Ursinus College

Digital Commons @ Ursinus College

Philosophy Honors Papers

Student Research

5-1-2021

Skorupskian Allyship: Human Rights Reconstructed Through Efficacious Enforcement and Social Relativism

Chase Opperman

Follow this and additional works at: https://digitalcommons.ursinus.edu/phil_hon

Part of the Ethics and Political Philosophy Commons, and the Human Rights Law Commons

Click here to let us know how access to this document benefits you.

Skorupskian Allyship: Human Rights Reconstructed Through Efficacious Enforcement and Social Relativism

Chase Opperman

05/01/2021

Submitted to the Faculty of Ursinus College in Fulfillment of the Requirements for Honors in Philosophy.

ABSTRACT

This project aims to take the subject of Human Rights and attempt to wrestle with its clarity. The concept has been, since its more modern manifestation, as represented by the United Nations' Uniform Declaration of Human Rights, heavily criticized for its being indeterminate, unclear, ambiguous, or somehow not fully understood. Despite the concept's incredible moral potential, the extent to which this potential can be realized is determined by the concept's intelligibility and defensibility—both of which are affected by the concept's being understood to a sufficient point. Given Human Rights' moral potential to challenge the forces of evil in the world, and inform the extents to which individuals can be protected from antagonizing institutions, the importance of the subject is palpable. In this thesis, I attempt to assess key thinkers' conceptions and use these conceptions to clarify my own understanding of Human Rights to hopefully bolster the subject's credibility and intelligibility. I do so by merging the work of two philosophers of international law and Human Rights: John Skorupski and Joseph Raz. With the unification of Skorupski's notion of efficacious enforcement, juxtaposed to what Raz's Social Relativism asserts, hope to synthesize an interesting lens through which myself and others can better understand the concept of Human Rights. Thus, through this new lens, I hope to be able to better understand the consequences of this pursued understanding of Human Rights—what can and can't we leverage with the concept. This is accomplished through defending a two-level hierarchy of Human Rights, which maximizes the utility of the subject as well as maintains its intended function: individual defense of transgressing state/institutional powers.

Introduction to Human Rights: Globalization and Pluralism

Law and laws, foreign and domestic, have structured the world we find ourselves in, for better or worse. The degree to which these laws serve their function and invoke claims, justifications, and warrants of morality is a question that very well may explain at least some of the world's historical and current legal structure. On the subject of the philosophical structure of law, Hershovitz claims that the debate which has long existed between Hart, Dworkin, and their respective followers is one which doesn't deserve the attention it gets.[1] He claims that it has, for far too long, caught the attention of the philosophers of jurisprudence and that its merits are not enough to warrant its continued engagement; we ought to leave the "fly bottle."[2] If he is right, then there exists no distinct sphere of normativity for law that is separate and distinct from morality. In fact, the sphere of normativity that encompasses both the law as well as the moral are one and the same. Thus, it seems we, irrespective of the source of legal content, would all do better to focus our attention on the moral structure and consequences of our legal practices.[3]

But this leaves us with the following question: by what definition ought the "our" of "our legal practices" be construed? Surely there are moral upshots of many, legal subjects. But ought we entertain a more liberal understanding of *our legal practices* and apply it to the ever-developing global stage; or, would it be beneficial to simply limit the conversation to the legal practices that exist *within our respective nation-states*? While many have, and many still, argue that the second one takes precedence, or maybe even that the former isn't at all their business, it

[1] See Page 1159 Hershovitz. "The End of Jurisprudence." (2015).
[2] *Id*. 1162
[3] *Id.* 1200

has never been more relevant to take the dive into trying to wrestle with the former question due to the ever globalizing and pluralistic world in which we find ourselves.

Globalization, fueled by both fast-paced changes in technology as well as increased mobility of goods, services, and labor has, over the past decades, influenced the extent to which societies, the environment, and various economies have changed. Many countries have seen rapid economic growth.[4] Others have seen much political reform with western influences asserting democratic political notions in those places where its influence can be felt.[5] And, of course, there are those that have seen challenges with globalization, simply understood by a disproportionate distribution of its benefits and costs.[6] Through both the outsourcing and mechanization of labor, the work industry has been, and continues to be, fundamentally changed in ways that include job losses, changes in needs for labor/education, and more. The amazing feats of technological advancement witnessed in recent history have also affected the world and its workforce. Those countries that do not have access to these advancements (AI, computer science, medicine, weapons, urbanization, etc.; all things that are defining the stability and standards of living for those countries fortunate enough to have them) are at risk of being left behind. Maybe most importantly, many of these trends closely linked to globalization all have tangible impacts on our environment and significant influence on climate change. This is all to say that the world is acting in a more global way; that is, the world is consisting of more and more actors, be it state actors or otherwise, engaging in international interaction.

[4] See https://ourworldindata.org/economic-growth-since-1950

[5] See Page 1162, Besson and Tasioulas. “The Philosophy of International Law.” (2010).

[6] See Scheuerman. "Globalization.” (2018)

Even further, our world, in its becoming more and more globalized, also has become more pluralistic. A very commonly supported notion born of the general increase in democratic ideologies and regimes in recent history,[7] pluralism argues, generally, that there are multiple true views one can hold regarding a given subject: religion, politics, etc.[8] The globalized, and yet still incredibly diverse, circumstances we find ourselves in lends itself to assuming that the world, in all of its complexity, has a lot of different people with a lot of different ideas, all of whom have at least some elements of truth within their respective understandings of the world. The pluralist assumption has been increasingly found at the forefront of international relations, as it often serves as the tool by which people remain inclined to overcome difference, through acknowledgement and acceptance. In so doing, those that employ this assumption are better enabled to compromise with those with whom they may engage in the international arena, in light of the fact that the increased interactions we see between various nation-states, as well as non-state actors, promotes thoughts about long-term stability and mutual benefit. In short, the ripple effects of both globalization and increases in pluralism are massive and multifaceted. The former is a phenomena of certain developments, and the latter is a philosophical response to the consequences of the former's developments. This backdrop helps us understand how the effects of such developments, globalization and pluralism, have led to the certain institutional developments within another subject: Human Rights, this paper's subject.

---

[7] *Id.*

[8] See Mason. "Value Pluralism" (2018)

Introductory Parallels

In returning to the aforementioned questions, two different paths of inquiry make themselves available if we choose to pursue the former question; that is, again, ought there be a context wherein our definition of "our" is globally concerned: there are, after all, two different main camps of international law regarding institutions. First, there are International Legal Institutions (ILIs) that transcend, though are not always supreme to, the sovereignty of nation-states and exist exclusively at the international level, such as the United Nations. The second kind of international law focuses not on any international entities, but rather on the laws that existing nation-states make that apply or extend themselves beyond their own respective sovereignty and into the international sphere, often consisting of trade agreements, treaties, and other such things. Of course, there could very well also be relationships/overlaps between these two spheres of international law, the consequences of which raises their own questions.

Central to both spheres of international law is the notion of what Allan Buchanan refers to as "the right to rule":[9] the extent to which a legal institution, and by extension the laws it propagates, is/are legitimate in claiming at least some authority over others. Importantly, the institution's legitimacy is primary in the sense that for any law, or any extension of it, to be legitimate, the institution that conceived it must also be legitimate. Similarly, the extent to which international laws stemming from nation-states extend beyond their own sovereignty raises equally justified questions of legitimacy. Hence, it is only natural for one to wonder if both of these spheres of international law are legitimate, as they do indeed make rules, at least some that

[9] See Page 79, Besson and Tasioulas. "The Philosophy of International Law." (2010)

are followed by some nation-states, and these international legal institutions/nation-states could not rightly make such rules if the nation-states were not, themselves, legitimate in their claim to at least some kind of shared right to rule.

One scholar, Allen Buchanan, illustrates: “The World Trade Organization does not claim that it alone is justified in engaging in multilateral efforts to promote the liberalization of trade; it recognizes that the legitimacy of regional trade regimes that promote liberalizations” and similarly: “The International Criminal Court does not claim to be the only tribunal that may justifiably prosecute the international crimes specified in the statute; it allows for both prosecution of individuals by their own states and the exercise of ‘universal jurisdiction’ by states over foreign individuals.”[10] Still, he makes clear that the right to rule of an international legal institution is very often different from that of the nation-state, mainly in these institutions not often claiming the right to, or very rarely acting upon the right to, utilize coercive force in the effort to ensure compliance. But the same question exists about the extent to which both kinds of international law can be morally justified in their governing/right to rule (and all of its implications).

As previously illustrated, the age of globalization continues to directly influence the ways in which the international law sphere effects global politics. The questions pertaining to international legal institutions and nation-states-based international law are wrought with relevance to this increasingly active global stage. One of these very important implications manifests itself as the increase in the degree to which international law has become influenced by non-state actors. This particular trend, according to Buchanan, has resulted in a kind of

---

[10] *Id.* 84

recentering that invokes a uniquely strong focus on the individual as the "ultimate objects of moral concern."[11] As a result of this shift in focus, the traditional understanding of international political theory, as exemplified in political realism, fails to sufficiently capture the moral importance of the individual, at least relative to that which the theory claims to be the paramount concern for the state: security and power in the face of international anarchy. Thus, given globalization, a more satisfactory understanding of legitimacy, according to Buchanan, must wrestle with why states ought not assume that they are the ultimate entities of concern, those who determine what does and does not have *right to rule*. Instead, states and non-state actors alike must sufficiently empower the individual with the moral importance they deserve. Then and only then can nation-states begin asking the right questions within the context of international law. Without the assumption of individual importance relative to the state, international law cannot be understood; that is, there is something to international law that inherently, in Buchanan's eyes and mine, doesn't involve the state: it's for the individual. The consequences of such a lack of understanding thus hones our focus towards the implications of how morality informs us, as the ultimate entities of moral concern in this globalized world, about moving forward in developing relations with each other at an international scale.

Continuing with the theme of understanding, there is also a great deal more to say about misunderstanding: for instance, there are many ways, other than the one previously mentioned, one can understand the purpose of international law. For example, one such understanding of the purpose of international law is purely instrumental. Such a stance implies that any form of international law that exists is only as a direct result of situational preferences and/or interests on the part of the nation-state. Even further, as previously alluded to, there is the obvious question

---

[11] *Id.* 88

of for whom governments ought to be primarily concerned, especially if a given nation-state assumes its persistence can't be trusted in the hands of the people or if its regime structure is contrary to individualism. For instance, the Chinese political regime would likely not be sympathetic to the individualist claims asserted about international law. But, again, pluralism allows for such disagreement given sufficient moral concern for the individuals within the context of international law. I will defend this claim in a later section.

