized,

[19] Cf. for an example of such reasoning from the analysis of constitutional rights Richard A. Posner, *Economic Analysis of Law* (New York: Wolters Kluwer, 2014), 978: "A search (or seizure) is reasonable if the cost of the search in privacy impaired (B) is less than the probability (P) that without the search the target of the search cannot be convicted or otherwise rendered harmless …, multiplied by the social loss (L) if he eludes punishment." For an analysis of torture, ibid. 984, arguing that under normal circumstances torture is regularly too costly but is efficient in the case of prevention of terrorist attacks: "The cost-benefit analysis of coercive interrogation would be dramatically altered if for example the interrogation concerned a terrorist plot and the person interrogated – a peripheral figure in the plot but a possessor of vital information – faced no criminal punishment but merely deportation as an illegal alien, continued surveillance, or a warning."

[20] Posner, *Economic Analysis*, 4 ff.

value being measured by the willingness to pay. Willingness to pay is dependent on ability to pay, which creates an (unsolved) problem for this approach: The assessment of a thing's value depends on the given resources of the agent.[21] Not factoring an agent's financial background out of the willingness to pay has the effect that potentially any good is more valuable for rich persons than for poor persons – because of the rich persons' financial resources, they may be willing to pay more for everything.[22]

Efficiency-based rights accounts have shortcomings comparable to those of functionalist theory: They fail to capture appropriately the central point of human rights, which is to provide normative principles beyond efficiency, understood in the terms of standard economic efficiency criteria.[23] Rights formulate limiting conditions for any efficiency regime and therefore presuppose a justification that transcends the limits of an efficiency-based cost–benefit analysis.[24] Making the value of a thing dependent on the contingent financial resources of an agent is already a very implausible analytical starting point for a theory of efficiency, utility, value and the law. Moreover, the worth of liberty or other goods protected by human rights is not what a person is willing to pay for them anyway. Their value is certainly not lower for the poor than for the financially affluent. It is a category error to try to assess the worth of a good such as liberty in monetary terms. Moral evaluation depends on moral principles – in Kant's pithy words, "for that an object of justice is small does not prevent the injustice done to it from being great."[25]

A more promising approach stems from *behavioral economics*. Its main advance in comparison to classical law and economics is the attempt to base theories upon empirical research in human psychology, particularly in decision-making. Psychological research of this kind points to structures of bounded rationality: Under certain conditions, human decision-making is determined by other reasons than merely rational ones. Studies within prospect theory on psychological mechanisms such as heuristics, framing patterns and biases like risk aversion form the common starting points of such research.[26]

[21] Posner, *Economic Analysis*, 11 ff.

[22] On the conclusions of this starting point, which are unethical from his point of view, too, cf. Posner, *Economic Analysis*, 11 ff.

[23] For an example of a discussion of the limits of criteria like Pareto optimality and Kaldor–Hicks efficiency, Posner, *Economic Analysis*, 13.

[24] To take the example mentioned previously: The point of limiting governmental searches and seizures is the protection of human freedom and autonomy. This idea can justify much stricter limits than conceived in Posner's formula quoted above (see n. 19). This is even more evident for the crucial example of torture, where the dignity of a person justifies an absolute prohibition of such practices. A cost–benefit analysis of the kind imagined by Posner, *Economic Analysis*, creates a gateway for practices that cannot be reconciled with human rights.

[25] Kant, *Zum Ewigen Frieden*, 384; translation in Kant, *Perpetual Peace*.

[26] An interesting example is the reconstruction of the debate about civil and political rights on the one hand and social and economic rights on the other from the perspective of framing them as losses or gains, cf. Zamir, *Law, Psychology and Morality*, 143 ff.

Behavioral law and economics are no substitute for justified normative principles: Skewed decisions due to heuristics, framing effects or biases are important elements of a realistic theory of human decision-making. The findings on bounded rationality, however, lead to the question of what principles should guide human decision-making instead, not least which normative principles should be decisive in overcoming its shortcomings.[27]

Sophisticated theories on behavioral law and economics factor a deontological threshold into the cost–benefit analysis, which aims at achieving harmony with common moral intuitions.[28] This move underlines the importance of normative principles. It invites us to consider closely the nature of common moral intuitions and their role in normative theory. In particular, it raises the question of why common moral intuitions should be decisive in *normative* terms.[29] As these theories formulate some of the currently most influential empirical hypotheses about the human mind, they will be discussed in more detail in the analysis of current theories of cognition that forms Part III of this study.

4.2.3 *Human Rights and Maximizing of Happiness*

There is a rule-utilitarian defense of human rights – despite Bentham's proverbial critique of these norms. This argument holds that having human rights in the long run secures the greatest happiness of the greatest number and thus satisfies the basic utilitarian principle for justifying individual and social norms. This is the case, it is argued, because everybody will profit from the goods protected by rights as social rules, even though, in particular cases, the principle of utility could demand that the goods of the individual are sacrificed for the greatest happiness of the greatest number.

One good example for this kind of argument is the enslavement of a minority, because a classic counterargument to utilitarianism is that it offers no theoretical defenses against the justification of the enslavement of a group of persons if the happiness of the slaveholders outweighs the misery of the enslaved. Utilitarians answer that this is not so, because it is not clear that the misery of slaves is not so profound that the benefits for the slaveholders become irrelevant. Even if under very particular circumstances – for example, some kind of privileged form of household slavery where the slaves are treated well – this were not the case, as a rule the prohibition of slavery

[27] The debate about libertarian paternalism and its limits is exactly about this question, cf. Richard H. Thaler and Cass R. Sunstein, *Nudge* (London: Penguin Books, 2008). For a critique, Jeremy Waldron, "It's All for Your Own Good," *The New York Review of Books* 61, no. 15 (2014); Christopher McCrudden and Jeff King, "The Dark Side of Nudging: The Ethics, Political Economy, and Law of Libertarian Paternalism," in *Choice Architecture in Democracies: Exploring the Legitimacy of Nudging*, eds. Alexandra Kemmerer et al. (Oxford and Baden-Baden: Hart and Nomos, 2015).

[28] On threshold deontology Eyal Zamir and Barak Medina, *Law, Economics and Morality* (Oxford: Oxford University Press, 2010), 41 ff.

[29] Cf. Zamir and Medina, *Law, Economics and Morality*, 65.

would still be justified: Overall, given the many forms of slavery and the experience of the cruelty it engenders in at least sufficiently many cases, it is reasonable to assume that the institution of slavery causes more suffering than well-being and thus as a rule is not justified according to the principles of utility.

Utilitarian support of this kind for the justification of human rights is certainly welcome. It is not a reliable defense, however. The central reason for this is that the point of ethics and justified law is not to maximize goods abstracted from individuals. Individuals cannot be factored out of a normative argument and be substituted by aggregate social goods. Rather, they are at the heart of it.[30] Thus, even if enslavement did promote the greatest happiness of the greatest number, it could not be justified.

There is another important point. What is good and admirable about utilitarian doctrine is its sense for the equality of human beings. Its central pillar is, after all, that the happiness (determined quantitatively[31] or qualitatively,[32] depending on the utilitarian outlook) of all humans should count equally. This is an important and, in many ways, a progressive doctrine. However, it presupposes the normative principle of the equality of human beings and thus normative content beyond the principle of utility itself.[33] The same is true for the radical selflessness that utilitarianism implies and that demands that individuals relinquish any good if it serves the greatest happiness of the greatest number. This presupposes a selfless, other-regarding moral motivation and not just the pursuit of pleasure and the avoidance of pain. As such, it shows that we cannot escape the question of the normative ideas that lie at the heart of the discussion of human rights and that therefore have to be confronted head on.

4.3 JUSTIFICATION BY AGREEMENT

4.3.1 *Discourse and Consensus*

A further influential approach stems from *discourse theory*. To many, this theory recommends itself because it seems to rely only on very thin theoretical

[30] Cf. on this standard criticism from the "separateness of persons" for instance Herbert Lionel Adolphus Hart, "Between Utility and Rights," *Columbia Law Review* 79, no. 5 (1979): 828 f.

[31] Bentham, *Principles of Morals and Legislation*, I, 1.

[32] Mill, "Utilitarianism," 211.

[33] Bentham, *Principles of Morals and Legislation*, I, 13, note d; Mill underlines the importance of the principle of equality for utilitarianism emphatically: "The entire history of social improvement has been a series of transitions, by which one custom or institution after another, from being a supposed primary necessity of social existence, has passed into the rank of a universally stigmatized injustice and tyranny. So it has been with the distinctions of slaves and freemen, nobles and serfs, patricians and plebeians; and so it will be, and in part already is, with the aristocracies of colour, race, and sex," Mill, "Utilitarianism," 259. On the problem that this apparent egalitarian starting point "may license the grossest form of inequality in the actual treatment of individuals, if that is required in order to maximise aggregate or average welfare," Hart, "Utility and Rights," 830.

preconditions. It consequently appears well adapted to a "post-metaphysical" age that is skeptical about substantial normative theory.[34] It starts from the assertion that neither a teleology of history, nor human nature, nor traditions are able to furnish the foundations of ethics and legal systems.[35] Instead, subjective practical reasons need to be replaced by *communicative reason*.[36] The core principle for the justification of any ethical principle, including human rights, is the *discourse principle*. According to this principle, those norms that all participants in rational discourses are able to agree upon are justified.[37] A discourse is rational when its outcome is determined solely by arguments and not skewed by the power of some participants. This deliberative process respects human beings' foundational right to justification:[38] People are bound to principles that are not imposed upon them but rather prove to be justified once everybody's interests are taken into account. It is only adhering to such principles that enables the self-endorsement of everybody's subjectivity without domination by others.[39] Ultimately, the culture of reason-based argument is rooted in specific historically grown lifeworlds (*Lebenswelten*).

Discourse theory correctly highlights the importance of individual autonomy that is the non-negotiable yardstick of legitimate normative content.[40] This notwithstanding, it faces a substantial theoretical problem: A discourse that includes everybody's concerns in the sense outlined above is a normatively charged enterprise. It presupposes equality, freedom and respect for other human beings. These normative principles are partly implied in any form of communication that is based on arguments between equals, as discourse theorists correctly maintain.[41] However, this discursive practice is not the source of these normative principles. Morality is not the child of the structure of communication. Rather, equality, freedom and respect for human beings are the preconditions for the obligation to enter into such forms of communication with everybody in the first place. Doing so is not self-evident. Many people throughout history and in the present have not had and do not have a voice because they are not respected as free and equal subjects worthy of respect. The normative principles demanding equal respect for free individuals cannot then be

[34] Cf. on the genealogy of post-metaphysical thinking, Jürgen Habermas, *Auch eine Geschichte der Philosophie, Vol. I: Die okzidentale Konstellation von Glauben und Wissen* (Berlin: Suhrkamp, 2019), 21.

[35] Habermas, *Faktizität und Geltung*, 17

[36] Habermas, *Faktizität und Geltung*, 17.

[37] Habermas, *Faktizität und Geltung*, 138: "*Gültig sind genau die Handlungsnormen, denen alle möglicherweise Betroffenen als Teilnehmer an rationalen Diskursen zustimmen können.*"

[38] Cf. Rainer Forst, *Das Recht auf Rechtfertigung* (Frankfurt am Main: Suhrkamp, 2007).

[39] Cf. Klaus Günther, "Anerkennung, Verantwortung, Gerechtigkeit," in *Sozialphilosophie und Kritik*, eds. Rainer Forst et al. (Frankfurt am Main: Suhrkamp, 2009), 269, 286 f.

[40] The fact that the individual is not replaceable does not mean that the results of moral thought are private, cf. Lutz Wingert, *Gemeinsinn und Moral* (Frankfurt am Main: Suhrkamp, 1993), 290 f.

[41] On a "minimal ethics" implied in communication, cf. Jürgen Habermas, *Erläuterungen zur Diskursethik* (Frankfurt am Main: Suhrkamp, 1991), 194.

the products of the application of the discourse principle, because these principles are the normative preconditions for the legitimacy of the discourse principle itself. The discourse principle is not normatively foundational but dependent on the acceptance of other, truly justifying norms of equality, liberty and respect for others. Thus, it is thin, but too thin.

Moreover, the norms demanding the kind of respect for human beings embodied by human rights reach beyond normatively structuring patterns of communication. Human life is not a discourse. A human life has many dimensions beyond communicating with others, and human rights take account of this fact. The right to bodily integrity, for instance, protects a pain-free existence, which is a value not only because it enables the rights-holders to enter into political deliberation. Freedom of faith protects belief for the sake of individuals, whether they want to share this belief with anybody or not. One cannot rely only on the supposed normative implications of communication to justify such rights, because these rights protect spheres of human life beyond such communication. Nor can one simply rely on a supportive lifeworld: Respect for other humans and their rights is the ultimate normative precondition for the historical and political *creation* of discursive and deliberative practices and lifeworlds. Such a lifeworld can only come into existence and persist over time if people feel obliged to respect others as free and equal individuals. Discursive and deliberative practices and lifeworlds thus cannot be the ultimate normative foundations of human rights – they depend on the cultural ethical appeal of these very rights.

Discourse theory professes ultimately to leave open the question of the normative principles that would be justified by a rational discourse. But precisely this is the central question to be answered for the topic at stake here: Are there any reasons why agents who are respectful of good reasons should regard human rights as justified, and if so, what are these reasons? The fact that discourse theory engages in this enterprise irrespective of its professed normative abstinence only underlines the importance of this point.[42]

4.3.2 *Justification by Contract*

Another self-proclaimed *thin* normative theory is *contractualism*, which draws on the long tradition of social contract theories that majorly influenced normative thinking on modern constitutionalism and fundamental rights. In the history of thought, social contract theory has been a powerful tool for rationalizing, individualizing, secularizing and universalizing norms crucial to a body politic. The baseline

[42] The theory of human rights within discourse theory sets out to derive a "system of rights" from the discourse principle: The defense of a standard catalogue of human rights is charged with normative assumptions about the worth, equality and liberty of human beings. Cf. Habermas, *Faktizität und Geltung*, 151 ff.

is that norms, including those constitutive of the state, are justified by the consent of the parties to a contract. In contemporary approaches (as in most older social contract theories), this contract is not real but a thought experiment. It serves to test the legitimacy of norms by checking whether it reasonably could be assumed that these norms could be the result of agreement between free and equal individuals. The conditions under which such an agreement is reached can be very specific in order to highlight the importance of impartiality, as is the case, for instance, in Rawls' theory.[43]

This approach faces a problem related to that of discourse theory: Social contract theories presuppose the freedom, equality and right to respect of all human beings. Otherwise, there would be no reason to include them in the imagined contract. The very point of a contract is to honor human beings' liberty, equality and equal worth by making their agreement the precondition of their obligations. As the norms underlying liberty, equality and respect for human worth form the foundations of the social contract, they ultimately cannot be its products. Contractualism leaves the question of the contract's normative foundations open: Why is it legitimate that human beings are bound only by obligations that can be imagined as accepted by free persons of equal worth?[44] Where do the noncontractualist preconditions of contractualism stem from?

The problem of normative principles independent of and foundational for contractualist justification is the reason for an influential critique of contractualism that focuses on the formality of contractual principles, as this formality misses the decisiveness of material normative principles. The reason for the justification of normative principles is not that people would agree that certain principles are legitimate (under whatever specified conditions honoring their freedom and equality) but, contrariwise, that people could be imagined to agree upon the legitimacy of certain principles because these norms are justified by good substantial reasons. As J. J. Thomson stated pointedly:

> For my own part, I cannot bring myself to believe that what *makes* it wrong to torture babies to death for fun (for example) is that doing this "would be disallowed by any system of rules for the general regulation of behavior which no one could

[43] The central tool of his argument is the "veil of ignorance," cf. Rawls, *Theory of Justice*.

[44] This may be true but is not evidently so. Hegel, for example, was repulsed by the idea that a contract could be imagined as founding something sublime like a state, cf. Georg Wilhelm Friedrich Hegel, "Grundlinien der Philosophie des Rechts," in *Werke Vol. 7*, eds. Eva Moldenhauer and Karl Markus Michel (Frankfurt am Main: Suhrkamp, 1986), § 273. The same problem also arises for other contractualist theories – for instance, the second-person standpoint and its implied contractualism, cf. Stephen Darwall, *The Second-Person Standpoint: Morality, Respect, and Accountability* (Cambridge, MA: Harvard University Press, 2009). Darwall argues that any claim to moral authority is subject to a test of reasonable acceptance or rejection from the second-person standpoint of any second-personally competent being. This test presupposes the normative equality of these agents and their legitimate claims to equal treatment, concern and respect.

> reasonably reject as a basis for informed, unforced general agreement". My impression is that explanation goes in the opposite direction – that it is the patent wrongfulness of the conduct that explains why there would be general agreement to disallow it.[45]

The contractualists' answer is that the contractualist formula is about "what it is for an act to be wrong. What *makes* an act wrong are the properties that would make any principle that allows it one that it would be reasonable to reject (in this case, the needless suffering of the baby)."[46] This answer, however, is not enough to save the contractualist paradigm. The answer itself underlines that material normative standards are crucial (those that would make any principle that allows, for instance, the torturing of babies, one that it would be reasonable to reject), not a formal, content-free, thin contractualist principle. Moreover, the hypothetical agreement that it is reasonable to reject a rule allowing certain actions is not "what it *is* for an act to be wrong." "What it *is* for an act to be wrong" is the fact that it constitutes a violation of one of those moral principles that are justified. What it *is* for torturing babies to be wrong is the fact that torturing babies violates basic principles of human ethics. The agreement about this – whether hypothetical or real – is the consequence of the cognition of this state of affairs. This agreement does not, however, constitute the nature of wrongness.

One of the strengths of Rawls' theory is that it acknowledges the limits of contractualism. According to Rawls, the original position in which the agreement is concluded is a *device of representation*.[47] This stance is important for contractualism in general. Through a formidable metaphor, it illustrates profound ethical intuitions that are crucial for the justification of modern constitutionalism and fundamental rights. It does not, however, substitute these normative principles by the foundational idea of a social contract. Instead, it derives this idea from these principles and therefore remains dependent on their justification.

4.4 HUMAN RIGHTS AND HUMAN EXISTENCE

4.4.1 *The Rights of Autonomous Agents*

Human rights are rightly associated with the protection of and the respect for autonomy as a central element of human existence. Accordingly, influential theoretical approaches that are both sophisticated and highly demanding in philosophical terms rely on *agency* as the foundation for the justification of human rights. There are basically two kinds of agency theories. One is based upon what one might

[45] Thomson, *Realm of Rights*, 30 n. 19 (emphasis in original).
[46] Thomas M. Scanlon, *What We Owe to Each Other* (Cambridge, MA: Harvard University Press, 2000), 391 n. 21 (emphasis in original).
[47] Rawls, *Political Liberalism*, 24.

want to call the *logic of action*. This theory relies on a variant of a transcendental argument by identifying the protection of human rights as the precondition for the possibility of agency.[48] The other variant refrains from statements about the logic of action and centers its argument on the normative consequences of what is called *normative agency*, the value of autonomously defining and pursuing one's own course in life. We will look at these two theories in some detail in turn, as this will allow us to distill certain important systematic insights.

4.4.1.1 Human Rights and the Logic of Action

Two questions form the starting point of the argument for human rights from the logic of action perspective: "First, what logical or rational justification is there for attributing to self-interested individuals a concern for their own having rights or making rights-claims? Second, what logical or rational justification is there for a self-interested individual's moving, or having to move, from an acceptance that she herself has rights to the much broader moral judgment that every individual has rights, so that there are human rights and correlative duties?"[49] The answer is found by a "dialectically necessary method"[50] deriving normative principles from human action, which is the foundation of a rational argument for morality and human rights.[51] This foundation has a particular quality as nobody can escape the context of action, not even by committing suicide (which is itself an action).[52] The key features of action are voluntariness or freedom and purposiveness or intentionality. As agents act to actually fulfill their purposes, purposiveness is extended to the general conditions for succeeding in this endeavor and thus to well-being.[53] Therefore, it is concluded, "freedom and well-being are the proximate necessary conditions and generic features of action and of generally successful action."[54]

Human rights are justified on this basis. It is argued that, first, "every agent must logically accept that he or she has rights to freedom and well-being" and, second, "that the agent logically must also accept that all other agents also have these rights equally with his or her own, so that in this way the existence of universal moral rights, and thus of human rights, must be accepted within the whole context of action or practice."[55]

[48] Alan Gewirth, *The Community of Rights* (Chicago, IL: University of Chicago Press, 1996), 13 ff.
[49] Gewirth, *Community*, 8.
[50] Gewirth, *Community*, 16.
[51] Gewirth, *Community*, 13.
[52] Gewirth, *Community*, 13.
[53] Gewirth, *Community*, 13. Gewirth distinguishes different levels of well-being that become increasingly rich: basic well-being (life, physical integrity, mental equilibrium), nonsubtractive well-being (not being lied to, not being stolen from) and additive well-being (education, self-esteem, opportunities for acquiring wealth and income).
[54] Gewirth, *Community*, 14.
[55] Gewirth, *Community*, 17.

To show that self-interested agents must (with logical necessity) attribute rights to themselves, eight steps are outlined that set out the argument very clearly.

The first step consists of the agents each setting an aim: "I do *X* for end or purpose *E*." Second, *E* is identified as a good. Third, the agents must accept that their freedom and well-being are necessary goods, because they are the proximate necessary conditions of action and of acting successfully in general, and thus of attaining any purpose. Given this, the agents must, fourth, conclude that they must have freedom and well-being. The fifth step is of particular importance: The agents, it is argued, logically must accept not only that they must have freedom and well-being, but that they have *rights* to freedom and well-being. The alternative would be self-contradictory: It would amount to, sixth, rejecting the proposition that others ought at least to refrain from removing or interfering with the agents' freedom and well-being. It would imply, seventh, that others are permitted to remove or interfere with the agents' freedom and well-being. This in turn would mean, eighth, accepting that they may not have freedom and well-being, a proposition contradicting the conclusion of step four that the agents must have freedom and well-being as the proximate necessary conditions of action and of acting successfully in general.[56]

The logical principle of universalizability[57] builds the bridge from these findings to the justification of moral rights for all: If any agents hold that they have rights by virtue of them being a prospective agent, they must grant this right to all.[58] This is an application of the central moral principle of this theory, the *principle of generic consistency*: "[A]ct in accord with the generic rights of your recipients as well as of yourself."[59]

From this foundation, particular rights are deduced, most prominently positive rights to welfare. These thoughts also set the stage for the important argument that rights and community are not opposed but that, on the contrary, rights establish a community – a community of rights.[60]

4.4.1.2 Human Rights and Normative Agency

A different approach puts *normative agency* center stage.[61] Normative agency as a qualified form of agency[62] is understood as a rights-generating reason that at the same time offers a well-defining and content-limiting existence condition of moral human rights. This is taken to be crucial, as the "term 'human rights' is nearly

[56] Gewirth, *Community*, 17 f.
[57] Stated as "if some predicate P belongs to some subject S because S has a certain quality Q (where the 'because' is that of sufficient condition), then P logically must belong to all other subjects S_1 to S_n that also have Q," Gewirth, *Community*, 18.
[58] Griffin, *On Human Rights*, 18.
[59] Griffin, *On Human Rights*, 19.
[60] Griffin, *On Human Rights*, 1 ff., 71 ff.
[61] Griffin, *On Human Rights*, 2.
[62] Griffin, *On Human Rights*, 45.

criterionless," it is argued.[63] There is a certain consensus about the term's extension but not about its intension, at least not in a sufficiently thick sense, because "the fragment of intension we have – namely, a claim that we have on others simply in virtue of our being human – holds of moral claims in general, and not all moral claims are rights-generated. For example, the claim that one has on others that they not gratuitously cause one pain is not."[64] That task is thus "to remedy the indeterminateness – to do what the Enlightenment failed to do."[65]

Normative agency is the proper starting point to achieve these ends, the argument goes. Normative agency and what it entails spell out the meaning of the term "human dignity,"[66] which is not human beings' most important moral status, however.[67] Normative agency is of intrinsic value: "If normative agency is valuable, it is intrinsically valuable. One can only try to make it sufficiently clear what normative agency is and expect others to see that it is valuable."[68] Such a teleological *personhood theory* is based on an "expansive naturalism" that justifies human rights because they are preconditions for human agency.[69]

Normative agency consists in the possibility to form a conception of a worthwhile life and to pursue one's life accordingly. Normative agency in this wider sense, it is argued, encompasses three elements: autonomy, liberty and minimum provision, which enable normative agency.[70] Autonomy concerns self-decision, "a capacity to recognize good-making features of human life, both prudential and moral, which can lead to the appropriate motivation and action."[71] Liberty refers to the possibility to follow one's choices.[72] With minimum provision, the important aspect of the

[63] Griffin, *On Human Rights*, 14.
[64] Griffin, *On Human Rights*, 17.
[65] Griffin, *On Human Rights*, 18.
[66] Griffin, *On Human Rights*, 3, 44: "What we attach value to, what we regard as giving dignity to human life, is our capacity to choose and to pursue our conception of a worthwhile life."
[67] Griffin, *On Human Rights*, 94.
[68] Griffin, *On Human Rights*, 152.
[69] Griffin, *On Human Rights*, 32 ff.
[70] Griffin, *On Human Rights*, 32 f.: "[W]e value our status as human beings especially highly, often more highly than even our happiness. This status centres on our being agents – deliberating, assessing, choosing, and acting to make what we see as a good life for ourselves. Human rights can then be seen as protection of our human standing or, as I shall put it, our personhood. And one can break down the notion of personhood into clearer components by breaking down the notion of agency. 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 to 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 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'). Because we attach such high value to our individual personhood, we see its domain of exercise as privileged and protected."
[71] Griffin, *On Human Rights*, 156.
[72] Griffin, *On Human Rights*, 149 ff.

material preconditions of real agency enters the picture – a plausible and classic thought of the justification of social and economic rights. From this basis, other human rights can be derived, the ensemble of which forms the well-founded bill of moral human rights.[73]

According to its proponents, this approach allows the crucial critical function of human rights theory – namely to sharpen the vague contours of the term "human rights" – to be fulfilled. The human rights project is said to have led to an implausible proliferation of rights.[74] Given this development, one central driving force behind the normative agency account is the need for critical yardsticks to determine what is rightly called a human right and what is not. The agency account is thus deliberately restrictive. Human rights are not "anything that promotes human good or flourishing, but merely what is needed for human status."[75] The personhood account "is deflationary in three related ways. It supplies a ground for rejecting certain actual declarations of rights. It tends to narrow the content of individual human rights. And it reduces the importance of human rights."[76] This restrictive approach encompasses the personal scope of human rights as well. Contrary to current human rights practice, not all human beings, only "functioning human agent[s]"[77] qualify for protection by human rights,[78] excluding infants,[79] those with severe mental disabilities or people in an irreversible coma.[80] This does not mean that there are no moral obligations towards these persons. They just do not have human rights, it is argued.[81] If the threshold condition is met, however, anybody above it counts as an agent without differentiation.[82] According to this argument, the diminishing capacity for agency in the elderly can curtail their human rights – for example, to health care (e.g. when medical resources are scarce).[83] On the other

[73] Griffin, *On Human Rights*, 33 provides a list: "[T]he generative capacities of the notion of personhood are quite great."

[74] "Unacceptable cases" are supposed to include the right to peace, the right to inherit, the right to protection of honor and reputation and the right to residence, Griffin, *On Human Rights*, 194 ff.

[75] Griffin, *On Human Rights*, 34.

[76] Griffin, *On Human Rights*, 95.

[77] Griffin, *On Human Rights*, 35.

[78] Griffin, *On Human Rights*, 34 f., 83 ff. The underlying theory of personal identity makes capacity for self-consciousness the crucial criterion, preventing a "temporally backward proliferation" of personal identity. On the debate on the factors of personal identity, with other results, Mahlmann, *Grundrechtstheorie*, 298 ff.

[79] Griffin, *On Human Rights*, 87, because infants do not have full consciousness yet.

[80] Griffin, *On Human Rights*, 92: "My belief is that we have a better chance of improving the discourse of human rights if we stipulate that only normative agents bear human rights – *no exceptions*: no infants, not the seriously mentally disabled, not those in a permanent vegetative state, and so on" (emphasis in original).

[81] Griffin, *On Human Rights*, 90 ff., 95: "To deny an infant the chance to reach and exercise and enjoy maturity is a far more horrendous wrong than most infringements of human rights."

[82] Griffin, *On Human Rights*, 44 f.

[83] Griffin, *On Human Rights*, 101.

hand, agency can provide reasons to accept new and hitherto contested rights – for example, to same-sex marriage,[84] or what are called positive rights; that is, rights to the provision of goods,[85] including welfare rights.[86]

Practicalities are a second existence condition of human rights: Human rights must be suitable for real human individuals and social life. Therefore, practicalities encompass "features of human nature and of the nature of human societies."[87] Knowledge constraints and a realistic account of human motivation play important roles in delineating the content of human rights.[88]

It is stressed that the human rights thus justified do not encompass the whole domain of morality, which is identified with equal respect.[89] Other and equally important normative principles exist that are not identical to, related to or reducible to human rights.