At the very least, there are great reasons for these international legal arrangements to be morally concerned. Hence, an extension of the conversation of the philosophy of international law is the question of how morality informs the metarules of arguments, particularly in light of our being increasingly pluralistic, and given that disagreement about key human questions will not be leaving anytime soon. This is an issue relevant to the work of John Rawls who touches on the circumstantially important notion of public reason; that is, what can we say/how do we go about working through difficult discussions with each other, generally speaking? To insert this kind of question within the international law paradigm: how ought we, as individuals of states, stateless individuals, or representatives of states, arrange ourselves on this increasingly connected global stage?

Rawls claims that one must leave out their comprehensive world views as evidence for a claim used in public spaces, as it may not be a valid criterion or bit of evidence that logically assists a given argument's conclusion. This is because of a result of one person's comprehensive conception potentially, and maybe even likely, finding itself at odds with another person's. In fact, Rawls claims that one is morally obligated to not cite a comprehensive world view on the grounds that such a citation too likely rules out sufficient space for political compromise and Conversely, another scholar, Nicholas Wolterstorff, believes that instead of trying to limit the

ways one goes about speaking in public discourse, one should recognize the practical implications of allowing people to offer whatever views they may have, even their more comprehensive religious and metaphorical views. He resolves that any view too obscure, radical, and world-view grounded will tend to naturally fall away to the periphery of public discourse. Thus, such views are often not taken seriously; such overly sure and thoroughly intricate conceptions of reality fail to influence interlocuters. In conclusion, Wolterstorff would argue that those with such extreme views ought to be able to express such views because less restriction means more ideas are shared, which means more conversation. Assuming the costs of such extreme views being expressed are sufficiently low relative to the unimpeded expression of enough views that find themselves sufficiently away from the extremes, unfettered conversation will always be better. But that assumption is the key. Lest we wish to turn an inability to reconcile difference into resentment and actions that result from such resentment, it may be in one's best interests to be limited in what one can say.

I think that Rawls's view is naturally tempting. The kind of moral restriction of speech for which he advocates has merits one could easily understand to be important: it's often the case that unfettered speech can be damaging for international relations. But it is important to note that Rawls doesn't advocate for an enforceable, legal set of safeguards. But it remains the case that many institutions have taken Rawlsian understandings of speech and incorporated them within their legal frameworks. This speaks to many modern movements seen within the United States,[12] in addition to comprehensive hate speech legislation, such as that which has been enacted, granted to varying degrees, in England, the Philippines, and other places,[13] to ensure that the

[12] See Page 1-40, Besson and Tasioulas. "The Philosophy of International Law." (2010)
[13] See Republic of the Philippines House Bill 6963. 2018

costs of extremist views being expressed are eliminated by such views' discussion in public spaces being governmental restricted. Modern movements towards minority group empowerment mimics Rawls's ideals too: get rid of those loud people that incite hate and violence by expressing their views because of the fact that there are cases where rules of expression ought to be restricting to at least some degree. There are problems due to the real-world consequences of allowing people to, on (at least some currently) untransferable grounds and unbridgeable differences, make claims that end up causing more damage than benefit. Some of the damage could very easily result in a kind of alienation, discouragement, or frustration with the conversing parities which could then result in each party being inherently skeptical of the other(s), as seen in cases such as the relations between the United States and many parts of the Middle East post 9/11.

Both authors' respective notions maintain real parallels with the thesis of this paper: there are incredible benefits derived from the unfettered expression of ideals, just as there may be good moral reasons to morally restrict one's own speech in certain contexts. It even may be the case that such contextually relevant restricting of the rules of discourse is necessary for the current state of Human Rights. More on this to come.

Legitimacy and Why it Matters

For the sake of clarity, let's return to the subject of legitimacy and further explore its importance within the context of Human Rights. After all, it is through legitimacy that issues of Human Rights primarily manifest themselves, as we will explore later. To briefly justify my exploration of the subject at this point, it is important to note that the United Nations is one such international institution whose legitimacy has been under frequent scrutiny. Thus, extensions of it, such as Human Rights claims/philosophy, face questions of legitimacy themselves. It is this that we ought to take up here. I plan to do this by looking at the thoughts of two international legal scholars: Allan Buchanan and John Tasioulas.[14]

Let's begin with an analytical investigation of the term 'legitimate'. Buchanan argues that there are two ways by which one could understand the word 'legitimate': a sociological way and a normative way. The latter is most important for our purposes, on account of the fact that it is not the case, simply by virtue of society predominantly believing it to be so, that an institution has a right to rule. Instead, on a normative understanding of legitimacy, he operates under the framework that "an institution that attempts to rule is legitimate if and only if it has the right to rule." Further, he articulates that institutional legitimacy is paramount when determining whether or not a law is or is not legitimate. This is because laws derive legitimacy from legitimate institutions; that is, all legitimate laws are products of legitimate institutions, irrespective of that law's content. Of course, not all laws are legitimate, even if some come from legitimate institutions.

---

[14] See chapters 3 and 4, Besson and Tasioulas. "The Philosophy of International Law." (2010)

On the subject of institutions, it is important to note that there are tangible differences between sovereign states and non-state actors/legal institutions, on the matter of legitimacy. The core of our exploration will wrestle with the latter's legitimacy, given the increased involvement/influence of these kinds of institutions in international law-making. Specifically, too, such institutions are also the institutions primarily concerned with matters of Human Rights. Some examples of kinds of international legal institutions include those of treaty-making, customary international law, global governance institutions, and international economic institutions.

Now, with these frameworks having been established, let's explore the ways about which one could assess legitimacy. First, it is important to distinguish assertions of legitimacy between two different kinds of institutions: those that assert coercive forces and those that don't (and instead only assert advantageous, maybe practical, grounds for their justification). Of the many justifications one could use to support the latter, I uphold Buchanan's claim that assertions of legitimacy are surly normative claims, maybe grounded in moral evaluations. Buchanan insists that the moral perspective for which he advocates is important to be treated as such, which is to say distinct and separate from the practical justification, on the following grounds: first, given disagreements about what justice is, with respect to the moral accountability of international legal institutions, practical/advantageous justifications for institutional legitimacy are insufficient; and second, the benefits derived by an institution's being morally grounded are more easily and reliably secured.[15] Hence, the question with which we frame the right to rule, if

[15] I still, in my attempt to think more like Hershovitz, find it difficult to divorce the two (moral justification and justice) given their overlapping relationship. I suppose what he does here, however, is not dispute their overlap, but argues instead that justice must have some kind of consensus view given that morality has been and will likely continue to be a subject to too much dispute for sufficient consensus. This seems to me true: a general notion of justice can be reached and agreed upon generally enough by many

we assume Buchanan's framework, is as follows: do international legal institutions, like the UN, have the moral, legal, or both rights, to rule, and what are the implications that follow from their possessing, or not, certain rights to rule?

There is also another factor of consideration with respect to the notion of the right to rule: such claims vary in strength. There are stronger and weaker senses of the right to rule. Buchanan asserts that the prominent philosophical tradition asserts one notion: the Dominant Philosophical View (DPV) of state legitimacy.[16] However, it seems this particular conception of legitimacy, as a result of its traditional and politically realist roots, unsurprisingly fails to fully map onto non-state actors. The Dominant Philosophical View conception is indeed strong, arguably too strong for some things. But it isn't the single form of legitimacy representing the *right to rule*; while the Dominate Philosophical View may fit for states, there might be something more appropriate for non-state actors. So we have this two-part framework with one stronger conception of legitimacy, only appropriate for nation-states, and one weaker conception that can potentially extend to the international sphere.

---

different societies; morality can only dream of achieving such to a similar extent. This begins to make me think more along the lines of Griffin, an author who comes later in this work, in a sense who believed that the realm of justice and the realm of human rights are overlapping but not congruent.

[16] Defined by the following (page 82. Besson and Tasioulas. "The Philosophy of International Law." (2010)):
(a) the institution's agents are morally justified in engaging in governance functions, including issuing rules and attaching costs and benefits to various agents to facilitate compliance with them (the justified governance condition)
(b) the institution's agents are morally justified in using coercion to secure compliance with the institution's rules (the justified coercion condition)
(c) only the institution's agents are morally justified in engaging in governance functions in the domain of action in question (the exclusive justification condition)
(d) the institution's agents are morally justified in using coercion to prevent others from attempting to engage in governance activities in its domain (the coercive exclusion condition)
(e) those whom the institution attempts to govern have a content-independent moral obligation to comply with (all) the rules the institution imposes (the content-independent moral obligation condition).
(f), a similar obligation *not to interfere* with the institution's efforts to secure compliance with its rules, there are in fact six elements of legitimacy on this account.

1: the strong view: the dominant philosophical view, a compound of six elements: justified governance, justified coercion, exclusive justified governance, coercive exclusion, content-independent moral obligation, and obligation of non-interference.

2: a weaker view: double-barreled conception of legitimacy (WCL) which includes only the following: (1) a moral justification for governing, and (2) content-independent moral reasons for compliance and for non-interference with efforts to secure compliance.

Tasioulas disagrees with this two-part conception put forth by Buchanan; rather than embrace dualism, he argues that we should simply distinguish the content of laws, which varies, from the normative status laws assert, which doesn't vary. Tasioulas also believes that his formula accommodates Buchanan's weaker conception without the added issue of it being a dualist theory both in a domestic and collective sense. Domestic law often falls short of the dominant philosophical view, as Buchanan construes it, due to "the internal dispersal of, and external limitations on, the authority of the state."[17]

> "[T]he UN Charter confers exclusive jurisdiction on the Security Council to respond to threats to international security by coercive measures. A dualist, by contrast, must somewhat artificially interpret these developments as involving a switch from one sense of legitimacy to another."[18]

A quick aside: these assertions made by Tasioulas are arguably problematic. They may not do sufficient justice to Buchanan's interpretation, given a couple reasons: first, that the example he provides with the UN Charter giving exclusive jurisdiction involves an international legal institution whose legitimacy has, arguably, yet to be established or is at the very least insufficiently grounded (according to Buchanan). Second, Buchanan does not say that the DPV

[17] Id. 99
[18] Id. 99

is limited to and always present as it relates to state sovereignty, rather that its principles are commonly invoked during, and most appropriate for, that specific context. I remain unsure of why, given Tasioulas's love for variability and case-by-case analyses, he dislikes the dualist conception asserted by Buchanan; this variable and context-dependent two system method is just that: flexible. But he remains correct in arguing, I think, that the DPV, so understood according to Buchanan's conception of it, is lacking in some sense (as does Buchanan). Regardless, we are left to choose between two alternatives: One, Tasioulas's concept of authority; and two, Buchanan's DPV (stronger state-based conception of legitimacy) and the WCL (that which is better suited for international legal institutions).