The existence conditions of legal human rights are said to be different from moral rights. Nevertheless, the importance of a theory of moral human rights for the conception of the law is (quite plausibly) understood to be significant. Court decisions are no substitute for such a theory – on the contrary, they require this theory to solve some of the crucial puzzles of how to understand human rights law.[90]

The normative agency account hopes to renew the argument, rightly taken to be a key element of the human rights tradition, "that these rights are grounded in natural facts about human beings."[91] The account is universalist: The existence conditions of human rights are taken to be valid for any human community.[92] Changes in social and cultural circumstance are no counterargument because universality can be defended for higher-level rights that are, in turn, the foundation of derived rights relative to a certain time, like freedom of the press.[93] The challenge of relativism can thus be met.[94]

These thought-provoking proposals resonate well with the uncontroversial connection of human rights and the respect for human autonomy. Let us consider, then, how promising these approaches are in making the case for human rights.

[84] Griffin, *On Human Rights*, 163.
[85] Griffin, *On Human Rights*, 97 ff. He is critical of some, e.g. right to health, ibid. 99 ff.
[86] Griffin, *On Human Rights*, 176 ff., 181: "The value concerned is being a normative agent, a self-creator, made in God's image." Therefore, the proximate necessary conditions for normative agency must be secured, ibid. 183.
[87] Griffin, *On Human Rights*, 38.
[88] Griffin, *On Human Rights*, 98 ff. on the effects on positive rights, which are rights to the provision of certain goods.
[89] Griffin, *On Human Rights*, 39.
[90] Griffin, *On Human Rights*, 205.
[91] Griffin, *On Human Rights*, 36, 93.
[92] Griffin, *On Human Rights*, 48 ff.
[93] Griffin, *On Human Rights*, 50.
[94] Griffin, *On Human Rights*, 38 f.

4.4.1.3 The Concept of Agency

The first step in assessing the reach of these theories is to clarify the different aspects of the concept of agency. One possible understanding of agency is that it refers to a particular property of human beings, the capacity of human subjects to initiate chains of events, undetermined and free, as uncaused causes, if you will. If so, this kind of capacity (if it exists) seems to be inalienable, and human beings cannot lose it (apart from certain extreme situations to be discussed shortly) as it is part and parcel of their existence. This is the understanding of agency in the sense relevant for the question of free will.

Only in rare cases is this capacity for autonomous decision-making as such endangered, restricted, made irrelevant or even extinguished. These cases are far from banal. The most obvious example is killing a person – there can be no agency if the agent is not alive. Another important example of such cases is torture. Among the many evils of this practice is the tortured human being's loss of the ability to form an autonomous decision. To be sure, in a certain sense, a person who is being tortured can still decide about their course of action – for example, to remain silent. In practical terms, however, leaving ideas of superhuman willpower aside, this possibility is only theoretical – for every human being has a breaking point, everybody has their Room 101, where their autonomy is wrested from them by the pain and degradation inflicted. Other instances of this kind include brainwashing, drug-induced behavior, forced "reeducation" and the like.

The second understanding of agency is the possibility of acting in line with autonomous decisions. Agency can be rendered meaningless if there is no scope to act in a way that corresponds to the agent's intentions, even if the possibility of making a decision as such remains unimpaired.[95]

4.4.1.4 Agency and the Problem of Justificatory Underdetermination

It is far from clear whether all particular liberties and other important classes of human rights are in fact necessary preconditions for agency in the senses discussed by agency theories, which seem mostly related to agency as the possibility to act in line with autonomous decisions. Can one only be an agent in the sense of being the subject of action by acting according to one's will if one enjoys freedom of expression, of religion, of assembly or the freedom to choose a profession? There are all kinds of repressive regimes that violate very many classic human rights but do not call agency as such into question, only certain uses of agency. For instance, the use of agency to criticize the government may be proscribed while other fields

[95] There is a gray area between these two kinds of impairments of agency: The total lack of possibilities to act upon one's choices may have a very considerable influence on the decision-making itself.

https://doi.org/10.1017/9781316875520.007 Published online by Cambridge University Press

remain untouched – say, the agency as to one's narrowly circumscribed (but still very important) private life. History is full of such regimes. This does not mean that human beings only became full agents after human rights were established. Consequently, the logic of action as such does not carry very far in justifying particular rights. By deducing a full set of rights from agency, the theory over the course of the argument in fact implicitly enriches the preconditions of agency to such a degree that it is not just the *logic of action* that carries the argument through but something else, namely the normative relevance of the *minimum conditions of a meaningful life*. This is an important point but no longer is based solely upon the logical necessities of being an agent.

The normative agency conception fares much better in this respect. But even in an illiberal society without much freedom, meaningful normative agency remains imaginable, as explained above.[96] In addition, human rights are more capacious than this argument implies – the freedom guaranteed by human rights, at least in some crucial cases, is not limited to the *minimum* of what is necessary to assure agency but to the *maximum* that is compatible with the same equal freedom for all human beings and some other constraining public interests – in the case of free speech, for instance, as much as in the case of freedom of religion.

Equality guarantees, a further building block of human rights thinking, raise some questions for an agency approach, too. Why is equal treatment as such a human right enlisted in every bill of human rights? Interestingly, equality guarantees are somewhat neglected in reconstructions of the legitimacy of rights in agency accounts. Filling in this gap in the spirit of agency theories, one may want to argue that equal treatment is important for agency in the normative sense if discrimination is such that it curtails or takes away certain freedoms. If you are unable to rent an apartment because of your skin color, your liberty is substantially limited because you cannot choose your preferred dwelling place. Such arguments are important, but not the whole story about equality guarantees. Another important reason for the protection of equality as a human right derives from considerations of justice,[97] yet another from the respect due to a person. Discrimination on the ground of race is forbidden (and thus equal treatment secured) at least partly to make sure that

[96] Griffin, *On Human Rights*, 46 f. accepts the objection that repressive regimes do not negate any form of agency but maintains that such regimes prevent individuals from a central element of normative agency: "By 'agency' we must mean not just having certain capacities (autonomous thought, executive action) but also exercising them," ibid. 47.

[97] Griffin argues that only issues of procedural justice are part of human rights, not other forms of retributive and distributive justice, Griffin, *On Human Rights*, 40 ff. This fails to convince for, as Griffin himself notes, human rights have distributive effects, ibid. 41, which, however limited they may be, must be legitimized with reasons of distributive justice. In addition, some forms of "fairness" like equality of men and women are regarded as being internal to human rights because of the equal agency of men and women, ibid. 41. All of this explicitly points to principles of justice as a central legitimizing reason for human rights.

everybody is treated with such respect as is due to them.[98] It thus is not just agency that is at stake but these other normative considerations as well.[99]

A further example for a lacuna in the theory is the widespread view that human rights provide yardsticks for just punishment, contrary to what agency theorists assume.[100] Personality rights including human dignity play an important practical role in this respect, and plausibly so. A system of sanctions that instrumentalizes human beings for the purpose of deterrence certainly creates a human rights issue. High-profile court cases underline the importance of this approach.[101]

Agency theories thus seem to have the problem of *underdetermining the precise content of human rights*. This problem is relevant both for the logic of action variant and for the more capacious normative agency approach, though the latter is less affected by it because it has the resources to legitimate at least some important substantial rights.

This leads to another critique of agency theories, which is the flipside of the argument just mentioned: They fail to include important goods other than agency that are protected by human rights. A good example is the right to life. Agency theories derive this right, as they do any other, from the importance of agency.[102] However, life is protected not just as a precondition of action or to enable normative agency. It is protected as the precondition of the many things – including agency, of course – that make up a meaningful human life, from the possibility of enjoying a gentle spring breeze to the many other fruits to be reaped in the fertile gardens of human thought and sentiment. Not all of these goods of life are secured for the sake of agency: Falling in love (the sheer event, not the actions stemming from it) is not an exercise in autonomy. On the contrary, it is entirely beyond autonomous decision-making, which is the source of its bliss and sometimes of its tragedy.

[98] Griffin argues for protection from discrimination because being a "member of a hated minority" impairs agency – for example, by inhibiting such a person from speaking out, Griffin, *On Human Rights*, 42. In addition, he (rightly) takes it as a "monstrous injustice, a flagrant violation of equal respect," 42. This, however, points to the importance of justice and respect for the foundations of human rights, as argued here.

[99] As a consequence, Griffin's account sits uneasily with current human rights practice beyond the examples mentioned. He argues that racism and sexism are human rights issues, while ageism is not. A huge bulk of current antidiscrimination law, generating much case law, today is concerned precisely with the latter and is widely regarded as a human rights issue, cf. e.g. for the EU context Council of the European Union, *Council Directive 2000/78/EC*, OJ L 303, 12/02/2000, November 27, 2000, its transposition into Member State law and the case law on the matter by the CJEU and national courts.

[100] Griffin, *On Human Rights*, 43.

[101] Cf. for instance ECtHR, Vinter and Others v The United Kingdom, Judgment of July 9, 2013, appl. nos. 66069/09, 130/10 and 3896/10, [2016] III ECHR 317.

[102] Griffin, *On Human Rights*, 100: "On the personhood account, we have a right to life, because life is a necessary condition of normative agency." There are arguments that make the account harder to grasp, because the value of life, it is said, is derived from the value of the person concerned for others and from the intrinsic value of life. The most consistent interpretation is that all of these are ultimately based on the value of normative agency.

Nevertheless, it is something that many would regard as the prime gift (in a very deep and literal sense) of human life. Life consists of a myriad of other such good things that make it the precious thing it is. Life in this sense is of intrinsic value as such, not only in an instrumental sense as the precondition of action or normative agency.

The same seems to be true for the goods protected by other rights. Part of the point of freedom of expression is to satisfy an existential need: the desire to talk, to express thoughts and the many other aspects of one's inner human life. One important dimension of freedom of religion is the possibility to live according to something that many people would regard as beyond personal choice – their particular faith and what it means for them. A normative agency theory may argue that these kinds of expression are covered by the capacious concept of agency, but this underestimates what is at stake, namely expression or belief as manifesting a form of exercising human potential that is valuable for humans as such and not only as the manifestation of a choice or the pursuit of an autonomously formed conception of a good life.

Even torture is an evil not only because it means a threat to or even the abrogation of agency in the sense discussed above. Part of the evil is the pain inflicted, whatever other goods are impaired as well.[103] The same holds for the protection of bodily integrity. To be sure, it is true that a violation of this right has consequences for agency, but avoiding the impairment of bodily integrity is a good in itself. A last example: Social rights, including to basic subsistence, are important preconditions of agency. In underlining this, agency theories have made a very important contribution. But not being hungry is a good in itself, too, irrespective of the further benefits of secured agency.

4.4.1.5 Why Protect Agency?

Another issue concerns the value of agency itself. Agency forms the fulcrum of the argument for human rights. Why is agency of such importance? Agency theories imply that enjoying agency is a central human good. This may not be obvious, at least for the logic of action variant. From the logic of action perspective, the agency-based argument for human rights appears to imply nothing about human goods. From this point of view, rights are a precondition for the possibility of action. As humans have to act, the precondition for the possibility to do so needs to be

[103] Griffin, *On Human Rights*, 52 accepts this but argues that not just any pain qualifies as giving rise to human rights – in his example, the pain inflicted by a callous husband does not. However, this only proves the need for arguments that concrete manifestations of human goods (e.g. a pain-free existence) are candidates for protection by human rights, not that some of these (an existence free of torture) are not protected by human rights for the reason of shielding human beings from the pain of torture. Whether Griffin's claim is correct that a theory cannot sufficiently specify the goods legitimately protected will be discussed in the further argument of this book.

protected. This appears to be a straightforward and watertight argument. But is it valid? What if acting were nothing but a pain and burden for human beings? What if a life of wordless meditation, refraining from action as far as possible, were preferable to the *vita activa*? What if there is no good answer to the question of why *not to be*? After all, it is not only noble young men facing a rotten world of baseness and betrayal who take this question seriously. One may grant that human rights are the precondition of agency but nevertheless ask: What is the point of agency?[104]

How, then, does the agency theory justify the fact that the existence of agents needs to be protected? This seems the most fundamental concern of human rights – to assert the intrinsic, inalienable, supreme value of human beings and spell out its normative consequences for human life and institutions. There are two possible answers to this. The first relies on some kind of argument that agency is of value as such irrespective of what human beings may think of it, independently of whether they enjoy it as a gift or curse it as a burden. Perhaps there is such an argument. Agency theories, however, seem not to be wedded to any such argument despite considering agency an intrinsic value.[105]

Consequently, agency theory needs to base its justification of this right – and this is the second option – on the value of life *for* an (average) human agent, which brings us back to the most fundamental good: the good of human life.[106] Agency theory (correctly) presupposes the value of human life as lived by agents, which is not, however, an *a priori* truth but an evaluative stance that needs to be accounted for. In particular, there is a need to explain that not only some agents are protected (say men or whites or North Americans) but all human beings equally, because the value of life is equal for all. Agency theory thus is wedded to some egalitarian theory of human worth that argues for this equal value of human life. This indicates that the principle of equal respect is of great importance for a theory of human rights and that such a theory cannot do without it.[107]

Furthermore, agency theories refer to the interests that people have and the qualified nature of some of these interests that justifies "ring-fenc[ing] them with

[104] Gewirth considers the possibility of suicide. It is true that suicide is an action, too. However, this finding has no bearing on the question at issue, which is, if you will, Camus' question of the philosophical reasons against suicide, cf. Albert Camus, "Le Mythe de Sisyphe," in *Œuvres complètes Vol. I: 1931–1944*, ed. Jaqueline Lévi-Valensi (Paris: Gallimard, 2006).

[105] Cf. Griffin, *On Human Rights*, 152 or 200: "The dignity is then to be seen as deriving from the value we attach to our normative agency." This assertion is embedded in a teleological not deontological argument, ibid. 36, 57 ff., 73: "It is teleological somewhat in the way that Aristotle's ethics is: the only values used in the derivation of moral principles are the ends of life."

[106] Griffin's argument in Griffin, *On Human Rights*, 71 ff. that the prohibition of killing is a conservative "policy" because it is too unclear what the benefits of abandoning it may be is not particularly convincing.

[107] Griffin's argument in Griffin, *On Human Rights*, 39 that equal respect is too abstract a concept to form the foundation for the derivation of human rights is thus only right in that this principle is only a part of a full justificatory account of human rights.

the notion of human rights."[108] This shows that agency does not do away with the need for a substantial account of interests or (more generally) human goods. This is all the more so if we bear in mind that human life, as indicated above, is valuable not just because it is a precondition for agency (though this is important, too), but because of the many other human goods it enables us to enjoy.

4.4.1.6 Is There a Bridge from Agency to Rights?

These findings lead us to the next problem. Agency theories – as we just have seen – presuppose that agency is so important that it should be protected by rights. This is certainly correct, but there is a gap in the reasoning, even if – for the sake of the argument – one assumes that the case for the importance of agency is fully made. It is an example of a structural problem for any justificatory theory of human rights and consequently merits close attention.

This problem concerns the concrete normative implications drawn from agency. Where does the *right* to agency (with its particular complex normative meaning) stem from? Why is the importance of something for agent A not just a reason for, say, the agent's urgent wish to have this important thing protected, but rather an existence condition for a very specific normative position of the rights-bearer A and the addressee(s) of the rights – a *claim obliging* the addressee(s) of this right? It is plausible that individuals value their agency. But why should potential addressee(s) be concerned about these individuals' agency? Why should they bother about the agency of *others*? Why should the importance of agency for a meaningful human life create a specific web of normative incidents – including a claim of the rights-holder and obligations on the part of the addressee(s)? A transformative step is taken from the self-interested perspective of an individual to the normative position called a *right*, a step that requires explanation. Why do the needs or interests of others obligate agents to respect the preconditions of agency of these others? Universalization is of no help in this respect. Universalization presupposes that others count morally – the very question at issue here.

The importance of this problem can be illustrated by the eight steps outlined in the logic of action argument. The issue arises when taking the step from the conclusion that agents *must have* freedom and well-being in order to pursue their goals to the assertion that they have *rights* to freedom or well-being. A right is a

[108] Griffin, *On Human Rights*, 36. Because of this importance of interests that can be balanced against other interests and goods, Griffin understands his theory as teleological (in a broader sense than "'consequentialist' or 'utilitarian'") and not deontological, ibid. The important role of interests is underlined in his "metaphysics" of human rights, ibid. 115: "One way to see something as worth wanting is to see it under the heading of some general human interest." Or ibid. 116: "To see anything as making life better, we must see it as an instance of something generally intelligible as valuable and, furthermore, as valuable for any normal human being." Ibid.: He sets up a list such as accomplishment, enjoyment, etc. In his view, this amounts to "a kind of need account: what is needed to function as a normative agent."

normative notion that implies duties on the part of the addressee. If only self-interest and no normative principles are relevant, the fact that agents must have freedom and well-being in order to attain their goals does not imply (with logical necessity) that they have a right to freedom and well-being. To begin with, another normative position of the agents is entirely possible: They could have a privilege, namely that attaining their freedom and well-being would not violate the rights of others, although they have no right that others do not interfere with them achieving their purpose.

In assuming that agents are motivated only by self-interest and not some moral principle, the logic of action argument aligns better, however, with a different view of the world, a world of adversarial, competing self-interest. It could even be a deeply antagonistic, survival-of-the-fittest world, where the agents understand that in order to be able to act, they have to fight for their freedom and well-being and can only realize their agency if they are victorious in this fight. It is a world not of rights, but of power. In such a world, the agents most probably would wish that other agents did not interfere with their attempt to achieve their purposes. Nevertheless, if only self-interest matters, this wish does not translate into a right just because it concerns important goods of the agents. For such a right, the agents need to recourse to a normative principle that *entitles* them to realize their agency and other goods of human existence and *obliges* other agents to refrain from obstructing their pursuit of these goods.

This does not imply that others are *permitted* to interfere with a person's freedom and well-being in this world, only that they *can do* it. Permission is a normative notion as much as a right. It cannot be derived from the self-interest of the agents either. In this amoral world of self-interest, the situation is simply that others can (and probably will) in fact interfere with a person's freedom and well-being, not that they are permitted to do so. If they are stronger, they will succeed; if not, the person will prevail.

There is thus no contradiction if agents hold that they must have freedom and well-being and, at the same time, that others may in fact prevent the agents from enjoying these goods – if, as is assumed, normative principles do not play a role. What the agents *must* have specifies the factual preconditions of their acting but does not imply anything about their rights and about what others ought to do. The agents would contradict themselves if they held – at the same time – that they must have freedom and well-being and do not need freedom and well-being in order to act. They do not contradict themselves if they hold that they must have freedom and well-being but (unfortunately in this tough world) have no right to obtain either and that they consequently will not get what they need in order to act.

The fact that there is no connection between something necessary for human action and a right to this something can be illustrated by a practical example, too: There are cases where it is justified not to provide agents with something that they must have in order to be agents, even something that is of existential importance

for them. For example, no person has a right to the lifesaving organ of another person, even if taking the organ from this latter person would not endanger that person's life. This is because of normative principles that delineate the scope and limits of rights.

It is no counterargument to maintain that the action-based argument is formulated from a first-person perspective.[109] The argument starting from action concerns not just any kinds of possible, erroneous beliefs of agents, but logically necessary and thus justified beliefs. Given what has been said above, one cannot conclude from the fact that something is important to an agent (as a precondition for action) that they have a right to this something. This is true irrespective of the point of view.

This analysis highlights the importance for a theory of human rights of something already underlined above: the intrinsic value of human persons. While it is a grave inhumanity to deny others the possibility of becoming or continuing to be agents through slavery or even extermination, it is not a logical error to do so if one does not accept the key moral principle of the equal intrinsic value of human persons and certain basic principles of justice. If the perpetrator of such crimes denies the victims of his deeds either any or sufficient worth and assumes that whatever worth they have is outweighed by other considerations – such as the interests of a master race – he is not committing a logical fallacy. Victims may even agree (at least this is a theoretical possibility) that, given their properties, there is no point in protecting their agency because these properties make them (in their own eyes) worthless creatures. Only if any of the agents as individual persons are of intrinsic worth is there an argument for protecting the possibility to act as a *right*, and only if principles of justice count is there an argument for *equal* rights.

This raises difficult normative questions. The humanity of persons commands respect. Respect in this sense is a normative concept and differs from non-normative appreciation or admiration – for example, for a free kick into the corner of the goal from thirty meters away. As a consequence, one *ought* to respect persons, and one *ought* to treat them accordingly. But where do these normative demands stem from? The idea that there is something about human beings that commands this kind of respect is not self-evident and requires solid arguments, as illustrated by the many examples of contempt for human beings and the power of the forces that motivate inhumanity. The step from the precondition of *being an agent* to the *right to act as an agent* is therefore surely entirely justified, but only under much richer premises than the theories of agency identify.

4.4.1.7 The Objective Reason Argument

There is one important argument still to be considered, which we can call the *objective reason argument* or the argument from the perspective of (logical)

[109] Gewirth, *Community*, 21.

universalization. This argument holds that we have to accept duties towards others as correlatives of their rights because the same reason that justifies the predication of value to us justifies the predication of value to others. The same normative conclusions – rights for us and others – thus follow, given that this objective reason is applicable to all.[110] Griffin provides a concise formulation of this argument:

> It is tempting to treat the reason-generating consideration that moves me when my autonomy is at stake as different from the one that moves me when yours is at stake. The obvious difference between these two cases is that in the one it is *my* autonomy, and in the other it is *yours*. But the most plausible understanding of the engine of these two judgements is *autonomy: because a person's quality of life is importantly at stake*. The *my* and *your* are not part of the reason-generating consideration. The clause *because a person's quality of life is importantly at stake* lacks reference to me or to you, but it lacks nothing of what we understand the reason to be. To try to deny "autonomy" its status as a reason for action unless it is attached to "my" would mean giving up our grasp on how "autonomy" works as a reason for action.[111]

A related argument holds that one only respects the objective value of one's own humanity if one respects the humanity of all – because the reasons for this respect are the same, a line of reasoning that is called "Kant's argument" and that we will discuss below.[112]

In a certain sense, this is a good, important and valid argument. There is no discernible reason why some consideration *X* applicable to human being *A* should invest *A* with some kind of normative status, including rights, but the same consideration *X* should not invest human being *B* with the same normative status. It is thus contradictory to treat *A* (even if *A* is oneself) differently from *B* (some other person) if consideration *X* is the reason for this treatment.

There is still a fundamental problem here, however. As discussed, the implications of the logic of action or of the consideration "a person's quality of life is importantly at stake" are not sufficient conditions for generating rights. Agency theories simply have not made the point that agency is a consideration applicable to *A* that gives rise to rights of *A* and there is thus no reason to accept that other agents to whom the same consideration applies also enjoy such rights. An argument insufficient to ground rights for an agent *A* is insufficient to ground the rights of other agents as well.

[110] Gewirth, *Community*, 19; Griffin, *On Human Rights*, 135.

[111] Griffin, *On Human Rights*, 135 (emphasis in original). Similarly, ibid. 58: "The ground for my liberty is a ground for your equal liberty; the ground cannot justify my being more at liberty than you are. That identifies a formal constraint on the content of the right; each person's liberty must be compatible with the same liberty for all." In Griffin's view, this kind of argument seems to account for the transition from prudence to morality, from value judgments like "this is cruel" to prohibitions of torture, ibid. 126.

[112] Dworkin, *Justice for Hedgehogs*.

One further issue is a matter of substantial debate. As we have seen, the framework of agency theories provides insufficient reasons for the justification of human rights. If that were different, however, the following problem would arise. It is inconsistent to think that there are reasons for oneself having rights but not to accept that others – for the same reasons – also have rights. The nonacceptance of rights of others is, however, not only a logical error. It also is a violation of moral principles as one *ought* to treat others equally for moral reasons, not the least justice, not just because of the demands of consistent reasoning. This is a matter of analyzing the phenomenon properly.

In addition, there is a dimension at issue that leads to a problem haunting a substantial part of moral philosophy: the problem of moral motivation. An insight as such has no motivational force. One can agree that people have such things as rights, shrug one's shoulders and go about one's business without being affected by this insight, just as one does not need to be particularly affected by the insight that 1 + 1 = 2. The fact that an insight into the existence of rights has a different status – that to assert, "Yes, A has a human right to X" implies "Because of this right of A, I have an obligation to Z," an obligation with a motivational effect – is a consequence of the normative nature of the right at issue, not a consequence of the demands of consistent thinking.

The gap in the argument from agency to human rights can only be bridged by normative principles, namely the respect for human beings, for egalitarian principles of justice and for basic obligations of human solidarity, as will be explained in more detail below.[113]

4.4.1.8 The Important Point of Agency Theories

In sum, agency theory encounters at least the following problems: First, the reference to agency fails to sufficiently determine the content of human rights, as the differentiated set of human rights transcends what is necessary to secure agency. Second, human rights protect goods other than agency for their own sake. Third, agency theories rely on a theory of human goods, which crucially includes the good of the life of a human agent, which they do not spell out. Fourth, agency theories imply but do not identify the normative principles that turn the existence conditions of agency and other goods important for human rights into the content of claims towards others and their correlated duties.

The critique of agency theories thus confirms the importance both of a theory of human goods and of normative principles for the justification of human rights. These findings may prove helpful with regard to a question of great practical importance, namely the question of who the bearers of human rights are. Agency

[113] Griffin, *On Human Rights*, 160 underlines that a constraint on liberty is the equal liberty of all. This is true but rests ultimately on the principles of justice at issue here.

theories sometimes determine this group quite narrowly, excluding human beings such as infants,[114] who are protected uncontroversially in human rights law. If one is willing to relinquish the persuasion that agency alone is the key to understanding the foundations of human rights, the door may open to form an inclusive concept of human rights that is more convincingly justified and is a better match for the state of current human rights law.

The importance of normative principles does not mean that human rights and morality are coextensive. They are not. There are indeed "most heavyweight moral obligations"[115] that are not part of human rights. However, this does not mean that these moral principles are not foundational for human rights theory. The fact that justice and human solidarity and human rights are not coextensive does not imply that justice and solidarity are not central for the foundations of human rights. This seems crucial to understanding the whole project of human rights. Human rights are a part of the language of justice and human solidarity, and this is what the further argument of this book will try to spell out.

Agency theories thus do not answer all questions that need to be answered concerning the justification of human rights. However, they do underline a central element of the edifice of human rights that needs accounting for: the importance of autonomy.

4.4.2 *Needs and Interests as the Engine of Rights*

4.4.2.1 The Argument Based on Needs and Interests

Need and interest theories share some common ground: Both hold that some needs or interests of human beings are so important that they give rise to human rights.[116]

Need theories argue that certain basic human needs are the reason for the existence of rights, at least for the fundamental ones. The need to live without bodily harm thus justifies the protection of bodily integrity by rights, for example. The need not to starve justifies certain social rights. Other rights are derived from these fundamental rights by further considerations that depend on the right in question. Due process rights, for example, can be derived from rights to bodily integrity or the protection of liberty, because due process rights are necessary preconditions if these fundamental rights are to have substantial content.

[114] Cf. Griffin, *On Human Rights*, 83 ff., assuming that children's rights are acquired in "stages," ibid. 95.

[115] Griffin, *On Human Rights*, 43.

[116] On need theories, cf. e.g. David Miller, "Grounding Human Rights," *Critical Review of International Social and Political Philosophy* 15, no. 4 (2012): 407 ff., 422. On interest theories, cf. Raz, *Morality of Freedom*, 166. For a critique of need theories and in defense of interest theories, John Tasioulas, "On the Foundations of Human Rights," in *Philosophical Foundations of Human Rights*, eds. Rowan Cruft, S. Matthew Liao and Massimo Renzo (Oxford: Oxford University Press, 2015), 63 ff.

Current influential need theories face criticism on various grounds. One important critique argues that need theories are implausibly restrictive because not all rights are linked to true human needs.[117]

Interest theories provide an alternative. Joseph Raz's influential version offers what is called a definition of rights, but in fact includes a theory of the justification of rights through interests:

> Definition: "X has a right" if and only if X can have rights, and, other things being equal, an aspect of X's well-being (his interest) is a sufficient reason for holding some other person(s) to be under a duty. Capacity for possessing rights: An individual is capable of having rights if and only if either his well-being is of ultimate value or he is an "artificial person" (e.g. a corporation).[118]

From this perspective, interests are of sufficient importance to generate rights if a certain threshold criterion has been met. However, Raz's theory is not clear on the argument's crucial step, as it does not spell out how interests are transformed into normative incidents, into claims and corresponding duties, privileges and no-rights. It limits itself to asserting that some interests are of such a nature that they give rise to rights and duties: "Only where one's interest is a reason for another to behave in a way which protects or promotes it, and only when this reason has the peremptory character of a duty, and, finally, only when the duty is for conduct which makes a significant difference for the promotion or protection of that interest does the interest give rise to a right."[119]

The respect for persons, which plays a prominent role in the justification of human rights, also is derived from interests: "[A] person has an interest in being respected as a person. That shows that rights grounded in respect are based on interests."[120] There is, however, another step in the argument that grounds it on something other than naked interest, namely the value of the well-being of persons: "It is, as was indicated before, the duty to give due weight to the interests of persons. And it is grounded on the intrinsic desirability of the well-being of persons."[121] The proposition about the "intrinsic desirability" itself seems not to be derived from interests, but from an evaluative judgment about the value of the well-being of persons.