Tasioulas recognizes that there is not much differentiating the two conceptions: the only difference is that the latter adds "the apparently superfluous requirement of a moral justification for governing."[19] He is convinced that the addition of this requirement is unnecessary since "It is not obvious what justified *governing* could be other than the issuing of directives that are genuinely content-independent reasons for action."[20] That is, it isn't clear how a government could be justified without there being an assumption of its simply ordering things, irrespective of their content, still having power as a result of its being legitimate. But I think this is the exact grounds upon which Human Rights, and its application through international legal institutions, can stand the firmest. To divorce Human Rights from moral justifications is to take the wind out of the sails of the last life raft of the struggling concept; the concept of Human Rights is not simply a matter of practicality and politics born into international law; the strongest reasons that exist to support the concept are moral. Hence, it becomes very important for us to try and work

---

[19] *Id.* 99
[20] *Id.* 99

from a framework of understanding international law that, at least somewhat, resonates with Buchanan's further need of moral justification coupled with his governmental assessment of legitimacy. I introduce the subject only briefly for the sake of being clear about where I am to go with this conversation of international law.

Putting aside Human Rights, for now, let's return to the conversation of the right to rule. The following is a good way of understanding the right to rule within the aforementioned moral context, given the DPV's insufficient utility outside of the nation-state context. A better way of understanding the "being morally justified in governing" element of legitimacy is as follows: the nature of international legal institutions is captured here without also being as strong as to employ coercion alone, unlike the DPV, as they can actually be morally justified in issuing rules and seek to gain compliance with said rules by implementing some kinds of repercussions for those who don't comply and some kinds of benefits for those who do. Such repercussions include sanction, fees, or some other transnational punishment. Buchanan also draws our attention to the term 'justified' in being "morally justified to governing." Its meaning is ambiguous: according to Buchanan, it could mean one of two things: (a) having a liberty-right to govern (it being morally permissible to govern); and (b) there being good moral reasons in favor of (the institution's) governing.[21] He notes that he will operate under the latter weaker notion, but concedes his dependance on this former notion for this argument. His description of the DPV's stance on legitimacy being justified in governing in the following sense is: "A can have the liberty-right to do X and it can nonetheless be true that no one has any duty or even any reason not to interfere with A doing X."[22]

[21] See page 83 Besson and Tasioulas. "The Philosophy of International Law." (2010)

[22] *Id.* 83

In essence, Buchanan argues that if we require content-independent practical support, then, unlike the DPV, there is no need for content-independent moral obligation. Hence, the presence/absence of the latter does not determine the legitimacy of an institution. So long as a combination of a content-independent moral obligation or substantial content-independent reason not to interfere, in addition to substantial content-independent moral reasons to comply are present, an institution's existence can be rightly deemed legitimate. This is all to lead us to Buchanan's conclusion that legitimacy as a right to rule does not entail a content-independent moral obligation to comply.[23] Thus, the DPV's understanding of what counts as rule (that is, governance) is excessive in what constitutes a satisfactory definition of the right to rule for non-state actors like ILIs, which don't necessitate obligation. At least for the purposes of international legal institutions, which if we remember do not necessarily claim exclusive right to rule, it leaves us with the question of whether they are legitimate through these means (content-independent practical support). Buchanan proposes the following answer by claiming legitimacy as the right to rule includes two main elements:

> 1: the institution must be morally justified in attempting to govern (must have the moral liberty-right or permission to try to govern) in the sense of issuing rules (that prescribe duties for various actors) and attempting to secure compliance with them by imposing costs for non-compliance and/or benefits for compliance.
>
> 2: those toward whom the rules are directed (chiefly, though not exclusively states) have substantial, content-independent moral reasons or compliance and others (including citizens of states) have substantial content-independent moral reasons for supporting the institution's efforts to secure compliance with its directives or at least have substantial, content-independent moral reasons not to interfere with those efforts.[24]

[23] See page 84 Besson and Tasioulas. "The Philosophy of International Law." (2010)

[24] *Id.* 85

Some of the advantages of this conception are as follows: first, it avoids the error of misunderstanding the distinction between international legal institutions and the overly strong conception of legitimacy that may be appropriate for state legitimacy on account of the fact that international legal institutions very often do not utilize coercive measures (then it is mostly derived from, which is to say secondary to, other sources of legitimacy). Second, the conditions allow for variation among international legal institutions as to whether they claim partial or exclusive right to rule. Third, and as an extension of the second point, under this conception, the legitimacy of ILIs can extend beyond those who are stateless, and not under the stipulations of any state's sovereign jurisdiction.

Now that we have taken a look at a more intricate view regarding the conception of international law, it is important to note that the very concept of international law is not without criticism: a first criticism of international legal institutions is that such institutions, like the UN Security Council or the WTO, or even the entire international legal order, are unfairly controlled by a handful of powerful states, thereby unfairly disadvantaging weaker ones. This is to say that people are concerned, rightfully, about the relationships at play with respect to which, and to what degree, parties involved have a hand in international law. It certainly is the case that the international legal institutions about which we are thinking very much have their roots in certain specific nation-states, mostly western powers like the United States and many European countries. Thus, it stands to reason that less represented views, such as those of Yemen and the global south, are in jeopardy of being crowded out, so to speak. But, as Buchanan reminds us, "whether it is supposed to be a claim [with respect to proportionality large influencers] about injustice or about legitimacy is often unclear."[25] This raises the question of how decisions ought

[25] *Id.* 86

to be made by the people that constitute these international legal institutions. For instance, ought they allow for equal voting and representation?

Second, international legal institutions are unfair to individuals and stateless groups/people. At the very least, they may fail to take the legitimate interests of non-state individuals or groups seriously enough and thus threaten their welfare. Because it seems such institutions are often constructed as a kind of made-by-states-for-states-type entity, and because of their being designed to cater to matters involving affairs of states, the individual, and especially the stateless individuals, are often forgotten. At the very least, some make the claim that stateless individuals are not being cared for enough, if at all, by these institutions, such as those that have been historically disregarded by society, such as the Roma. Even further, there are some whose current status is the result of oppression on the part of an antagonizing state, such as many stateless Uighur refugees fleeing from the Xinjiang region of China, who have been persecuted, detained, and, in many senses, hunted. This is an especially interesting case given China's position on the UN security council. Some people who hold this made-by-state-for-state view argue, therefore, that the only way these ILIs ought to be legitimate is when a global democracy is assumed.

In relation the aforementioned concerns about potential conflicts of interests, the third legitimacy-challenge focuses on the credibly of international legal institutions, over and against the particular interests of its constituents, which are very often states. For instance: do such institutions do jobs they are supposed to do or act in accordance with the goals and procedures to which they publicly commit themselves? Many argue no. This critique manifests itself as a result of the historical failure of some ILIs to serve their self-proclaimed intended functions. One example of this is the failure of the UN security council, and other such institutions tasked with

the protection of Human Rights, on more than one account, to intervene during genocide; they failed to protect against the thing that they were made to eradicate, given their genesis in light of the moral atrocities of WWII.

For instance, in the region of Xinjian, China, there are roughly 11 million Uighurs, a predominantly Muslim/Turkic ethnic group, being detained on a massive scale by Chinese authorities. In light of China's claims of enforcing necessary prevention measures to mitigate terrorism and root out Islamic extremism, Uighurs have been surveillance, interrogated, and jailed. The majoritarian/Han-Chinese perpetrators argue that the detention camps, where many of the Uighurs are being held, are an effective tool in its fight against terrorism. These camps are referred to by the Han Chinese as "Vocational Education and Training Centers." At these locations, the Uighurs are forced to learn the majoritarian language, Mandarin, in addition to their being forced to both renounce extremist thoughts and consume thoroughly pervasive Chinese Communist Party propaganda. Reports from numerous sources such as The Times Now News and the Daily Caller even describe how people who are detained in these camps are forced to eat pork on holy days, contrary to the Muslim faith, in addition to some Han-Chinese officials rewriting the Quran for the sake of trying to redact and remove anything potentially dangerous to the Han-Chinese political party. These actions are examples of attempts to eradicate and destroy a minority culture. No less, some have even suffered sexual abuse, torture, and extreme solitary confinement. The Uighur in these camps are also forced into training for low-class labor, such as work in factories.

The 9/11 attacks on the World Trade Center greatly influenced the fears of China: the Han-Chinese responded to these attacks and the subsequent wars on terror in their own way by implementing a campaign against Uighur separatists [those who tried to claim historical independence form Han-China]. Further, the Chinese government's use of the term "separatism" refers to a broad

range of activities, many of which amount to no more than to peaceful opposition or dissent, or the peaceful exercise of the right to freedom of religion. One of the central issues with the current Chinese legal system is that it is hyper generalized: the laws that constitute its legal framework are intentionally general and, because of this, it is the responsibility of custom and judicial discretion to interpret case law. The common implication that occurs from this is system of law is that Chinese judges will defer preference to that which most serves their country's needs. And, like previously mentioned, the Chinese government and its maintenance of its power (the Chinese Communist Party) is paramount. Any opposition is likely to be met with negative push back, in the favor of the system of law that the Chinese support: the present regime's law: the law which is intent on maintaining the Han-Chinese majority and uprooting the Uighur and other such minorities deemed threatening to the current regime.

This very uprooting has been causing rippling consequences for the Uighur population in China. One such consequence has been the mass displacement of the people who are able to evade the detention/re-education camps made manifest by Han-Chinese repression of the Uighurs. They are migrating out of the Xinjiang region where they, according to the Dr. Hess, "often flee to Kazakhstan and Kyrgyzstan, Pakistan, Nepal, Europe, and the US." Yet, according to the Human Rights World Watch Report issued in 2005[26] there are still suspected cases of individuals being persecuted, even when having fled or who were in the process of leaving, China, by Han-Chinese authorities who feared that those who would flee would spread to the world information about the detention/re-education camps and/or trade secrets to terrorist organizations. By virtue of the Chinese attempts to have the Uighurs "detained for periods ranging from days to months, most for attempting to bring information about the crackdown to the attention of the foreign communities," and that "Credible

[26] See pages 270-271 of the mentioned document

sources report that many of those held were subject to severe ill-treatment and torture." the legitimacy of the institution of Human Rights falls under righteous criticism.

Why has there been this action on the part of the Han-Chinese as they go about trying to uproot a minority people? Why, especially when there is plausible evidence to suggest that the terroristic organizations and ideologies the Chinese claim to be an integral part of the Uighurs is not a valid connection (as they are very often historically non-violent), are the Han-Chinese doing what they are doing? It could very well be a matter of money: Xinjiang, as a region is incredibly valuable because of its abundant natural resources and strategic location vis-à-vis Central and South Asia. In other words, it suits China to oppress the Uighur, as they obstruct it from fully exploiting the resources of the region. Hence, considering what is being done to the Uighur people, in combination with the rather minimal response we have seen from institutions who are supposed to help such regions during times like these, people have come to rightly ask: if not for that, then why do organizations like the United Nations exist; if the Security Council fails its most central role, are they still legitimate?