John Tasioulas' approach formulates a much more differentiated argument that is particularly helpful for understanding promising ways to justify human rights. Importantly, it is pluralistic in the sense that not only interests, but also other considerations play a justificatory role. In particular, the crucial role of human dignity for the justification of human rights is highlighted, which marks a major difference from other interest-based approaches.

[117] Tasioulas, "Foundations," 66.
[118] Raz, *Morality of Freedom*, 166.
[119] Raz, *Morality of Freedom*, 183.
[120] Raz, *Morality of Freedom*, 188.
[121] Raz, *Morality of Freedom*, 190.

The derivation of rights from interests takes the following shape:

(i) For all human beings within a given historical context, and simply in virtue of their humanity, having X (the object of the putative right) serves one or more of their basic interests, for example, interests in health, physical security, autonomy, understanding, friendship, achievement, play, etc.
(ii) The interest in having X is, in the case of each human being and simply in virtue of their humanity, pro tanto of sufficient importance to justify the imposition of duties on others, for example, to variously protect, respect or advance the interest in X.
(iii) The duties generated at (ii) are feasible claims on others given the constraints created by general and relatively entrenched facts of human nature and social life in the specified historical context. Therefore:
(iv) All human beings with the specified historical context have a right to X.[122]

These steps are spelled out in helpful detail: The universal interests are objective, standardized, pluralistic, open-ended and holistic. They are objective in the sense that they exist independently of the attitude of the subjects of these interests. They are standardized because they abstract from individual cases and are derived from standard cases of ordinary human beings' interests. There is an open-ended plurality of interests, meaning that there is no single overarching value underpinning all human interests and that the interests may change and evolve over time. Their holistic character leads to an interpenetration of different interests – the prudential value of freedom for agents, for example, is said to be dependent on moral values: "[M]ultiplying trivial or morally depraved options does not enhance their freedom."[123] Freedom may have an important impact on other values, too: A partnership based on autonomous decisions is more valuable than one that is based on the decisions of others, as in the case of arranged marriages. However, freedom is not an element for every prudential value.[124]

This theory includes the idea of human dignity in its account of the foundations of human rights:

> The interests on which the pluralist account draws are always the interests of individual human beings, and understanding their normative significance requires that we grasp the intrinsically valuable status equally possessed by all human beings, one grounded in the fact that they are humans. What emerges is a form of the interest-based theory which regards the interests in question as generative of human rights in crucial part because they are the interests of human beings who possess equal moral status: human dignity and universal human interests are equally fundamental grounds of human rights, characteristically bound together in their operation.[125]

[122] Tasioulas, "Foundations," 50 f. (emphasis in original).
[123] Tasioulas, "Foundations," 52.
[124] Tasioulas, "Foundations," 53.
[125] Tasioulas, "Foundations," 53 f.

The reference to dignity adds an important dimension to Tasioulas' approach: In particular, it answers the question of why interests of persons cannot be aggregated to form a collective notion of interest that then is taken as the true yardstick for individual and social norms: "If human beings matter in themselves, as sources of ultimate moral concern, each potentially with their own life to lead, then it is a travesty simply to 'detach' their interests from them with a view to maximizing the overall fulfilment of interests across persons. The individuals with these interests count in themselves and not because the satisfaction or frustration of their interests is ultimately assimilated to some overarching aggregative concern."[126]

Tasioulas argues that this provides a key to the puzzle of why rights are hostile to trade-offs: Every individual counts, and their interests must be taken into due account.[127] The dignity of human persons is based on a set of particular properties of human beings, properties that are not limited to humans' rational nature.[128]

According to Tasioulas, the following criteria must be met for a qualified interest to give rise to a right: the possibility of fulfilling the duty imposed by the right, the limitation to duties that do not confound the point of the right and, importantly, the compossibility of this right with others' rights of the same content and a burdensomeness test. If the overall duties imposed by human rights are too burdensome for the addressees of the rights, these rights are not justified.[129] Moreover, he argues, human rights are intrinsically connected to principles of justice.[130]

4.4.2.2 The Reach of Need and Interest Theories

4.4.2.2.1 NEEDS OR INTERESTS – OR SOMETHING ELSE? Need and interest theories make an important constructive point by underlining that there can be no theory of human rights without reference to and sufficiently detailed specification of the goods these rights protect – an account that explains why these specified needs or interests count and not others.

There is much intense debate between need and interest theorists. When reviewing these discussions and controversies, many of the arguments seem to be directed not at need or interest theories as such, just at certain *versions* of these theories. In addition, seen from a slight distance, there appears to be a considerable overlap between these theories. In particular, the real question at stake hinges not so much on the problem of whether needs or interests are the better starting point for theory, but on which particular human goods count as relevant for the justification of

[126] Tasioulas, "Foundations," 55.
[127] Tasioulas, "Foundations," 55.
[128] Tasioulas, "Foundations," 54.
[129] Tasioulas, "Foundations," 56 ff.
[130] John Tasioulas, "Justice, Equality, and Rights," in *The Oxford Handbook of the History of Ethics*, ed. Roger Crisp (Oxford: Oxford University Press, 2013).

human rights. The main difference between the variants of the theories as they are formulated in contemporary discussions is that the term *interests* is taken to be more capacious than *needs*. For example, it is argued that freedom of religion cannot be derived from basic human needs, or at least that the protection of manifestations of belief that usually are included in the scope of this right cannot be.[131] Is this indeed so? Can we be sure that at the base of the concern for the manifestation of one's belief there really is not some kind of deep-seated human need not only to entertain religious beliefs, but also to live according to their commands? We can even go a step further and ask: Are there any independent interests that are not connected to human needs in one way or another?

It appears that the problem with some need theories is not the idea that needs are important for human rights but the concrete interpretation of what human needs are.

Interest theorists rightly criticize certain need theories for overly restricting the goods included in the set of goods worthy of protection by human rights.[132] However, given what already has been said, there is no reason to assume that all need theories must be so restrictive. Furthermore, there is no reason not to include both needs and interests in a wider theory of human goods worthy of protection by human rights. This has the advantage that one does not have to answer the question of where precisely needs end and interests begin – if this is indeed possible at all. Consequently, this will form part of the approach developed over the course of the further argument, while taking on board the insights that the debate about needs and interests is offering. From this point of view, it is not crucial whether one calls the deep longing of human beings to manifest their religious beliefs a need or an interest (although much speaks in favor of seeing it as a fundamental need) as long as one agrees (as one should) that this longing is a human good worthy of protection by the special instrument of human rights.

4.4.2.2.2 NEEDS, INTERESTS AND HUMAN DIGNITY As we have seen, an important schism runs through the interest theory camp: One influential version of the interest theory bases respect for other people on interests by pointing to people's interest in being respected. This argument is not sufficient, however. What needs to be explained is why one *ought* to respect others (and respect their interest in being respected). This cannot be achieved by pointing to the interest of the agent herself in being respected because a normative element is missing from the argument. This almost becomes explicit when Raz refers to the "intrinsic desirability" of the well-being of persons, which is an evaluative judgment.[133] Even if the theory referred to

[131] Tasioulas, "Foundations," 21.

[132] Others criticize interest theories as being too expansive, cf. Griffin's critique of Raz, Griffin, *On Human Rights*, 54 ff. In addition, he argues, rights are not only exclusionary reasons.

[133] Cf. on the normative status of human beings and human rights, Joseph Raz, "Human Rights in the Emerging World Order," in *Philosophical Foundations of Human Rights*, eds. Rowan

non-normative reasons for the interest in well-being (its intrinsic desirability in a non-normative sense), the question still remains of how the normative dimension of respect for others is derived. How is the intrinsic desirability of being respected as an aspect of well-being turned into one's right (and the right of others) to be respected?

Tasioulas' version of interest theories that includes human dignity therefore constitutes a major improvement, offering substantial insights into the justification of human rights. It correctly highlights the importance of the equal, supreme normative status of human beings that is the reason for respecting the interests of others. This paves the way to understanding the question of possible limitations of human rights or of trade-offs. The theory provides space for weighing and balancing rights with other rights and legitimate public concerns. Such weighing and balancing exercises are, however, limited by the rights of persons to be protected as ends-in-themselves. Weighing and balancing is no license to abrogate the intrinsic value of persons and instrumentalize them. This has entered into doctrinal findings – for example, that there is an essence of fundamental rights that needs to be protected and that there are nonderogable rights or absolute rights that cannot be limited. A prime, widely accepted example of the latter is the prohibition of torture, a *ius cogens* norm.[134]

At this point, however, the theory of justification has to take one more step, a step already encountered in our discussion of agency theories. This step consists of introducing normative principles into the argument to transform interests that as such are of no moral concern to others into something that is the object of claims and correlated duties.

This step is indispensable because both need and interest theories face a common problem we have encountered before. How do certain needs or interests give rise to normative claims and privileges on the part of the rights-holder and obligations and no-rights on the part of the addressee of rights? This is far from obvious. All kinds of needs and interests have no normative consequences at all. Why is it different in the case of some needs and interests? There is a gap in the argument between the descriptive proposition that humans have certain (important, existential) needs or interests and the normative proposition that they legitimately have the right to have these needs and interests secured:

> [R]educing human rights to universal interests is a category error. Interests belong to the domain of prudence or well-being, which concerns what makes a life better for the person living it, whereas human rights are moral standards that impose duties on others, where the violation of the duty entails *wronging* someone in

Cruft, S. Matthew Liao and Massimo Renzo (Oxford: Oxford University Press, 2015), 217–31, 225: "[O]ne crucial contribution of individual rights to the emerging world order is underpinning its commitment to the value of human life."

[134] Cf. ECtHR, Gäfgen v Germany, Judgement of June 1, 2010, appl. No. 22978/05, which states that the prohibition of torture allows for no exceptions whatsoever.

particular – the right-holder. Our interests, by contrast, can be impaired in all sorts of ways without any *moral* wrongdoing being in the offing, let alone a directed wrongdoing of this specific kind.[135]

To refer once again to a standard example: A person for sure has a need and interest of the highest order not to die. This does not mean, however, that this person has a right to any kind of medical treatment, even if treatment is available that could save this person's life. No person has the right that another person relinquish involuntarily a kidney, even if this would save the life of the first person and the donor would still be able to continue their life.

This remains the case even if we qualify the theory with a (very helpful) threshold criterion, according to which one precondition for the justification of a human right is that the interest protected is possible to satisfy and the consequences of the right are not too burdensome for others.[136] However, the introduction of this criterion still leaves open the question of why these qualified interests entail normative consequences. The problem of the category error remains unsolved.

Among the threshold criteria, the importance of the compossibility of the content of rights is (correctly) underlined. This points in the same direction, revealing the importance of the principles of justice that are the ultimate reason for the justification of this demand: Justice demands the compossibility of the content of the right of one person with the rights of others because otherwise the agents would be treated unequally without any justified reason.

The constitutive role of dignity allows for similar conclusions: Human dignity is a central building block of the theory of human rights, as the pluralist interest theory rightly and importantly highlights. Dignity correctly is not derived merely from interests to be respected. It is a fundamental value status of persons. Moreover, it is the origin of a normative principle, namely the principle that one ought to respect a person who enjoys this value. Human dignity is an axiological judgment with prescriptive effect. Again, the importance of normative principles becomes manifest over the course of the argument.

Such normative principles are the reason why nobody is obliged to donate their organs to save the lives of others (laudable as this would be): Such a duty would violate normative principles, in particular the principle of equal respect for personhood that prohibits the instrumentalization of persons, even for the benefit of others.

In view of these findings, the best way to bridge the gap that still remains between needs and interests even if one considers sophisticated and convincing threshold criteria is to take one more step. This step consists of including among the justificatory reasons for human rights not only human dignity as a status, but also

[135] As John Tasioulas correctly observes in "Human Dignity and the Foundations of Human Rights," in *Understanding Human Dignity*, ed. Christopher McCrudden (Oxford: Oxford University Press, 2013), 296 (emphasis in original).

[136] Tasioulas, "Human Dignity," 297 ff.

normative principles as further coeval grounds of human rights: Humans enjoy fundamental rights because of normative principles of justice, equal respect and human solidarity that prescribe the conditions under which the needs and interests of persons to enjoy certain goods are normatively relevant and may generate claims, privileges and obligations of the rights-holders and the addressees.[137]

4.4.3 *The Capability Approach*

4.4.3.1 Determining Desirable Functionings

The capability approach has become a paradigm in various areas of research, from economics, where it originated, to philosophy. Its core concern is how to properly measure the advantages of persons in a society. As such, it concerns a central element of normative theory and is relevant to both distributive justice and human rights. Capabilities, it is argued by leading proponents like Amartya Sen and Martha Nussbaum, give the best answer to the question of how a person's overall advantage is properly assessed.[138] They are "the relevant space within which to make comparisons of quality of life across societies."[139] A person's well-being consists of qualified "functionings," of being able to act in certain manners ("doings") and of certain states of being ("beings"). Capabilities are neither the functionings themselves nor the formal opportunity to do or be something. Rather, a capability is a "real opportunity to achieve valuable functionings."[140] It is a comprehensive opportunity: One central element of capabilities is choice,[141] because it is not only the opportunity to achieve something that is valuable; the possibility to choose already is valuable in itself (and crucially so).[142] Given different circumstances, needs and interests, trade-offs between capabilities are necessary.[143]

The focus on capabilities presents an alternative not only to welfare approaches, which foreground happiness, pleasure or utility as the basic units for assessing a human being's advantage, but also to other influential theories in which primary goods[144] or resources[145] fulfill this function. Happiness, pleasure and utility are not

[137] Therefore, Tasioulas is right to underline the intrinsic connection between justice and human rights, Tasioulas, "Justice, Equality, and Rights."

[138] Sen, *Idea of Justice*, 231. M. Nussbaum and A. Sen disagree about some aspects of the theory, cf. e.g. Martha C. Nussbaum, *Women and Human Development* (Cambridge: Cambridge University Press, 2001), 70 f. In the following, these disagreements will be discussed only if they are relevant for the course of the argument.

[139] Nussbaum, *Women and Human Development*, 63.

[140] Sen, *Idea of Justice*, 371.

[141] Nussbaum, *Women and Human Development*, 88; Sen, *Idea of Justice*, 232.

[142] Nussbaum, *Women and Human Development*, 88; Sen, *Idea of Justice*, 228 ff., 235 ff., 370 ff.