The fourth challenge to the legitimacy of international legal institutions alleges that all, or some, usurp the proper authority of states or, on one variant of the view, of democracies.[27] The challenge is that because some of these institutions have overstepped their authority by jeopardizing the integrity of state sovereignty, they are, or risk becoming, illegitimate. However, what is important to note is that there is no logical contradiction in the presence of both ILIs and maintained state sovereignty given the possibility of shared right to rule and complimentary legal structures. Second, unlike the first charge, one could challenge that there actually IS a logical

[27] See page 86 Besson and Tasioulas. "The Philosophy of International Law." (2010)

contradiction in the existence of both, and that ILIs are therefore necessarily illegitimate. As Buchanan notes, one could achieve such compatibility if the laws made by ILIs are compatible with the nation-state's constitution, and he suggests that a nation-state could simply amend or create a new constitution whereby this mutual satisfaction can be achieved. Of course, this then raises the question of if it is at all reasonable or ideal for a nation-state to willingly assent to this. But this is precisely his point: it is not the case, no matter how constitutions are formed currently, or how they could be changed, that ILIs or sovereignty are, in principle, incompatible. But there remains still a great deal of difficulty to realize this kind of mutual satisfaction where ILIs are ultimately considered legitimate. While it may be technically possible in some cases for a nation-state to relinquish some of their sovereign power, it does not seem likely to me that this is going to be happening in our world anytime soon. So, we need to ask ourselves whether this is a reasonable ask: for nation-states to amend their constitutions to legitimize ILIs. The merits of doing so would do wonders for the institution of Human Rights, but the practical limitations of constitutional revision to incorporate collective right to rule over the international arena are such that a revision of this nature seems rather unlikely. ILIs are not themselves democratic, nor is the world. Given this, the question we need to ask ourselves is whether democracy (somehow understood) is necessary for the legitimacy of ILIs and, if that is determined to be true, then if our current global climate is sufficiently democratic for ILIs to be rightly called legitimate. While there may be an assent on the part of the state to accept law from a non-state actor, like an ILI, the citizen/individual may dispute that. This is because individuals can themselves conceivably be violated by both ILIs and nation-states. This brings us to the heart of Human Rights doctrine, and the tensions that reside in its current conception. Considering that the current conception of Human Rights law is heavily dependent on the willful assent of the state,

yet the agents who it most benefits are individuals, we are left with the question: "Why should states consider international law binding?" The reality is that they don't have to in many ways. Especially for institutions, the lack of sufficient intelligibility and clarity in Human Rights Results in many situations where nation-states and other actors may not feel compelled to act. After all, it is difficult to act on that which one cannot argue to be unlawful, which is different than that which is purely moral.

Buchanan then moves on to illustrate a kind of attack on the institution of state consent; that is, if legitimate international laws are created in accordance with the procedures that states have consented to for the making of international laws, is/are these factor(s) sufficient for legitimacy? He quickly dismisses the simple state consent view on account of its being both problematic and insufficient. First, the consent of weaker states may be less than sufficiently voluntary, because stronger states can make the costs of small states not consenting prohibitive. Second, in many cases, states do not represent all of or even most of their people; they are not sufficiently democratic to make it reasonable to say that state consent, by itself, legitimizes what states consent to. "It would still not follow that state consent suffices for legitimacy, for two distinct reasons."[28] Those two reasons are as follows:

> "First, the problem of questionable voluntariness would still remain: the fact that a weak state is democratic does not change the fact that it is weak and therefore may face pressures [from the strong] that undermine the voluntariness of its consent. Second, as I have already noted, international law increasingly is not limited to rules to which states can be said to consent in a normatively substantial sense; instead, some important international law is created by global governance institutions of various sorts."[29]

[28] *Id.* 91
[29] *Id.* 91

He also asserts the issue of the problem of 'bureaucratic distance', which speaks to the relational necessities of ILIs mentioned in previous sections. The principle articulates the disconnect that can arise from consent on the part of the will of the people, consent on the part of the nation-state to ILI laws, and the performance of these laws. Thus, he seems to be arguing that one must continuously and proactively consent to the legitimacy of an ILI for it to be sufficiently legitimate. It is not an unfair claim, I don't think. As we shall see in what follows, social applicability, as it relates to the degree to which an institution can rightly apply its rule over its transnational jurisdiction, greatly determines the extent of something's institutional legitimacy. The simple state consent view also insufficiently allows for non-state actors, like ILIs, to participate in the international law project.[30] Not to mention that it isn't the case that states are the only participants of international law, hence state consent for a non-state actor strains the validity of this view.

Given Buchanan's rejection of the claim that state consent is sufficient for legitimacy in the previous section, he now turns to whether or not it is necessary for the legitimacy of ILIs. A dangerous implication of assuming that it is necessary, as Buchanan points out, is that most existing national law would be made illegitimate. One of the better realist (under current and foreseeable conditions) arguments for saying state consent is a necessary condition for the legitimacy of international law may be that, under current and foreseeable conditions, it provides

[30] Note this helpful summary on page 91 for clarification on this section:

> "Under current conditions in which (1) there is great disparity of power among states, in which (2) many states do not represent all of their people, and in which (3) there is a serious problem of 'bureaucratic distance', state consent is not sufficient for the legitimacy of international institutions nor, therefore, for the legitimacy of the laws they make."

an important safeguard against the ever-encroaching rule of the strong. One of the dangerous consequences of this view, if it is correct, is that strict adherence to the requirement of state consent "gives every state, including the most oppressive ones, a veto over any progressive change in international law."[31] For Human Rights, such a system would be crushing, as it allows for the strong to determine for the weak, in a way which benefits the strong, what does and does not constitute Human Rights. The institution of Human Rights must remain separate from influence of the powers that be, to whatever extent possible.

One of the more crucial challenges to the legitimacy of Public International Law involves the notion of 'parochial' values; values that argue that international law manifests itself as the dogma of the law's generator (and the powerful nations which influence it). Tasioulas argues that all these kinds of charges fall under the category of the "service conception." Those who find themselves within the service conception specifically argue against Public International Law's ability to sufficiently secure conformity by means of "objective reasons." This is because of the fact that International Parochial Law is simply a representation of the agendas of its strongest influences. Hence, disconformity arises when people rightly ask the question of why anyone should conform to seemingly strong-armed standards, which further illustrate the dangers that are derived from a purely procedural/state-consent framework? Power ought not be the voice of reason: they are not the same thing.

Tasioulas points out that any response to the challenges of Parochialism must involve the explication of two errors. The first error of parochialism is the following: to be able trace back the historical origins of a given ethical notion does not mean ethical notion cannot be objective.

---

[31] *Id.* 93

It's also important to remember that a consensus about a notion does not equate to the objectivity of that notion. The second error is that non normative circumstances, which is to say social facts regarding a community's circumstance, objectively alter cases. So, what counts as upholding certain values/norms is dependent on these social facts.

In response to the parochialism objection he offers two replies: The first reply is skepticism. This response involves a complete rejection of ethical objectivity. But this rejection is deeply problematic because it seemingly does nothing to account for the possibility of radical, and maybe even evil, social practices. This allows for morality to become purely conventional, socially relative, and entirely plastic. This practical implication of the skeptics is one that fails to account for the moral atrocities that have been witnessed throughout history, let alone in the past 100 years, many of which a significant majority of the world regards as morally repugnant. Hence, I regard this argument to be weak. The second argument is stronger: pluralism.[32]

If pluralism is correct, the question arises whether particular norms, even if they exemplify an ordering of the relevant values, represent only one such ordering among others. In other words, there can be more than one logical ordering of these values. Tasioulas even goes as far as to say that we can also, under pluralist doctrine, come up with diverse ways of specifying the content of that right. This is all important because the degree to which Public International

---

[32] His definition of it on page 109:

(i) There are many irreducibly distinct values
(ii) These values can come into conflict in particular situations,
(iii) Some of these conflicts are incommensurable in that responses to them are not subject to a complete ranking, i.e. they cannot all be ranked as better or worse than each other, nor yet as equally good, and
(iv) At the level of individual and collective forms of life, there are many different and conflicting ways of responding to these values, which also are not subject to a complete ranking.
(v) The idea of the single best way of individual or collective life, even given 'ideal' conditions, is a chimera.

Law works is directly proportional to the degree it represents the diverse viewpoints of the nation-states which are subject to it. Hence, the degree to which PIL is legitimate is also very much dependent on a satisfactory acknowledgment of these differing views.

We ought to also note the value of freedom, so understood as both agency and liberty, within the context of international law. Even if a citizen were to derive more good from choices made for them as opposed to acting on their own reasons, such would not imply a legitimate authority. The reason why Tasioulas argues this is because he is worries about a charge against the legitimacy of Popular International Law--specifically the one that claims that it fails to sufficiently respect state sovereignty.[33] He notes a Rawlsian notion of international law whereby he asserts, rightly, that it would remain pertinent for Public International Law to be extended to, and involving, all societies who are at least somewhat willing to participate in such conversations. By this he means that the North Koreas of the world may be left aside, because working with them likely wouldn't be productive given their isolationist political philosophy. But those non-democratic states like China ought to be included because, at the very least, discussion is possible given their wanting to discuss at all. But this raises the fundamental issue of incompatibility between Public International Law and state sovereignty. "Even if certain PIL Human Rights norms reflect reasons that are both objective and suitably universal in light of value pluralism, they may lack legitimacy because they purport to bind states regarding matters that should be left to their own free choice."[34]

We now turn to the question of what standards must be satisfied for justified claims to legitimate authority. Buchanan does not offer a complete answer to this question. Instead, he

---

[33] *Id.* 113
[34] *Id.* 113

only argues that both consent and global democracy are insufficient. Tasioulas believes that Buchanan's depiction is lacking and that something more needs to be claimed, something stronger. He asserts that this can be accomplished by means of what he calls the "Normal Justification Condition (NJC)," which he defines as the following: "A has legitimate authority over B if the latter would better conform with reasons that apply to him if he intends to be guided by A's directives than if he does not." Hence, Tasioulas later claims that NJC, at its core, is really about what the goals should be of those who are subject to it.[35]

Tasioulas acknowledges that some would dispute his conception, and asserts, however, that what really matters is not "whether PIL possesses *any* authority… but the *extent* of its authority." It is here that he introduces the idea of '**domain** fragmentation' and its having relevance to the issues with the United Nations being legitimate despite Human Rights being 'hopelessly vague'. Domain Fragmentation basically means that the legitimacy of Public International Law may be relevant in some locations but not others. Thus, this still allows for the UN to confer its powers and laws despite the things which extend from it being questionably legitimate (at best). Hence we see how the consequences of this result in Human Rights, as extensions of an institution whose legitimacy is geographically relative.

There is also another kind of fragmentation about which we need to be wary: '**subject fragmentation**'. This is the kind of fragmentation where Public International Law norms "enjoy legitimacy with respect to *some*, but by no means *all*, of its putative subjects." This is something which he argues, responsibly, resembles the unattractive and arguably hypocritical notion of

American Exceptionalism, which he agrees is at the very least problematic and worth addressing. According to Tasioulas, American Exceptionalism is defined as the following:

> "Although PIL may possess legitimate authority over all other states, it does not have authority, or does not have it to anything like the same extent, over the US, because for a significant number of PIL norms the NJC is not fulfilled with respect to that state."[36]

Under the conception of American Exceptionalism the US is perfectly entitled to both establish and enforce Public International Law norms for other states while at the same time not holding itself at to the same standard of scrutiny. I think Tasioulas makes the claim that subject fragmentation and domain fragmentation are much weaker on their own than when argued together. The union of these two components amount to what Tasioulas refers to as the 'neo-conservative argument'.[37] Generally, the argument is derived by acknowledging that there are great threats out in the world and that the existing Public International Law norms can only be sufficiently enforced by the US—the only entity with values sufficiently coinciding with the current Public International Law norms AND the only entity with the power to be able to sufficiently enforce these Public International Law norms through military action. The neo-conservative argument then concludes by saying that, because of these aforementioned circumstances surrounding the US and its relationship to Public International Law norms, the US ought not be stifled or impeded by these norms (since it is the primary executor of PIL norms).

This view leaves the door open for incredible systems of oppression and malpractice, given that the keys to the kingdom are being left to the devices of the United States with the assumption that they will do a good enough job of maintaining their own ideals. But Tasioulas

---

[36] *Id*. 103
[37] *Id*. 103

suggests that there may be an alternative with which we all must wrestle: why not, instead of completely exempting the United States from Public international Law norms/enforcement of those norms, limit such exemption to only being justified during times of emergency? As Tasioulas puts it: why not observe “that the duty to obey a legitimate authority is not absolute but can on occasion be defeated, such as in cases of dire emergency.”[38] Still, again, the degree to which discretion in cases of Human Rights issues promotes problems of exploitation by powerful countries turning a blind eye to responsibility is tangibly dangerous. Hence, the neo-conservative argument is lacking. Still, we ought not simply throw out exceptionalism. Instead, we need to utilize exceptionalism in a different way: one that excludes emerging countries from certain aspects of international law or even social relativism as it relates to Human Rights (subjects that both will be expanded upon later on).

In concluding the subject of legitimacy for the time being, I think it is important that we note the following about international law: as it currently exists, according to at least Tasioulas, there are aspects the legitimacy of which remain in question and, as a result, it is in dire need of reform. However, the legitimacy costs of either breaking current international legal frameworks when reforming them or remaining content with their current conceptions are drastic and necessitate careful consideration. Either results in difficult consequences. The implications of such reform would be significant, and it is certainly the case that the current state of the United Nations, and institutions like it, are no stranger to these criticisms, questions, and problems. In fact, it remains in an ever-growing, tumultuous situation as a result of those institutions being of questionably legitimacy without or without reform.

---

[38] *Id.* 104

That said, we have discussed, and I hope proven, the fact that international law, and its respective institutions, are of questionable legitimacy in a variety of ways—ways that involve subjects of sovereignty, ability to enforce, applicability, compatibility, assent, intelligibility/clarity, etc. But we also know that the extensions of these institutions of questionable legitimacy, that is, what legal doctrines they produce, are also of questionable legitimacy as a result. We now turn to one such upshot of the international legal framework: Human Rights. In the section that follows we will attempt to wrestle with their history, their nature, and their content for the sake of trying to hammer down just what they are, what they do, what they can do, and why we should care about them.

A Brief History of Human Rights: Understanding Why We Are Where We Are

While the subject of legitimacy is one that is tumultuous, so too is the concept of Human Rights, no less for very similar reasons: the concept's evolution has made it indeterminate and confusing. Many scholars disagree about its justifications, the extent of its reach, and even its very definition. The degree to which many regard it to be insufficient is a direct result of the history the concept went through since its birth in ancient times and throughout its evolution, up to the current manifestations we wrestle with, so understood as the doctrines put forth by the United Nations. For instance, many scholars argue that there is an ambiguity surrounding Human Rights, as a concept, as a result of its secularization: that is, the religious underpinnings that had roots in natural law theory were some of the first that were used to both justify and articulate the concept. Thus, this gradual secularization removed what was once a huge component of its supportive content, leaving it in a weird position lacking sufficient justification and purpose as the process wasn't coupled with substantive revision to compensate for, or even address, the secularized shift. Now, with the modern impetuous to try and leverage international law on the basis of Human Rights, it becomes all the more pertinent that we cannot be satisfied with simply declaring something we deem to be a Human Right as such, given the concept's questionable grounding. We must be careful with our declaring, if done irresponsibly. As previously mentioned, there can often be irreparable damage derived from discussions that are not handled with sufficient care. This, after all, jeopardizes the legitimacy of the institution even more than it already is, as we learned from the previous section.

One author, James Griffin, is right to address the fact that many are dissatisfied with the Universal Declaration of Human Rights' first conception.[39] This is in part due to the presence of certain kinds of what some today consider Human Rights: a periodic right to paid holidays, as is articulated in the Universal Declaration of Human Rights, for example. It is not at all obvious why such a right should be, and is justifiably, considered a Human Right. The nature of international law, which includes a necessary relationship between the moral concept of Human Rights and the legal realms, necessitates far more than someone simply saying something is a Human Right. To very real extents, one must also know their content; that is, a combination of factors that, in unison, coalesce into a sufficient justification for the claim to be considered a Human Right. Importantly, while one may lack sufficient knowledge about a given item's potential for being a Human Right's, this isn't to say that it is impossible for that which has yet to be defended or expanded upon to not be capable of Human Right status. This critique is merely one that asserts we must do that due diligence first before calling something a Human Right where, in so doing, one could wrongly assume a stance that portrays a false legitimacy. What that looks like will soon be discussed.

There is a common method by which some scholars try to clarify the problematic indeterminacy about which we are concerned: they focus on Human Right's function, as a tool to serve specific spheres of international law. Ronald Dworkin is one person who regarded Human Rights in such a way. But Griffin is wary of Dworkin's conception of the purpose of Human Rights as Dworkin believes that such rights are "trumps over appeals to the general good."[40] Griffin is quick to reject this however, on the grounds that a consequence of such a view would

---

[39] See page 341 Besson and Tasioulas. "The Philosophy of International Law." (2010)
[40] *Id*. 341

result in Human Rights not serving their most historically important and intended functions: to restrain state/institutional powers and their transgressing against individual protections. Of course there is overlap, but Dworkin's generalization is both minimalist and broad. Griffin resolves to suggest that a satisfactory account of what Human Rights must be one that:

> "Contain[s] some adumbration of the term 'human dignity', again not in all of its varied uses but in its role as a ground for Human Rights. So the account must have more substantive evaluative elements than Dworkin supplies…more substantive evaluative elements; because no plausible account of human rights will be purely functional or purely substantive; it will be a mixture of the two."[41]

This is to capture something very important about what Dworkin misses in his seemingly on-point assessment of Human Rights: they are first important moral tools by which the individual human can be protected; they are not simply instruments of trumping some antagonistic institution. Human Rights discourse can be used in our national life and also be reliant on legal recognition as limiting state sovereignty and/or Human Rights should be so recognized as limiting state sovereignty. In other words, they are not mutually exclusive. But the concept must be morally concerned. Hence, I think it is fair to acknowledge Griffin and his concern: we ought to include in our understanding of the concept a certain amount of space for both the function of the concept's utility and the moral importance of its existence as well. So, we move forward slightly in our endeavor for clarity regarding the concept of Human Rights.

Another way by which many, such as John Rawls, suggest we can improve our current position regarding the legitimacy of Human Rights, as an institution, in light of the previously discussed issue of indeterminacy, is the following: simply get rid of those things we call Human

[41] *Id.* 342

Rights that we cannot currently defend![42] This argument manifests itself as a reductionist one, advocating for a condensing of Human Rights put forth in the Universal Declaration of Human Rights to only the ones most important. For example, we ought to keep the Human Right against "torture or to cruel, inhuman or degrading treatment or punishment" and maybe omit "Everyone has the right to rest and leisure, including reasonable limitation of working hours and periodic holidays with pay." This shows the basics of the view, but further omission becomes difficult when the rights being discussed aren't as obviously important. Even then, why is the listed example obvious? The condensed version of Human Rights argument is unsatisfactory unless there is also an explanation as to why one calls those rights 'Human Rights' as opposed to anything else.

Griffin finds the condensed version method sometimes potentially difficult to methodologically implement for the Human Rights mission but, most importantly, he is frustrated by the fact that its being condensed to certain rights has no clear/obvious methodology. He also claims that Rawls's notion of the role of Human Rights is also lacking on the grounds that it does not sufficiently extend beyond the purpose of establishing rules meant to guide international conflict in situations requiring the superseding of a nation-states' sovereignty; that is, they are also too functional. Some examples of this are the following: (intranational merits): the right to justify rebellion, critique of an oppressive state, argue for peaceful reform. How would Rawls determine, for example, the minimum welfare required by Human Rights, given his limited conception?

This diction is interesting given Griffin's use of this kind of language. There are some problems with his criticism as it seems exactly the design of Human Rights, as a legal tool to

---

[42] *Id.* 344

morally uphold the individual and protect them against the state, that they be considered according to their potential utility within the international arena. By this I mean that it may be that a necessary condition for Human Rights is the extent to which such rights are enforceable. Still, let's push him further: specifically, Griffin goes into this a little more later when he talks about what he calls the 'threshold' principle. But before getting to that, a little more about Griffin' dissatisfaction with the political/functionalist conception of Human Rights.

> "The political conception….restricts human rights, without qualification, to the role of limiting national sovereignty….perhaps the best characterization of his [Raz, an author to be discussed about soon] position comes in his conclusion, where he says that, if one focuses on the real words of 'legal and political practice and advocacy', one finds that the term 'human rights' either relies on their legal recognition 'as limiting state sovereignty' or constitutes a claim 'that they should be so recognized…and I should think, surely [is] false."[43]

While Griffin's premises of balancing the functional and the 'human dignity' of the concept is surely admirable and at least partially correct, I find myself confused by his own methodology. These days, Human Rights discourse is commonly used in our national life: for example, in the European Union's fairly recent bill of rights and its much more recent incorporation in the legal systems of several member states, in current campaigns against violations of liberty (For example, Guantanamo), in similar campaigns against torture. Yet, let's look at some of the other issues of his argument with the following excerpt: "To make sense of the term I suggest that we adopt this part of the tradition, that we see human rights as protection of our normative agency, of what I call 'personhood.'"[44] However personhood by itself fails to clearly and consistently exclude certain cases and not others as constituting Human Rights violations. He also suggests that we need to couple this notion of personhood with a safety

---

[43] *Id.* 344
[44] *Id.* 344

margin so as to not be left with another indeterminate and insufficiently clear picture of Human Rights.