[143] Nussbaum, *Women and Human Development*, 81; Sen, *Idea of Justice*, 233; Sen, "Elements of a Theory of Human Rights," 315 ff.

[144] Rawls, *Theory of Justice*, 78.

[145] Ronald Dworkin, *Sovereign Virtue* (Cambridge, MA: Harvard University Press, 2002), 65 ff.

the only things that are valuable, capability theorists argue.[146] What is valuable may even determine what brings human beings satisfaction and increases their utility[147] – a traditional argument already considered. From this perspective, freedom is of particular importance beyond welfare.[148] Capability theorists agree with the argument already encountered that aggregating across distinct lives and distinct goods, as in a utilitarian approach, overlooks the importance of the individual and the different values that certain goods hold for different persons. The aggregation of utility thus gives only a distorted image of persons' advantages.[149]

Primary goods and resources are only means to achieve valuable ends, not these ends themselves.[150] By contrast, capabilities offer the opportunity to directly assess freedom, rather than counting the means to achieve it. The capability approach thus provides a broader informational basis than its alternatives.[151] Capabilities are assessed on an individual level, because capabilities of groups are reducible to capabilities of individuals.[152] Capabilities are not "interests," because choices may concern actions that are not in the interest of the agent.[153] Sen underlines that capabilities are not the only concern for a normative theory. There are other considerations as well, such as fairness or other demands of distributive justice.[154]

The background of the capability theory is informed by a certain idea of human existence and the worth of persons flourishing according to their own choices. In Nussbaum's version of the approach, it is interpreted as a "freestanding" Aristotelian argument, not "deduced from natural teleology or any non-moral source"[155] about "the human being as a dignified free being who shapes his or her life in cooperation and reciprocity with others."[156] For Nussbaum, the core of dignity is to regard human beings as ends-in-themselves: "We want an approach that is respectful of each person's struggle for flourishing, that treats each person as an end and as a source of agency and worth in her own right."[157] The peron's individual well-being therefore is not to be traded off for the well-being of others,[158] depriving the person

[146] Sen, *Idea of Justice*, 274. In addition, happiness – unlike capabilities – does not create obligations. On the latter point, ibid. 270 f.
[147] Sen, *Idea of Justice*, 276.
[148] Sen, *Idea of Justice*, 282, 286 ff.
[149] Nussbaum, *Women and Human Development*, 62, following Rawls, *Theory of Justice*, 156 ff.
[150] Sen, *Idea of Justice*, 233, 253 ff. In addition, focusing on resources can result in a skewed picture because of further factors, importantly conversion opportunities; that is, the real ability to convert resources in quality of life (e.g. because of gender discrimination), ibid. 255 ff.
[151] Sen, *Idea of Justice*, 236.
[152] Sen, *Idea of Justice*, 246.
[153] Sen, *Idea of Justice*, 377 ff.
[154] Sen, *Idea of Justice*, 295 ff.
[155] Nussbaum, *Women and Human Development*, 76.
[156] Nussbaum, *Women and Human Development*, 72.
[157] Nussbaum, *Women and Human Development*, 69.
[158] Nussbaum, *Women and Human Development*, 56 f., 72 f., 74.

of autonomous decision-making: "For it is all about respect for the dignity of persons as choosers."[159]

Nussbaum's account identifies the ethically and politically relevant capabilities according to their importance in any human life.[160] There is an overlapping consensus about many such capabilities.[161] In this respect, not only their instrumental value is relevant, but also their intrinsic worth for human flourishing. Depriving human beings of a basic level of capabilities constitutes a violation of political justice.[162]

How does the argument build the bridge between capabilities as real opportunities for certain functionings and human rights? Human rights are "an especially urgent and morally justified claim that a person has, simply by virtue of being a human adult, and independently of membership in a particular nation, or class, or sex, or ethnic or religious or sexual group."[163] Capabilities are the key to identifying and justifying those claims that in this sense are especially urgent and morally justified: "The importance of freedoms provides a foundational reason not only for affirming our own rights and liberties, but also for taking an interest in the freedoms and rights of others – going well beyond the pleasures and desire-fulfilment on which utilitarians concentrate."[164]

Threshold criteria identify those capabilities of such a nature that they qualify to be protected by human rights. The key is their importance and the possibility for others to bring about their realization: "For a freedom to be included as part of a human right, it clearly must be important enough to provide reasons for others to pay serious attention to it. There must be some 'threshold conditions' of relevance, including the importance of the freedom and the possibility of influencing its realization, for it to plausibly figure within the spectrum of human rights."[165]

The human rights thus justified include at least central liberties, equality and claims to material goods that assure that the agent has sufficient resources to pursue a fulfilling life. In Nussbaum's view (unlike Sen's), it is possible to formulate something like an "objective list" of desirable human capabilities.[166] The theory of capabilities argues for a social structure that enables agents to achieve their goals and does not place obstacles in their way. Human rights may

[159] Nussbaum, *Women and Human Development*, 61 f.
[160] Nussbaum, *Women and Human Development*, 74.
[161] Nussbaum, *Women and Human Development*, 76.
[162] Nussbaum, *Women and Human Development*, 71.
[163] Martha C. Nussbaum, "Capabilities and Human Rights," *Fordham Law Review* 66, no. 2 (1997): 273 ff., 292.
[164] Sen, *Idea of Justice*, 367.
[165] Sen, *Idea of Justice*, 367. It should be noted that, for Sen, freedom is a capacious concept, including, for example, the freedom not to be tortured, ibid.
[166] Sen argues with the open space of public reason, Sen, "Elements of a Theory of Human Rights," 315, 333 n. 31.

contribute to assuring this. The discussion of capabilities and rights primarily concerns human rights as moral rights. However, these moral rights sometimes need to be turned into legal rights.[167]

Sen's account underlines the difficulty of justifying *duties to act*, not just *reasons to act*, for the benefit of others – a distinction already highlighted above. In Sen's view, one particular fundamental other-regarding duty is key: "The basic general obligation here must be to consider seriously what one can reasonably do to help the realization of another person's freedom, taking note of its importance and influenceability, and of one's own circumstances and likely effectiveness."[168] There is a duty to concern oneself with the well-being of others, particularly if an agent has the capability to reduce injustice. Power entails responsibility.[169] This duty is not based on considerations of reciprocity:

> Unlike the contractarian argument, the case for duty or obligation of effective power to make a difference does not arise, in that line of reasoning, from the mutuality of joint benefits through cooperation, or from the commitment made in some social contract. It is based, rather, on the argument that if someone has the power to make a difference that he or she can see will reduce injustice in the world, then there is a strong and reasoned argument for doing just that (without having to dress all this up in terms of some imagined prudential advantage in a hypothetical exercise of cooperation).[170]

This duty does not offer quick and simple solutions for practical questions but demands that the concern for others be included in the process of decision-making about what it is right to do: "There is a universal ethical demand here, but not one that automatically identifies contingency-free, ready made actions."[171]

Nussbaum emphasizes the egalitarian thrust of her argument.[172] Human beings have a capability to relate to others and should exercise it if they do not want to lead an impoverished life.[173] The "worth and dignity of basic human powers" forms the basis for "thinking of them as claims to a chance for functioning, claims that give rise to correlated social and political duties."[174] She underlines the importance of "human rights language": It serves as a reminder of legitimate and urgent claims of human beings, is rhetorically more direct than other ways of speaking, highlights autonomy and indicates a common ground in debates.[175]

[167] Sen, *Idea of Justice*, 361 ff.
[168] Sen, *Idea of Justice*, 372 f.
[169] Sen derives this idea from Buddhist thought, Sen, *Idea of Justice*, 205.
[170] Sen, *Idea of Justice*, 270 f.
[171] Sen, *Idea of Justice*, 373.
[172] Nussbaum, *Women and Human Development*, 86.
[173] Nussbaum, *Women and Human Development*, 92.
[174] Nussbaum, *Women and Human Development*, 84.
[175] Nussbaum, *Women and Human Development*, 100 f.

As mentioned above, capabilities are not the only concern of ethics. There are other topics that are taken to be relevant for human rights, too, such as fairness, although the consequences of such principles are not spelled out in any detail.[176]

In Sen's theory, the justification of his ethical theory rests on a particular concept of reason. Reason means viability in impartial reasoning, which allows for objectivity.[177] Sen denies that there is any reason to reduce rationality to the pursuit of self-interest and to exclude, for example, the commitment to alleviating the suffering of others.[178] The demand that people be seen as equals, which is a cornerstone of human rights theory, relates to "the normative demand for impartiality and the related claim of objectivity."[179] This reasoning is central to the rational vindication of human rights.[180]

4.4.3.2 Capabilities as Key?

The concern behind the concept of capabilities relates to a classic debate about the problems of equality of opportunity. One persistent theme in reflections on justice and equality concerns the shortcomings and sometimes even moral cynicism of conceptions of formal equality.[181] In the theory of justice and in the legal field of equality and nondiscrimination law, one major thrust consequently is to overcome the deficits of identifying equality with mere formal opportunities. Women have equal opportunities in formal terms to achieve highly qualified positions, for example, but this does not mean that they actually reach these positions. The formal opportunity of a person with a foreign-sounding name to rent a flat does not mean that the person will not be denied access to housing because of this name. Having formal opportunities thus constitutes only the first step towards equality. Such opportunities must be made substantial and real, empowering agents to reach those aims that are the conditions for a meaningful life. By now, a sophisticated set of legal instruments and extensive case law dealing with this matter have developed.

The concept of capability has the broader purpose of enlarging the informational basis for assessing what advantages for human beings consist of beyond concepts such as utility, preferences, pleasure and resources. In this context, the capability approach convincingly insists that opportunities are central elements of human goods and should be understood in a way that makes them more than just hollow promises society does not keep. In many respects, its detailed analysis has fleshed out

[176] Sen, "Elements of a Theory of Human Rights," 336 f.; Sen, *Idea of Justice*, 370 f.
[177] Sen, *Idea of Justice*, 180 ff., 293, 359, 365 f., 385.
[178] Sen, *Idea of Justice*, 180 ff.
[179] Sen, *Idea of Justice*, 293 f.
[180] Sen, *Idea of Justice*, 359, 365 f.
[181] Cf. the almost proverbial observation of a character in Anatole France's *Le lys rouge* (Paris: Calmann-Lévy, 1894) that the majestic equality of law prohibits the rich and the poor equally from sleeping under bridges, begging on the roads and stealing bread.

what opportunities that are not just formal and comprehensive mean in real terms. The capability approach therefore marks an important contribution to a theory of human goods. This should be borne in mind in the following.

Human rights are (explicitly or implicitly) understood as preconditions for the opportunity of persons to lead a flourishing life. Capabilities indexed to such a way of life are more capacious than the preconditions of agency, for instance. This allows the capability approach to provide reasons for the importance of a wide variety of rights. The arguments mustered against the agency approach in this respect consequently do not hold for the capability approach. More difficult to justify from this perspective are the demands of equality. Even an unequal freedom to live according to the demands of one's faith still may be sufficient to live a meaningful life, albeit perhaps not to the utmost extent. This raises the question of the origins of the demands of equality – a problem we already encountered when discussing the agency approaches. It is therefore right to underline – as Sen does – that there is more to a normative theory of human rights than a foundational recourse to capabilities.

A certain liberty such as freedom of expression protects a particular human good – for instance, the need to express oneself without censure. The capability approach presupposes these kinds of needs and other sources of human goods – a capability is a capability for something, and the question is where these valuable somethings stem from. The answer to this question refers to a certain valuable form of existence, the existence of free, dignified human beings who lead a truly human life. It is argued that certain capabilities are important in any form of human life an agent may want to choose and that there is something like an overlapping consensus on what these capabilities are. These are further helpful observations on the way to a comprehensive theory of human goods, and they chime well with traditional arguments in the history of human rights – say, Las Casas' defense of the value of freedom not only for Spaniards, but also for indigenous Americans. A question that remains to be answered, however, is what criteria determine which human capabilities are sufficiently important to generate rights and ultimately form such a consensus. This is particularly relevant for human rights because they are highly restrictive with respect to the goods they protect. This selectiveness needs to be justified.

A capability approach thus is no alternative to a theory of the sources of human goods. Rather, it depends on such a theory. Even if a capability approach were to interpret the capabilities protected in a formal fashion, not only (rightly) underlining the importance of choice, but also leaving it entirely up to the agents to autonomously determine what the content of a flourishing life might be, a statement about human goods is implied, as we already have seen. The protection of autonomy presupposes at least that human life is worth living and that freedom and autonomy as preconditions for making choices constitute elements of any meaningful life. Otherwise, there would be no reason at all for their protection. Here, too, the question of the reasons for this valuation of autonomy arises. This confirms a key

insight of the discussion so far: A human rights theory implies a substantial theory of human goods.

One challenge that the capability approach faces as much as any other human rights theory stems from the fact that rights consist of claims towards others and create obligations. They impose normative burdens to be shouldered by all that often translate into real, material burdens on the addressees and are the price to be paid for respect for human rights. As we have seen, these claims and obligations cannot be derived solely from the importance of a good for agents – for example, the importance of the real opportunity to speak their mind. One can acknowledge readily the significance of such a good for oneself and others and still ask: "Why do I have any duties concerning things that are (admittedly) important for others?" Normative principles are thus required that can serve as the foundations of such other-directed claims and obligations.

The capability theory makes some very important theoretical moves that help to provide a deeper understanding of the issue. Particularly crucial in this respect is a more capacious and thus plausible concept of rationality and reason, which includes certain other-regarding principles that are not derived from self-interested, utility-based calculations. In addition, principles of obligatory respect for equality and equal treatment play an important role. Finally, the principle of human dignity and the worth of individuals as ends are highlighted, notions that play a central role in the wider discourse on human rights in both ethics and law and that indeed seem to be key to understanding the importance of the individual in the idea of human rights.

Nevertheless, based on these results further questions arise. In Sen's account, the other-regarding duties result from the power to change the situation of another person for the better.[182] This seems to presuppose some duty to be beneficent to others rather than explain the foundations and content of this duty. A power entails responsibilities only if others exposed to this power count in normative terms. As such, it does not entail any duties not to harm others or to promote their well-being. Grounds for these duties independent of the factual ability to influence the lives of others are required. The same holds for an argument based upon the importance of a good for others (or oneself): The importance of a good as such has no normative implications.

In Nussbaum's account, these other-regarding duties seem to be equated with the capability to relate to others. This capability, however, important as it is, is something other than the normative duty to care for others. The ability to relate to others is not the same as the duty to care for their well-being. The powers of human beings, Nussbaum argues, give rise to claims to be able to exercise them. How can the transition of the fact of given human powers into normative claims be explained without committing the category error identified above?