But what constitutes this notion of a safety margin? Griffin basically means by this that we need a flexible line to be drawn with respect to Human Rights, as to ensure that all cases which a right intends to protect are protected, without such rights overextending themselves in inappropriate ways; we need to assume that difficult cases will exist and account for them in this safety margin. In reaffirming this, he says:

> "I propose, therefore, two grounds for human rights: personhood and practicalities. The existence conditions for a human right would, then, be these. One establishes the extent of such a right by showing, first, that it protects an essential feature of personhood, and, second, that its determinate content often results from the sorts for practical considerations that I have roughly sketched."[45]

This is a common sense approach that is similar to the way lots of other laws work: make it sufficiently specific to address the thing to which the law ought to apply, but sufficiently general so those more extraneous cases can be interpreted under that law as well, but only to a limited extent. This often works in cases where there is an arbiter of law, but such people are often appointed by nation-states . Questions of ambiguity relating to law are settled by those with the authority and jurisdiction, but that is less than ideal in situations where the nation-states themselves are the propagators of their own respective Human Rights violations. The question is whether this is a good enough framework for Human Rights to conceivably work. Maybe under ideal conditions. But I struggle with these flexible lines, as the person(s) who decide them are likely to be state powers on a case by case basis. But even then, we don't know because Griffin doesn't touch on the issue.

---

[45] *Id.* 346

Here is the reason why: Griffin clarifies that his conception of Human Rights is not a thorough logical derivation from premises. Rather, it is the hypothesized framework he thinks best serves Human Rights' ethical content. Griffin is careful to point out his framework does not depend on some logical derivation, but instead acts as an assumed ideal framework which has its own merits and cons separate and distinct from the traditionalist approach. Instead, if the definition of the political account is that it "focuses on the rights acknowledged by 'contemporary human rights practice' and, second, identifies 'the moral standards which qualify anything to be so acknowledged," then its sufficient.[46] But, while the former is a consensus, the latter isn't, given the quite large amount of disagreement concerning the latter.

Specifically, the level of protection reflected in the use of the word "minimal" and other such kinds of language fails to draw a definitive line. Thus, traditionalists often confuse their notion of the good life with their notion of Human Rights. But Griffin argues that he doesn't make this mistake. Human rights are meant to protect a kind of 'threshold' level of good, which if met necessarily and sufficiently constitutes one being called a normative agent; that is, basic humanness. Griffin clarifies that once above that threshold, assuming one has the ability to genuinely exercise that capacity of agency, what remains is not within the realm of Human Rights as nothing above the threshold inherently deprives one of their human status. He offers the following to understand the threshold:

> "So we can identify states below normative agency (a life entirely consumed by the struggle to keep body and soul together) and states above it (especially well endowed with practical wisdom and material resources). In drawing the dividing line, we should consider the general run of people. And we should focus on the conditions necessary to ensure that this general run of people will be at or above the threshold. Therefore, we should want there to be at least general literacy. In some parts of the world, literacy is the most effective way of reducing infant

---

[46] *Id.* 348

> mortality. And not all people—not many people, I believe—naturally have a good nose for what matters in life. Not all are imaginative enough to sense, unprompted, the broad range of options in life. The higher levels of education—bachelor's degree, doctorate—might (but only might) add yet more practical wisdom or executive skills, but at a lower level one already has a sense of what is or is not worth pursuing and the ability to build a worthwhile life."[47]

But he also acknowledges the following question: "is the dividing line between states below and the states above the threshold sharp?" to which he replies with a quick and easy no. There remains a great deal of ambiguity in his framework, maybe necessarily so. It's questionable what one can do with the kind of hypothesized framework being put forth by Griffin and those like him: One cannot, with an indeterminate thing, clarify something else to make that something less indeterminate (at the very least they cannot make it sufficiently determinate like Griffin attempts to say he can). As we shall see in what follows, there are those who would argue that this is the exact kind of framework that lessens the institutional legitimacy of Human Rights. This brings us to Joseph Raz.

---

[47] *Id.* 348

Joseph Raz: a Far Critic of the Tradition

Joseph Raz, another international legal scholar, also acknowledges the indeterminacy of Human Rights and their, as he would likely argue, over use in the international arena. He remains deeply skeptical of human rights rhetoric, as he regards it as wrought with hypocrisy and "infected by self-serving cynicism and self-deception…" He, much like Griffin, is unsatisfied with the traditional approaches to Human Rights Doctrine: those which hold there to be a set of importantly undeniable rights, universally belonging to all human individuals not by virtue of any law or social circumstance, but instead by the laws of nature—one's human nature. There is much room for argument within these seemingly intuitive claims that certain things are Human Rights. However, where one draws that line in less obvious cases is much more difficult. After all, the Doctrines were born out of circumstances of moral atrocity: it makes sense that the Human Rights Doctrine is purposefully articulated, to prevent other such atrocities, under an assumed framework that would both complement and strengthen the moral claims therein. But it remains the case that it is a heavily disputed framework.

Regardless, Raz thinks that the traditional approach is, in essence, sloppy and lacking substantive justification, much like Griffin articulated in his own way.[48] Yet, unlike Griffin, Raz critiques Human Rights traditionalism by appealing to the work of Gewirth and Griffin. He does

---

[48] "first…my aim is to characterize in abstract terms the moral standards by which the practice is to be judged…Second…My criticism of that tradition [of Human Rights[is primarily that it fails to establish why all and only such rights should be recognized as setting limits to sovereignty, which is the predominant mark of human rights in human rights practice…Third…just as rights generally while being reasons for taking some measures against their violators do not normally give reason for all measures, so human rights set some limits to sovereignty, but do not necessarily constitute reasons for all measures, however severe, against violators…Finally, rejecting the universality of human rights is no endorsement of moral relativism" *Id.* 335-336

so by listing some of the identifying features of the traditionalist framework: first, it seeks to derive Human Rights from a notion of what is humanly valuable and essential, universally; second, Human Rights are a kind of a fundamental moral rights; third, the respective definitions of 'rights' and 'value' merge and integrate with each other; fourth, Human Rights are often individualistic. He then moves to claim three main issues with this kind of approach to understanding Human Rights: (1) Gewirth and Griffin misconceive the relationship between values and rights. (2) They overreach, trying to derive rights which they cannot derive. (3) And they fail either to illuminate or to criticize the existing Human Rights practice.

To begin, let's consider the issue Raz asserts about confusing values and rights (1) by drawing on Griffin. Raz specifically takes issue with him and his work because it fails to consider the possibility of believing that while some things can be necessary for human life, and despite the fact the fact that we may try our hardest to acquire such necessary goods, we may still be not universally (if at all) entitled to such things. He critiques Griffin by saying that:

> He [Griffin] also believes, for example, that there is a general (overridable) right to freedom because 'freedom is a necessary condition of human purposive actions'—a claim which is evidently false if it means that, for instance, slaves cannot act purposively. In fact, there could never have been any economic interest in having slaves but for the fact that slaves can act purposively, and thus be useful to their owners.[49]

The following question ought to be asked: purposeful for whom? Must purpose be found within one's self and through achieving one's own ends or can it also be derived from achieving the ends of someone else (even in cases which are in direct contradiction with one's own autonomy or desires)? Does such a distinction even matter within the context of the question? Gewirth

[49] *Id.* 324

would be inclined to say that this response of Raz's makes sense. But I also think he would reply that Raz is missing the point. I think the implicit qualification (granted, it is not explicitly stated) to the claim that humans ought to live and have the means to live purposeful lives is that it be on one's own terms; that is, purposeful action can only be derived from the unimpeded will of the independent agent. Such fits the 'tune' of the Human Rights tradition but I admit it may fall into the very hypocritical and self-deceiving rhetoric which Raz points out earlier.

To address the issue of how the traditional Human Right framework too often derives conclusions which do not follow from their premises, Raz's second objection, Raz also cites Griffin. Raz claims Griffin fails to address just how moral values translate into Human Rights. Specifically, he argues that if one's agency is the thing that is *essentially* but *minimally* protected by Human Rights, then they don't extend very far: such qualifications yield valid claims for rights against incapacitation of humans' ability to act upon their will through things like nerve gas, dehydration, and sensory deprivation. However, he does not think that such qualifications of Human Rights extend themselves to protections against slavery nor arbitrary arrest as these things "do not affect our ability to act intentionally."[50] Hence, given this limited yield in Human Rights, one cannot rightly extend them beyond this limited sense without further argument.

The same question remains: Is that a fair characterization of what is taking place in the Human Rights tradition? Raz argues that if personhood is defined according to agency, then most humans have personhood. But then Human Rights only extend themselves as far as they need to protect that essential capacity in its most limited sense. Is it really true that someone who is dominated by his powerful mother, or controlled by his commitment to his employer (having

---

[50] *Id.* 325

signed a 10-year contract, on condition that the employer first pays for his education) is less of a person than someone who is not so dominated or controlled?[51]

He accepts the fact that the conditions that he illustrates here might fail to yield a good existence, but this is precisely his point: Human Rights need to be distinguished from some notion of what the good life is. His argument is that, fundamentally, the people who find themselves in the midst of slavery, dealing with an oppressive mother, or contractual obligation with an employer, despite what they may think about their circumstances, are still people. There is a difference between living well and living as a human. Where he finds issue with the concept of Human Rights is that it often bleeds beyond the line of that which is minimally essential for constituting personhood (that which Human Rights claim to do but in a way that also asks for far more than the minimal but without even establishing a clear threshold of that minimal requirement). The consequence of this is that we soon start blurring the lines between Human Rights and some notion of the good life, which we try and assert over other nation-states. An example of how this bleeding occurs is when Griffin utilizes the term 'minimal' to qualify his Human Rights. As previously mentioned, there is no metric by which we can ascertain what constitutes minimal education, minimal dignity, minimal satisfaction, etc. Raz makes the argument that by just existing and being alive, humans have at least some knowledge, but this minimal kind of knowledge is clearly not the kind of education for which Griffin is advocating. Hence, we are left wondering what distinguishes "what human rights secure and what conditions for having a good life secure."[52]

---

[51] *Id.* 325-326
[52] *Id.* 348

Raz's third critique of the traditional approach of Human Rights is that traditionalists fail to provide an argument as to why Human Rights are at all derivable from the nature of humanness and that which humanness implies.[53] Further, these theorists do not derive their Human Rights from the practices that result from their use in international politics. This brings us to the Razian way forward: he takes Human Rights to be

> "[R]ights which set limits to the sovereignty of states, in that their actual or anticipated violation is a (defeasible) reason for taking action against the violator in the international arena, even when—in cases not involving violation of either human rights or the commission of other offenses—the action would not be permissible, or normatively available on the grounds that it would infringe the sovereignty of the state."[54]