[182] As indicated, Sen relates this idea to Buddhist thought, Sen, *Idea of Justice*, 205.

Similar problems arise for the principles of justice invoked. The thrust is clearly egalitarian. But what exactly does the argument look like? How is equality as a normative principle to be understood? How does it provide foundations for human rights? Furthermore, what is the relation between human beings, viewed as ends because of their dignity, and the wider normative conclusions drawn about claims on others in the form of human rights? Is the dignity of "choosers" all there is at stake?

In this context, it should be underlined that human rights are not just about a "language of rights" in the sense of a rhetorical device or a way of speaking. The theoretical problem they pose is that of a particular, deontic status of human beings. This status has an identifiable content. The central problem of the justification of human rights is to account for the reasons to assume that human beings do in fact enjoy this particular status with its concomitant claims of the rights-holder and duties of the bearer of the rights. This deontic status is what the language of rights refers to – and correctly so, if this idea is successfully justified.

This leaves us with a task. The structure and content of the normative principles that render the importance of enjoying a rich set of capabilities normatively relevant need to be spelled out in more detail than the capability approach provides, as does the way that these normative principles translate into arguments for the justification of human rights. Only if these principles are exposed in the full daylight of critical reflection can answers be provided to the questions of their justification and their relation to human moral psychology and their epistemological status, a central concern of this inquiry. In this respect, it is interesting to investigate whether equality as a normative concern is wedded to impartiality and objectivity in reasoning, and if so, in which sense, or whether the normative principle of equality has different sources.[183] The origin of rights in normative principles, the coming into being of this intricate web of normative incidents that empowers the rights-holder through claims and privileges and entangles the addressee in obligations and no-rights under some apparently nonarbitrary conditions thus still needs to be fully accounted for, despite the many insights provided by the capability approach.

One last point: Sometimes capabilities appear as synonymous with effective human rights, contrasted to moral rights to something.[184] It is, however, important to distinguish the function of fully realized capabilities as yardsticks for human rights rendered effective (in particular in the legal domain) from the prior question of how to account for the normative content of human rights that is to be made effective. How to make the right to education effective for girls in the Global South is a highly

[183] We have already encountered this question, cf. the discussion of the objective reason argument above.

[184] Nussbaum, *Women and Human Development*, 98, understanding human rights as combined capabilities; that is, the internal capability of the agent to act and external conditions that enable the exercise of the function, ibid. 84 f., contrasting rights in this sense to moral human rights.

important question, but it differs from the problem of why it is justified to think that such a right exists in the first place.

4.5 POLITICAL CONCEPTION

4.5.1 *Human Rights and the Veil of Ignorance in the International Sphere*

A prominent approach in human rights theory developed by Charles Beitz outlines a political conception of human rights. The starting point for this approach is Rawls' transferal of his own contractualist theory of justice, already discussed in part above, to the international sphere. In this framework, human rights are understood as those rights that form a shared normative framework for liberal democracies and other "decent peoples," in particular hierarchical, nondemocratic societies, the latter characterized by a conception of justice linked to an idea of the common good and a consultative, albeit nondemocratic process of political decision-making. This shared normative framework is based on public reasons, because there is a "duty of civility requiring that they offer other peoples public reasons appropriate to the Society of Peoples for their actions."[185] Both kinds of societies form the set of "well-ordered peoples."[186] These peoples need to be seen alongside "out-law states" without respect for human rights, "burdened societies," which are poor, and "benevolent absolutisms."[187] Human rights in the international sphere are the products of deliberation behind a "veil of ignorance," Rawls' famous tool for neutralizing bias and interest. This deliberation is performed not by individuals, however, as when determining the basic principles of justice, but by peoples, which are the moral subjects of international law.[188] The veil deprives the peoples of knowledge about the size of their territory, their number of inhabitants, their strength and the like, information that may skew their judgment about the appropriate international order.[189]

Human rights are defined by being of international concern. One central indicator for this concern is the fact that these rights may justify an international intervention by other actors in the affairs of a state, in particular an outlaw state.[190] This approach to human rights thus is a functional account: The content of human rights is dependent on the function human rights serve, which is to determine the grounds for intervention. The list of rights derived from this starting point is considerably shorter than standard human rights catalogues – for example, it does not encompass a cornerstone of the international protection of human rights such as

[185] John Rawls, *The Law of Peoples* (Cambridge, MA: Harvard University Press, 1999), 59.
[186] Rawls, *Law of Peoples*, 63.
[187] Rawls, *Law of Peoples*, 63.
[188] Rawls, *Law of Peoples*, 23 ff.
[189] Rawls, *Law of Peoples*, 34 ff., 68 ff.
[190] Rawls, *Law of Peoples*, 81.

the equal protection of freedom of religion, among other liberties.[191] The reason is that "decent hierarchical peoples" do not accept such rights and cannot be coerced into doing so.[192]

4.5.2 *The Political Conception Reframed*

On this basis, Beitz outlines further arguments for a political conception of human rights, which in some important aspects breaks new ground and provides fresh insights into the problems of the nature and justification of human rights. This approach does not argue on the basis of some kind of abstract foundational normative principle: "We do better to approach human rights practically, not as the application of an independent philosophical idea to the international realm, but as a political doctrine construed to play a certain role in global political life."[193]

Consequently, this approach turns its attention to a political practice in which human rights count as reasons for a specific restricted set of actions – human rights are "transnational action-justifying norms."[194] The content of human rights, Beitz argues, is best derived by understanding the meaning of this practice. The task consists of determining the concept of human rights that best fits the nature of this practice. The approach "tries to grasp the concept of human rights by understanding the role this concept plays within the practice. Human rights claims are supposed to be reason-giving for various kinds of political action which are open to a range of agents. We 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."[195]

The international practice of human rights is only emergent.[196] Its outline needs to be derived from an informal construction of its content.[197] Thus, admittedly, the properties of the practice of human rights are in many ways amorphous, but they are still sufficiently established for this approach to succeed.[198]

[191] Rawls, *Law of Peoples*, 65, 78 ff.

[192] Rawls, *Law of Peoples*, 68: "The Law of Peoples does not say, for example that human beings are moral persons and have equal worth in the eyes of God; or that they have certain moral and intellectual powers that entitle them to these rights. To argue in these ways would involve religious or philosophical doctrines that many decent hierarchical peoples might reject as liberal or democratic, or as in some way distinctive of Western political tradition and prejudicial to other cultures."

[193] Beitz, *Idea of Human Rights*, 48, 68. Allen Buchanan, *The Heart of Human Rights* (Oxford: Oxford University Press, 2013), 3, also bases his account of human rights on the practice of international (legal) human rights.

[194] Beitz, *Idea of Human Rights*, 42.

[195] Beitz, *Idea of Human Rights*, 9.

[196] Beitz, *Idea of Human Rights*, 43.

[197] Beitz, *Idea of Human Rights*, 107.

[198] Beitz, *Idea of Human Rights*, 10.

The political conception of human rights allows their practice to be criticized from a normative point of view.[199] It argues, however, that one has "to distinguish between the problem of describing human rights [and] the problem of determining what they may justifiably require and identifying the reasons we might have for acting on them."[200] The approach intends as a crucial step to identify what agents commit themselves to if they participate in the practice of human rights.

The reasons for this approach are, first, that there undeniably is a substantial social practice connected with human rights.[201] Second, there is a "prima facie reason to regard the practice of human rights as valuable. On the face of it, its norms seek to protect important human interests against threats of state-sponsored neglect or oppression which we know from experience are real and can be devastating when realized."[202]

Human rights are distinguished from other norms by being of global concern: "The central idea of international human rights is that states are responsible for satisfying certain conditions in their treatment of their own people and that failures or prospective failures to do so may justify some form of remedial or preventive action by the world community or those acting as its agents."[203]

Importantly, human rights practice is not only a *legal* practice. On the contrary, it is argued, important dimensions of the international practice of human rights are political, not legal. Consequently, this account diverges from the legal paradigm.[204]

Beitz develops a two-level model[205] that underlines the priority of the (legal and political) protection of human rights by states.[206] The international protection of human rights adds a second level with its own particular features. Emphasizing that human rights are of international concern does not mean equating the practical expression of this concern with military intervention. On the contrary, military intervention represents an exceptional case of political action motivated by this international concern.[207] The international community has at its disposal a variety of other legal and political means that are far more important in practical terms to enforce (or try to enforce) human rights.[208]

The political approach not only provides a piece of descriptive human rights sociology, but also aims to identify criteria to justify or criticize certain human rights

[199] Beitz, *Idea of Human Rights*, 10, 78.
[200] Beitz, *Idea of Human Rights*, 11.
[201] Beitz, *Idea of Human Rights*, 11.
[202] Beitz, *Idea of Human Rights*, 11.
[203] Beitz, *Idea of Human Rights*, 13, quoting United States Court of Appeals, Filártiga v. Peña-Irala, Judgement of June 30, 1980, 630 F.2d 876 (1980), 881: "[I]n this modern age a state's treatment of its own citizens is a matter of international concern."
[204] Beitz, *Idea of Human Rights*, 40.
[205] Beitz, *Idea of Human Rights*, 108, 114, 160.
[206] Beitz, *Idea of Human Rights*, 31 f., 108 f., 119 f., 122.
[207] Beitz, *Idea of Human Rights*, 116.
[208] Beitz, *Idea of Human Rights*, 33 ff.: Mechanisms include accountability, inducement, assistance, domestic contestation and engagement, compulsion and external adaption.

contents.[209] It tries to contribute to answering all of the questions identified above.[210] Its basis is a kind of interest theory of the justification of human rights: Human rights claims are justified, it is argued, if there is a qualified interest, if the state has effective means at its disposal to foster this interest and if the failure of a state to protect the interest would be a legitimate object of international concern.[211]

Such a justificatory account of human rights claims includes empirical generalizations about causes for grievances and effective policy means and thus about social behavior and the working of social institutions.[212] Interestingly, "an empirical truth about human nature" also plays a central role: Following Rawls, Beitz argues that the ability of every human being to form a conception of the good constitutes such an empirical truth.[213]

According to Beitz, this kind of account shows that human rights are not the whole but only a part of social justice.[214] The practical conception of human rights has a justificatory function that makes it possible to critically assess human rights claims – for example, as to welfare rights,[215] rights to political participation[216] or women's rights.[217] This account is not called into question by the plurality of moral outlooks in different societies: The toleration of such divergent perspectives is (ultimately) conditional upon the respect for individual interests,[218] the most fundamental of which – like physical integrity – are by no means parochial Western concerns.[219]

[209] Beitz, *Idea of Human Rights*, 137.

[210] Beitz argues that the primary question is not why human rights are "sources for reasons for action for us," but how human rights "operate in the normative discourse of global political life," Beitz, *Idea of Human Rights*, 105. The emphasis on the critical function of human rights and the justificatory theory outlined illustrate the normative thrust of the argument.

[211] Beitz, *Idea of Human Rights*, 137: "We might therefore imagine a schema for justifying claims about the content of human rights doctrine with three parts. An argument for any such claim should make good three contentions:

1. That the interest that would be protected by the right is sufficiently important when reasonably regarded from the perspective of those protected that it would be reasonable to consider its protection to be a political priority.
2. That it would be advantageous to protect the underlying interest by means of legal or policy instruments available to the state.
3. That in the central range of cases in which a state might fail to provide the protection, the failure would be a suitable object of international concern."

[212] Beitz, *Idea of Human Rights*, 129: "Historically, the argument for a global practice with the functional features of human rights turns on an empirical thesis about the pathologies of a global political structure that concentrates power at dispersed locations not subject to higher-order control"; ibid. 139.

[213] Beitz, *Idea of Human Rights*, 146.

[214] Beitz, *Idea of Human Rights*, 142, 143.

[215] Beitz, *Idea of Human Rights*, 161 ff.

[216] Beitz, *Idea of Human Rights*, 174 ff.

[217] Beitz, *Idea of Human Rights*, 186 ff.

[218] Beitz, *Idea of Human Rights*, 144 ff.

[219] Beitz, *Idea of Human Rights*, 203.

4.5.3 A *Fresh Start?*

The political conception of human rights hopes to offer a "fresh start" for human rights theory that is better than other accounts. But does it succeed in its aim to make the normative meaning of current human rights practice fruitfully explicit?[220] And is this the key to the many riddles of human rights?

One problem that may be worth considering is the descriptive adequacy of the political conception's account of human rights practice. As indicated above, important rights guarantees are found in constitutions and other national legal instruments. In addition, regional, international or (in a technical sense) supranational layers of human rights guarantees are added to this primary element of human rights protection. Finally, there are universal international law systems of human rights protection. The international system of human rights is consciously designed to be complementary to the initial municipal level of their protection, which is of crucial importance in practical terms.

Consequently, it is important that – unlike in Rawls' own account – Beitz's conception highlights the primacy of the domestic protection of human rights.[221] Despite this, however, there is no substantial engagement with regional or national systems of the protection of human rights and with what they may teach us about the concept of human rights. Human rights are certainly of international concern, but not only that. Considerations of reasons for international agents to take action highlight only part of the practice of human rights and only part of their function in political orders, and in fact not the most important ones.[222]

This focus runs the risk of obscuring important differentiations. The domestic protection of human rights and the complementary regional and international systems (ideally) share a common goal but follow their own rules in certain respects. For instance, one crucial (practical) debate concerns the deference of the international interpretation of human rights to national human rights practice – the doctrine of a "margin of appreciation" of states in the ECHR system illustrates this question's content and key importance. Arguments are required to define the scope of such a "margin of appreciation" and – importantly – its limitations. This aspect of the practice of human rights may have important consequences for understanding

[220] Beitz refers to some of R. B. Brandom's thoughts on implicit normative commitments and the need to make them explicit, Beitz, *Idea of Human Rights*, 9 n. 14, as developed fully in Robert B. Brandom, *Making It Explicit* (Cambridge, MA: Harvard University Press, 1994).

[221] Beitz, *Idea of Human Rights*, 23, 31 f., 108 f., 119 f., 122, 143.

[222] Cf. for a related critique Griffin, *On Human Rights*, 24: The Rawlsian account of the function of human rights reduces them to establishing rules of war between nations and conditions for one nation being allowed to intervene in another. It overlooks the intranational role – for instance, to justify rebellion, to establish a case for peaceful reform, to curb an autocratic ruler or to criticize a majority's treatment of racial or ethnic minorities. Beitz rightly highlights the many forms of reactions to human rights violations, including on the domestic level, but he draws no clear conclusions from this observation for his general theoretical enterprise.

the idea of human rights – for example, as to its universality and the manner in which it relates to the many ways of interpreting the concrete meaning of human rights. This example shows that just looking at human rights in international law does not tell us enough about the true practice of human rights.