Fundamentally, Raz argues that there is a tension that exists between the moral rationale constituting Human Rights and the moral rationale that constitutes state sovereignty. It is the latter which, to him, "determines what forms of external interventions are rendered impermissible by the sovereignty of states."[55]

Raz uses Rawls to express a common and well-known account of Human Rights which manifests itself as something more akin to a polity than the traditionalist's less satisfying appeal to the nature of humanity. In his citing Rawls, Raz illustrates his own take on the nature of Human Rights: they are a kind of requirement for a system of cooperation; Human Rights are justified in their fulfilling the role that they are assigned: social cooperation at the greatest level possible. To bring back Griffin's framework, Raz is far more functionalist than he is anything else. Rawls believes that certain rights are necessarily derived from this presumed purpose: sustenance and security, personal property, and that certain cases be treated similarly in

---

[53] *Id.* 347
[54] *Id.* 328
[55] *Id.* 329

situations concerning justice. Any society that fails to uphold these central tenets fails to organize itself in a way other than ruling/commanding by force. However, Raz is not satisfied with this arrangement either. He claims that there is no reason to think that "all feudal societies, or all sexist societies, which denied women property rights, and much else, commanded by force."[56]

But it is not obvious to me that Raz is right in this case. Is it true that a system of normativity which determines for women the extent of their power, something obviously less than their male counterparts, one which is not commanding by force? Women did not have a choice in their being subjugated by men. I struggle with Raz in this regard, and it is at least in part because of my believing so strongly that certain things are morally wrong here. Let me take up the traditionalist mantle or a moment: We would do well to remember Griffin's binary: a conception of Human Rights cannot purely be functionalist; it must have elements of moral weight attached to its purpose. Certainly, all societies have different degrees of denying certain groups rights and privileges where they do not others. But this is precisely a kind of group-based oppression that Human Rights doctrine aims to uproot, on the grounds that it defies a kind of principled notion of justice across all people, by virtue of their being people. In other words, there are cases where there is simply no good reason to deny certain groups of people certain privileges and not others. They are Human Rights in that they argue against those who say to women within their sovereignty: you are entitled to less than men; or to black people: you are entitled to less than white people. The people ending up with less certainly are not being involved in the decision-making process of these normative structures which limit certain groups. It is also likely the case that such people believe that they are entitled to just as much as

---

[56] *Id.* 330

those privileged groups. And yes, they are all still people. Not having the right to property does not mean one is not a person. But it is precisely because these are all people that for one to say one group of people is entitled to something and not the other, based off of a condition like sex or race, raises questions pertaining to the implication of a morally questionable society. It is precisely because they are all people who, according to Rights doctrine, are equally deserving of certain things that to deny them equal access is a violation of Human Rights. Even further, the securing of such justice is the responsibility of no one other than the state. But why might Raz remain dissatisfied?

Raz is not satisfied with Rawls because Rawls' framework succeeds in breeding some problematic ambiguity: latent in his claims, there is the issue of sovereignty and legitimate authority, and their respective limits, being difficult to intuit. This then raises the issue of what actions constitutes what intervention (as there must be a threshold level transgression above which there is morally just reason for international bodies or foreign nations to trump a nation-state's sovereignty). In other words, we need to be clear about how, and to what extent, such a sovereign trump can be morally enacted. Of course, while the complaints I previously articulated seem like Human Rights violations, regardless of whether they are, Raz claims that they very well may not constitute sufficient moral justification for an international body to supersede the perpetrating nation-state that. Here again we see the necessary balance of the functionalist and moral justification for the concept: there cannot be, for instance, a purely moral justification for Human Rights, as the legal institution that couples it is very much reliant on the functionalist perspective; that is, what is practical for the international sphere given questions about enforceability, for example (we can't enforce all kinds of lying, despite it being widely being considered morally wrong). At the very least, more information is required to make that kind of

judgment rightly. Raz claims that not all wrongs violate people's Human Rights, nor is it the case that all limits of nation-state based authority are defined by these rights. But again, we are left with another issue of one failing to distinguish sufficiently between a notion of the good life and Human Rights.[57]

Let's focus a little more on Raz's specific understanding of the functionalist view: the one very much wrapped up in the legal component of Human Rights. Importantly, as he notes, the nature of the characteristics of rights relating to individuals are different from those of corporations and other non-person entities. Importantly, though, these non-person entities are "creatures of law", such as the United Nations. He points out that there are two main kinds of legal rights: the ones created by law and the ones recognized by law, the former creating the entirety of the justification behind the law and the latter deriving at least part of its justification from non-legal sources. The latter is important for our purposes because, again, part of the justification of Human Rights is moral, not purely legal. Legal rights that have moral force bear two lessons. First, the moral rights people have can change as a result of the law changing; and second, moral rights can rest on factors other than moral justification.

It is on these grounds that Raz offers the following four observations of rights that are crucial for his conception of Human Rights: one, it is a common feature of rights that the objects

[57] "The primary, though not the only, relevant interest of the right-holder is to be equipped with whatever knowledge and skills are required for him to be able to have a rewarding life in the conditions in which he is likely to find himself. Whether education, in a sense which involves formal instruction, is needed to meet that individual interest is itself a contingent matter. When it is required the question arises: what is the most appropriate way of securing it for all? Under some conditions the state should be a guarantor that education is provided, and when that is so, people have a right to education, and when it is so more or less throughout the world the last question arises: should states enjoy immunity from external interference regarding their success or failure to respect the right to education of people within their territory? If the conditions of the international community are such that they should not enjoy such immunity, then the right to education is a human right." *Id.* 355

of rights—what one has a right to—are things of value. Two, having a right is itself something of value to a right holder. Three, the rights of one person limit the freedom of other people in so far as people, as a result of people having a given right, have a duty not to violate said right. Thus, each right establishes both the duties, and people who are subject to these duties. Four, right-holders have control regarding their rights, meaning that they are empowered by being justified to complain and not be blocked by what Raz describes as the 'mind your business' defense. The blocking move 'it is none of your business' simply denies the standing/ability for one to contest a point. Thus, having the appropriate right(s) gives one sufficient standing/ability to do so.

Hence it is very likely the case, according to Raz, that one's having a right, and that right being of value to the ones who possess it, contributes to the reason/explanation as to why the right holder possesses it. But this isn't the full story, and this is the primary thing about which Raz is concerned with other scholars of Human Rights and their incomplete/dissatisfactory understandings of the concept. It isn't sufficient to assume that someone valuing something empowers them with a right to it because of the fact that such value alone doesn't establish that other people have an acknowledged duty to protect protect someone's having that right. The truisms previously mentioned raise the following question: why is it that rights are of value to the right-holder and why do they involve duties on others? The answer, according to Raz, is that they are applicable to cases where value warrants holding others duty-bound to respect it or otherwise secure it. But, importantly, the powers of enforcement and protection of rights do not belong exclusively to the right-holder either (there can be agents that act on behalf of those whose rights have been violated; for example: journalists and the UN). Hence, the degree to which international legal institutions can intervene/transcend state sovereignty on Human Rights grounds becomes a little less difficult to conceptualize. But there are some problems.

Human Rights are moral rights and they can certainly be incorporated into the law. As Raz notes, legal rights are considered not to be rights created by law, but ones recognized by law. Delete “the concept of” Human Rights’ combination of importance and universality, according to Raz, act as the reasons for why such an introduction into law, for Human Rights, is desirable. This inquiry wrestles with the question of does being a human being act as the ground of possessing those rights? To better grapple with the question, Raz takes up an example illustrated in the UDHR: the Human Right to education. For arguments sake, he asks us: “does it follow that cave dwellers in the Stone Age had the right to education in the same way the UDHR professes all humans now do?”[58] He asserts that they didn’t; the very definitions/concepts of education we use now (that inform what exact the UDHR asserts is the Human Right to education) simply did not exist within that temporal context. It would have made no sense then. Thus, even if it were the case that our humanity entitles us to education at the time, whose duty was it was to protect/enforce this right? It couldn’t have been anyone’s. Thus, to Raz, humanity is not a sufficient condition for the universal Human Right of education to be validly applicable. All practical moral conclusions are based on universal considerations applied to specific circumstances, such as the temporal context within which certain concepts are/are not understood. This is a concept Raz refers to as Social Relativism, and Human Rights are no exception to it (an argument that is going to be explored further later on). A more attractive argument that Raz takes up is a synchronically universal claim: the one where all people that are alive today have Human Rights (which helps do away with some of the issues derived from people lacking the concepts associated with Human Rights claims people make now). If we recognize that all human beings can have rights because they are human beings, then it follows,

[58] See page 40. Raz. “Human Rights in the Emerging World Order” (2010)

according to Raz, that human beings are of moral worth. But, as previously mentioned, moral worth isn't sufficient for Human Rights. We require the further claim that comes with synchronic universality, the claim that all people alive today have the same Human Rights, lest we wish to run into the issue of cross-state differences making Human Rights maybe too relative for the concept to do enough good. Maybe even such relativity would result in more harm than good.

Raz returns to his education example and asserts how certain social conditions in certain contexts make for a situation where these rights are conceptually valid and beneficial, as the moral worth combined with the aspect of duty mentioned before are both met (as the government can be held responsible for the provision of education). Maybe it works sometimes. But if it doesn't elsewhere, then we are left with the issues of lacking universalization (something rightly coveted in any legal sphere) making more difficult cases where the limits of state sovereignty can be rightly transcended on the grounds of Humans Rights-based justifications for intervention. In order to ensure that the defense "none of your business" or even "things are just different here" does not extend farther than it ought to requires, in my belief, the universalizability of Human Rights; that is, a sufficiently efficient limit to state sovereignty. Granted, doing so, as Raz understands, would "greatly raise the bar for any claim that any particular Human Right exists." This is because doing so would require a need to establish how a state would be in possession of a duty to secure the Human Right(s) of its (and all other) peoples. This qualification is very important because Human Rights are too often justified by virtue of the common conditions inherent in the western perspective. With globalization, we need to be sure that we are being diligent in not assuming the validity of Human Rights and then generalizing them to the rest of the world without the proper methodology Raz illustrates for us.

Raz asserts three very important implications in his reflections on Human Rights. First, he asserts that if there is a Human Right to something, then there is also a duty to establish and support impartial, efficient, and reliable institutions to oversee its implementation and protect it from violations. Second, until such institutions exist, normally one should refrain from attempts to use any coercive measures to enforce the right. Third, if, given the prevailing circumstances, there is no possibility that impartial, efficient and reliably institutions may come into existence regarding a certain right, then that right is not a human right.[59] As it relates to the subject of his second example, the UDHR's Human Right to health, he remains skeptical. In fact, he believes it would be "silly" to think of health as a Human Right. This is because, according to Raz, health is understood as the degree to which one can function, but that function is related to capabilities and activities so defined according to some ideal notion of success within a given social framework. Thus, these differing societies we find around the world all have different conceptions of success, ideal capabilities and, ultimately, health. Still, Raz doesn't seem content on dismissing the universalizability of Human Rights. Rather, he seeks only to assert the issue that remains: who gets to decide to what extent Human Rights are appropriate, across the very many different cultures the concept may attempt to reach? Maybe it would be more appropriate to greatly cut from the UDHR and keep only the most universalizable moral rights but, then again, such a culling would still require justified grounds for the specific things culled.