Another element of the practice of human rights – from an international perspective – is its robust inclusion of private individuals and legal persons as addressees of human rights, although this takes place to varying degrees and in controversial ways. It thus is important for conceptions of human rights to account for the idea of such horizontal effects.

The most important point, however, is the following. The practice of human rights is understood as the key to determining what kind of actions in which kind of circumstances are justifiably demanded by human rights claims. The practice appears to be a settled given. The first question one can ask is: Why should one take the practice *as it is* as a starting point? A practice may be flawed, being based on error and ideology, for instance. There needs to be a way of addressing the challenge that the current human rights practice may make no sense at all, that it may be ill-conceived from its very beginning. The argument thus starts from the assumption that a practice makes sufficient sense from a normative point of view. It is not naked facticity that is the reason for forming a conception of human rights on the basis of a certain practice, but rather the (assumed) legitimacy of this practice.

A second question relates to and confirms this point: What *kind* of practice is actually taken as relevant? The current practice of human rights has very many, often conflicting aspects – even more so if one seriously considers its past and keeps the distinction between morality and law in mind. Human rights often do play the role they are supposed to play as normative demands with which human beings try to do justice to their human dignity. However, they very often also are no more than ideological talk used for political purposes, not least to camouflage narrow interests. They can serve as pawns in geostrategic conflicts, as during the Cold War, when human rights were deployed as useful tools against authoritarian enemies but considered of little relevance if an equally authoritarian regime was seen as an ally.

Identifying what counts as a practice of human rights properly speaking thus already is a normatively loaded enterprise. This identification is not independent of a philosophical, theoretical normative standpoint – it implies it. More concretely, it hinges on some kind of assessment of the importance of the goods protected, of the proper politics of rights and (at least) of some normative principles. It is therefore crucial to spell out the theory of goods (as agency, need, interest and capability theories rightly do), the political assumptions and the normative principles involved, as these are the sources of the idea that the particular practice is in fact legitimate and worth considering, as we will see in more detail below.

Let us take the example of humanitarian interventions that seek to protect human rights. There are certainly some elements here of an emergent practice, though its

status under international law is far from clear. Why should this practice be able to determine the content of the concept of human rights? Perhaps the practice is in fact nothing but disguised imperialism and thus leads to a less than convincing conception of human rights. The question of whether or not human rights are of sufficient weight to be of international concern and may even justify intervention requires some kind of standards for assessing their importance. It is unclear how the weight of human rights can be assessed without (among other things) a principled account of the importance of the protected goods for human beings and of the human goods that may be at stake as a consequence of such an intervention. The political conception of human rights offers no alternative to a theory of goods – on the contrary, it presupposes such a theory. The same is true for the political evaluation of rights and for the normative principles involved. Would a practice of human rights distorted to the detriment and disadvantage of less powerful countries, as some claim the practice of humanitarian intervention is, not be an illegitimate violation of normative principles – for example, of international justice and equal respect for human beings, irrespective of the country in which they live? It is worth remembering that for many years the practice of human rights relied on the exclusion of a vast number of human beings from the protection of human rights – the colonial exception clause of the ECHR has been mentioned various times in this respect. The political and normative presuppositions of arguments challenging such exclusionary practices thus need to be identified and spelled out.

All of this points to a central conclusion: *Only from a normative point of view* can a human rights theory achieve its twofold aim, namely to refute skeptics who think that the whole practice makes no sense and to calibrate the concrete content of human rights. It is not a given practice that is the key to the concept of human rights; rather, a justificatory theory of human rights is the key to identifying (and building) a legitimate practice of human rights.

That this is indeed the case seems to be confirmed by the fact that the political conception of human rights explicitly states that the practice it considers serves prima facie legitimate normative aims.[223] The reason for this can only be that the existing emergent practice gives due weight to the dignity, freedom and equality of human beings. Clearly, those elements of the international practice of human rights that are identified as the relevant parts of the overall social practice of human rights are chosen because they live up to the promise of protecting these core values. By contrast, the ideological use and the political abuse of human rights and the hypocrisy and window dressing practiced in their name are taken to be irrelevant for the central task of determining what the relevant practice really is because they violate the normative vision of human rights.

In addition, the political approach even outlines a theory of legitimacy, or, in more concrete terms, a modified interest theory of the justification of human

[223] Beitz, *Idea of Human Rights*, 11.

rights.[224] It underlines the critical power of the political conception of human rights,[225] which is, after all, not just a descriptive sociology of certain facts of international political life.[226] One example, and a telling one at that, is the Helsinki Process.[227] This process and the transformative influence it had (in the circumscribed way this can be said in complex historical cases) upon Europe came about because a certain conception of human rights was made politically relevant – a conception that is not just a rhetorical facade but takes individual liberty, in particular political liberty, seriously. This example shows that the practice of human rights is a contested territory, shaped and continuously reshaped by the struggle over the meaning of human rights and the normative principles that should guide their understanding. Human rights practice is not a simple given that can be relied on to build a theory of human rights.

The same conclusion can be drawn from the discussion of the limits to the acceptable differentiation of normative terms or the demands of international tolerance. The argument that the concerns of individuals are central and may trump those of communities rests on a normative thesis, namely the importance of individual autonomy, an idea that guides the entire theoretical enterprise.

The political conception of human rights therefore relies on an argument without a completely explicit premise: Its conception of human rights is not just derived from a given identified practice and its content determined on other than normative grounds. A prior normative stance is itself the foundation upon which the identification and evaluation of the practice as justified prima facie unfolds.[228] The possibility of determining the content of a legitimate set of human rights depends on this normative stance.[229] Everything thus hinges on this normative theory. The

[224] Beitz, *Idea of Human Rights*, 137 ff.

[225] Beitz, *Idea of Human Rights*, 105. He argues in the context of what he calls agreement theories, ibid. 78: "Human rights are supposed to be critical standards: they are supposed to provide a basis for criticizing existing institutions and conventional beliefs and justifying efforts to change or revise them. Confining the content of human rights doctrine to norms that either are or could be agreed to among the world's moral cultures threatens to deprive human rights of their critical edge." One can ask why this is not also true for the identification of human rights with a particular practice if there are no normative reasons justifying this practice's normative authority.

[226] Beitz, *Idea of Human Rights*, 104.

[227] Beitz, *Idea of Human Rights*, 82.

[228] The theory of goods and the normative principles cannot be derived from some other higher-order practice, because this would beg the question of the legitimacy of this higher-order practice.

[229] The possibility of deducing substantial content from the functional role of human rights as outlined by a political conception of human rights is limited, cf. Griffin, *On Human Rights*, 144: "The serious weakness in Rawls' functional explanation of human rights is that it leaves the content of his shortened list – the content both of the list itself and of each individual right – unworkably obscure." Buchanan, *The Heart of Human Rights*, 12, 107 ff. argues that international human rights should not be identified with moral rights, but he argues at the same time for the need for a "genuinely moral justification" of these rights – which seems to confirm the importance of normative principles for a theory of human rights.

attempt to leave the problems of justificatory philosophical theories behind leads right back to the very theories that the political conception of human rights had hoped to transcend.

This notwithstanding, the political theory provides many insights. One key point for the current argument is the fact that it highlights the "beneficiary-centeredness" of some of the discourse on human rights: Such a perspective does not provide sufficient reasons to normatively account for the duties implied by human rights.[230] These theories focus on what is at stake for the rights-holder and go into far less detail on why the implied burden for the addressee (whoever that may be) is supposed to be justified. This burden can be substantial. The social price paid for the protection of human rights often is considerable; society may even incur great risks in their protection. Liberal rights entail the possibility of abusing of these liberties, with potentially severe consequences: "So there is the further question why an agent who is in a position to respect and protect the right should do so?"[231] This is the case for all levels of human rights protection. Why should human beings accept the rights of strangers who happen to share the same citizenship but perhaps nothing else? Why should they feel obliged towards people in faraway countries? Why does the suffering and well-being of individuals other than oneself matter in a particular manner that gives rise not only to pity or compassion, but also to rights and the duties they imply?

The reasons discussed for imposing such burdens are not entirely satisfactory, not least because attention is focused upon the international protection of human rights.[232] However, the formulation of the problem underlines a key finding of our discussion of justificatory theories of human rights so far: The burdens imposed by rights and the normative position the addressees of these rights find themselves in point to the relevance of normative principles. What else could be a promising candidate as the source of these sometimes-exacting duties?

4.6 HUMAN RIGHTS AND THE ART OF LIVING WELL

A theory pioneered by Ronald Dworkin understands rights as trumps in structural terms, analyzing them in terms of rules and principles (as discussed in Chapter 1 on the concept of rights). Substantially, Dworkin argues, human rights are a central pillar of lives lived well so that they become "tiny diamonds in the cosmic sands."[233]

[230] Beitz, *Idea of Human Rights*, 65.

[231] Beitz, *Idea of Human Rights*, 70.

[232] These reasons include the ability of a political agent to act significantly, the permissibility of the action, the nature and importance of the threat, the burdensomeness of the actions, the harm implied and the nature of the historical relationship, Beitz, *Idea of Human Rights*, 137, 140. If one includes the national, supranational and regional protection and natural and legal persons as potential (direct or indirect) addressees, additional questions about the legitimacy of such burdens arise.

[233] Dworkin, *Justice for Hedgehogs*, 423.

The foundational principle of human rights is human dignity. This obviously tallies with explicit statements of modern human rights law, though this is only a subchapter of his thought. For Dworkin, dignity in concrete terms means self-respect and authenticity.[234] From this, explicitly following Kantian lines, he derives the guiding principle for ethics, political philosophy and (as part of the latter) law: "Kant's principle," as he calls it, holds "that a proper form of self-respect – the self-respect demanded by that first principle of dignity – entails a parallel respect for the lives of all human beings. If you are to respect yourself, you must treat their lives, too, as having an objective importance."[235] One only respects oneself if one respects the humanity of all. The moral standard derived from dignity therefore is equal concern for all and respect for personal responsibility – a standard that, unlike the concrete shape it takes in different systems of positive law, is universal.[236] The canonical human rights can be derived from this principle. In light of this standard, norms that prohibit acts exhibiting a belief in the superiority of certain groups, the protection of basic liberties and the impermissibility of torture and punishing people for the benefit of others rightly are regarded as human rights.[237] The exact details form the object of debate – for example, about the meaning of controversial concepts like dignity that are neither criterial (i.e. for which no set criteria of use applies) nor natural kind concepts but interpretative; that is, in need of interpretation to determine their content.[238]

Like the other theories discussed, this argument strikes an important note by emphasizing the connection between dignity and rights. In central aspects, it is an objective reason argument of the kind already encountered and therefore poses a related question: Why is dignity a source of the special normative status of having *rights*? Why does it create duties? Is dignity the only foundational principle in this respect, or are other normative standards important, too? Framing the theory in the terms of a eudemonistic concept of a life lived well does not solve this problem. Living well does not just mean to feel pleasure but to live according to a normatively loaded vision of life – which leads back to the content and justification of the normative principles defining this vision of life. The problems that seem to haunt the theory of human rights raise their heads once again.

[234] Dworkin, *Justice for Hedgehogs*, 203 f.: "The first principle is a principle of self-respect. Each person must take his own life seriously: he must accept that it is a matter of importance that his life be a successful performance rather than a wasted opportunity. The second is a principle of authenticity. Each person has a special, personal responsibility for identifying what counts as a success in his own life; he has a personal responsibility to create that life through a coherent narrative or style that he himself endorses. Together the two principles offer a conception of human dignity: dignity requires self-respect and authenticity."

[235] Dworkin, *Justice for Hedgehogs*, 255.

[236] Dworkin, *Justice for Hedgehogs*, 338.

[237] Dworkin, *Justice for Hedgehogs*, 336 ff.

[238] Dworkin, *Justice for Hedgehogs*, 157 ff.

4.7 SUMMARY: AFFIRMATIVE THEORIES OF HUMAN RIGHTS

This discussion of some exemplary justificatory theories has not provided a full map of the theoretical landscape but has allowed for some constructive insights important for our inquiry. The discussion of social functionalist theories of human rights underlined that human rights prioritize the goods of individuals, not the functional imperatives of societies. Contrariwise, these functional imperatives themselves are dependent on the normative yardsticks of social organization, including human rights. The classic economic analysis of law faces a related problem: Rights are limiting conditions for any efficiency regime and therefore presuppose a justification independent of the efficient allocation of resources in society. Behavioral economics provides important insights into the psychology of decision-making to which we will return. The idea of bounded rationality, however, demands an answer to the question of what fully rational decision-making would mean and which normative principle should guide its exercise.

Rule-utilitarian defenses of human rights face at least two problems: First, it is not socially aggregated goods that are relevant for normative theory but individuals, who thus cannot be ignored when building a normative theory. Second, the power and many beneficial consequences of utilitarianism derive from its respect for the equality of human beings. This normative principle of equality is not itself derived from the principle of utility, however, but is its foundation.

Discourse theory relies on normatively loaded presuppositions that are the precondition, not the product of moral deliberation. Contractualism points to its own normative foundations that transcend a contractual compact. Theories discussing agency, needs, interests or capabilities as the foundation of human rights have illustrated the importance of the following point: It is a category error to draw normative conclusions such as the existence of rights from the importance of a human concern. Normative principles need to explicate why such concerns of individuals become the object of rights and the normative burdens of duties of the addressees. Moreover, they provide important insights for a plausible theory of human goods relevant to the theory of human rights.

The political conception of human rights reminds us of the weight of human rights: They are not just parochial concerns but central commitments of the entire human community. The political theory thus renders human rights theory a very important service: It reminds us of the stakes of justification. The practice of human rights is not a simple given but contested territory that takes its shape according to the normative theory of the human rights defended. Accordingly, it cannot become the ultimate foundation of the idea of human rights.

The derivation of human rights from a conception of a life lived well that is centered on human dignity, understood as authenticity and autonomy, underlines the importance of dignity for the theory of human rights, as the pluralist interest theory and the capability approach do as well. Among other questions, this

derivation raises the issue of how to bridge the gap in the argument between the perceived worth of one's own life and ensuing rights and duties of oneself and others. A normatively loaded vision of a life lived well does not offer an escape route from these questions.

These findings only scratch the surface of the sophisticated thoughts underlying these approaches. Much can be learned from these theories, and no one working in this field should feel confident to be able to produce anything remotely as thoughtful. This notwithstanding, none of these theories seem to answer the question of the justification of rights in an entirely satisfactory manner. Therefore, it may be useful to take a step back and once again consider how we can make some progress in this respect. This review seems to suggest that the problems initially identified are of real relevance. So far, there appears to be no way around a theory of human goods, a political theory of human rights and a theory of their normative foundations. Let us explore, then, how far we can travel along this path.