[59] *Id.* 44

Social Relativism: Morality and Social Facts

Now let's take up Raz and his theory of social relativism. As previously alluded to, it seeks to put moral normativity into the context of a cultural framework's respective notion of morality. Indeed, the question becomes whether social/cultural practices affect morality in some kind of way (and then how these moral norms coincide to inform how we can then utilize Human Rights, if at all, in a universal sense). That is the purpose of this inquiry. In a provisional sense, Raz defines social relativism as the following: "The morality (the moral doctrines and principles) which is binding or practices valid for a person is a function of the morality of his or her society."[60]

(A1) Each person is morally subject to (and only to) the morality practiced in his or her society.[61]

Of note, while the very important definition upon which Raz's defense for his Human Rights rests does include the word "relative", it does not at all intend to insulate that the truth of social relativism, as a concept, is itself relative. This is to say that he does not claim that there are certain localities/communities wherein social relativism does apply and in others not. Instead, if it is true, the concept of social relativism is true universally. He begins by articulating that the concept of social relativism is not a moral principle.

> "If (A) is a moral principle, then it can be true only if →(C) the practices of all societies (past, present, and future) are such that given the correct function by which their practices determine the moral principles which are binding or valid on their members, (A) is a valid principle in their societies. → If the function is identity and the correct version of social relativism is (A1), then (A)—and (A1)—is true

---

[60] See page 2. Raz. "Moral Change and Social Relativism": (2002)
[61] *Id.* 3

> only if (C1) the practices of all societies require all people to be guided by (and only by) the practices of their society."[62]

Raz derives from this provisional construction two possible objections. Importantly, one objection makes itself salient: are people to be held morally accountable by the societally defined standards of their respective states? Of course, this becomes a rather difficult principle to employ in modern day interactions between actors in the international arena, as people almost never judge the citizens of a nation state according to the latter's respective notions of normativity. There is, instead, a general trend, on the part of members of a given society, to judge everyone by their own respective cultural standards. There is also another reason for rejecting (A), or at least (A1), as a moral principle; that is, something which gives moral justification for something. both (A) and (A1) make morality too much a matter of convention and, as such, morality necessarily determines that which one is morally entitled to as a result of their being part of a given society and that society having a specific array of morals. As we can see with the subject of Human Rights, proponents of (A1) run into issues of justifying their moral entitlements/responsibilities in ways beyond some unsatisfactory moral conventionalism.

Raz rightly recognizes that moral conventionalism is undesirable as a justification for morality. However, the real aim for his social relativism is not to establish the concept as a moral principle, but something else. Instead, he seeks to wrestle with the possibility that the concept is streaming from morality's meaning. This framework seeks to elicit a deeper question of what the very meaning of morality is, not so much its application nor its extension to what we are specifically entitled. Thus, Social Relativism need not be a moral principle to be true. This is how Raz believes that assertion (A) can be proven true. As he notes, social relativism is a theory

---

[62] *Id.* 5

of the nature of morality, not a view as to what our moral duties are. It is, as he puts it "meta-ethical view, on a par with the thesis that, of the duties which a person is subject to, his duties to others are his moral duties." On this understanding, we now turn to classifying and clarifying the nature of morality in one crucial way; one that suggests that social relativism, and its conception of morality, presupposes the possibility of moral change. If moral change is false, then social relativism is false. According to Raz, some moral change is possible and, thus, there some kinds of Social Relativism are valid and possible.

Some have argued that there is no moral change and that there are such things as objective moral truths, which, after being discovered, act as the unchanging moral backdrop that guides humanity, during which time any straying from said backdrop is a fault of no one else other than humanity's failure to appreciate it. Thus, in this framework, morality is universal and thus in direct opposition to the Social Relativist thesis. But the way we would envision this is by understanding the combination of a moral principle and a given circumstance. Raz asserts that the unchanging moral backdrop necessary for the kind of argument the moral statics believe in isn't necessary because of the fact that we can establish, without it, whether something has changed. By this he means that we can, without this moral back drop, question if moral principle x is true or false or not in a given instance and then see if it is true or false in another instance. Seeing changes in truth and falsehood of moral principles compared across time confirms moral change has occurred by itself.

But he offers a counter argument against this kind of moral change: if moral change is possible, it is unintelligible (unless we know what exactly the moral backdrop is of a given moral principle). He breaks down this argument by saying that, hypothetically, there may be some moral obligations that come to begin in the current moment when they didn't in the past. So, the

question becomes the following: why now? He asserts that the answer is because things have changed (or recognized to have changed) to explain the moral principle. He sums up this kind of instance with the following assertion:(D) If *P*, then acts of the relevant kind are forbidden. Importantly, however it is but the consequent of (D) that acts as the new principle, whereas (D) itself is an unchanging principle that explains the validity of the consequent/new principle (assuming that the predicate is a moral statement). Yet, there is a problem with (D): if it counts as a moral principle, then the moral change thesis is in trouble. This is because moral change necessitates a way to be able to discuss that change without relying on moral language (non-moral terms). Raz cites the following as an example: "Surely some universal statements with non-moral antecedents and moral consequents are statements of moral principles." This brings us to the following illustration of that point: (D1) When you knowingly cause another person to rely on you to act in a certain way, and when, because of his reliance, failing to so act will be to his detriment, you have an obligation to act in that way.

According to Raz, that which is illustrated by (D) shows that certain accounts of non-moral changes (circumstances) can influence and make moral change intelligible. (D3) If inhaling tobacco smoke damages one's health, then smoking in public is wrong. This, according to Raz, is a statement of moral principle. Conditionals of the (D) form in which the antecedent specifies the reason for the validity of the consequent are statements of moral principles. But this leaves us with a problem: the new principle is not intelligible if there is not another already existing principle that can help specify the justification for the new one's coming into effect. Absent this, then we are left with the issue of unintelligibility. The argument is really about the conditions for the intelligibility of change regarding normative/evaluative principles of any kind,

be they moral or not. It claims that for such change to be intelligible there must be an unchanging evaluative/ normative principle, whether classified as moral or not, which explains the change.

As the argument has proceeded thus far, Raz asserts that moral change is intelligible if we assume a current unchanging principle (moral backdrop) which states the reasons for the change. But he also asserts, in a much less difficult but still surprising way, that moral change can come about by or even require conceptual change. This assertion implies that concepts evolve over time and, considering their plasticity, are coupled with evolved meaning. Raz cites the following example: "Treat every soul as an end in itself' differs from 'Treat every rational being as an end in itself." And further: "Is it not true that these cases exemplify moral changes which are intelligible, but do not presuppose a continuing moral principle to make them intelligible?" If the function from social practices to moral principles presupposes some moral principles—that is, if it is a function from social practices and moral principles to moral principles—there would be no guarantee that social practices condition morality until some continuing principles were known, and by definition these could not be a function of social practices themselves. Thus, the social practices, so understood, are not the ultimate determinant of the society's morality. If the degree to which moral validity for a person is a function of the moral practices of that person's society, then morality changes as the moral practices of that society change. Thus, "the possibility of radical moral change is a consequence of social relativism." This further results in the fact that morality cannot change all at once, nor can it change completely, as a result of the fact that all new principles that "explain change" are additive in the sense that they build off of previously established valid principles or are themselves timelessly valid.

Raz then goes on to say that because morality, within the context of a given society, cannot contain principles inaccessible to their understanding, a society establishes (consciously

or unconsciously) its moral vernacular. Multiculturalism, as a result, extends between these cultures, gaps in moral understanding. He views this philosophical framework, as a result of the deductions made, as incompatible with an understanding of the nature of morality. This is because of the fact that the concept forwards problems of communication and of comprehension when it is needed. This is because, if there really aren't socially defined moralities, there exists a morality that applies to all societies. This is what we need for Human Rights. Further, it's not limited to asserting that morality exists at a multi-level hierarchy constituted by a changing and unchanging part. Rather that which is socially relative, if one is to correctly use that language at all, is the simple application of universal moral order in a way that also pays homage to differentiating social facts. But even then, it's not the socially specific part that explains and justifies a societal manifestation of a moral principle, the universal part does: "This universal part explains how social practices and other circumstances can make a moral difference. This means that social relativism is untenable even in the modest form which says that part of morality is socially relative, and is not subsumed under (is not mere application of) non-socially relative moral principles."[63]

---

[63] *Id.* 18

Human Rights and Efficacious Enforcement:

We now transition from Razian notions of Human Rights, and the conversation of social relativism, to another thinker: John Skorupski. He argues that Human Rights are a subset of rights. Specifically, he argues that while some rights are more related to philosophical grounds, Human Rights, since they manifest themselves primarily within international dialogue, are very much politically grounded. This is because their purpose, much like how Raz and Griffin thought of Human Rights, lies in the communal effort to unite the World, whose components sometimes possess radically differing views, through some kind of systematic methodology. The following three necessary conditions comprise Skorupski's concept of Human Rights:

Human rights should be seen as a sub-class of rights

Human rights are moral rights

Not all moral rights are human rights

For the first criterion, he offers that we must remember to not make the concept of Human Rights unclear through trying to ground it in anything other than a subset of rights or kind of rights. To ground the notion of Human Rights within the notion of rights itself is to provide us that clear strong base that Griffin so desperately wanted to seek and that Raz criticized many for failing to find. For the second criterion, he makes clear that Human Rights are omnipotent and omnitemporal, and by this I mean that Human Rights are not bound to any human convention for their truth conditions to be effected (time can only effect whether or not it is appropriate for rights to be recognized and compensated accordingly). Human Rights have been, are, and will always be so. For the third criterion, he informs us that because Human

Rights are a kind of right, it would then not make any sense for us to think that all rights are human rights. Not only would it defeat the purpose to have Human Rights as a concept if they were one and the same with rights, but it would fail give any clarification as to just what Human Rights are. To boil this framework down into one question: what rights ought to be considered Human Rights and why?[64]

Skorupski cites Mill in his saying that "to have a right, then, is, I conceive, to have something which society ought to defend me in the possession of."[65] This is used to illustrate that Mill creates with this definition a chain of explanations through which he defines the following: "justice in terms of rights, rights in terms of moral obligations, and moral obligation in terms of the appropriateness of certain sanctions." All of this is to say that one can define justice in terms of rights. This is because, to paraphrase Mill, justice concerns precisely not just obligations to do and not to do but also the ways in which a person claims their moral rights. And Skorupski thinks this to be the correct: justice defined in terms of rights. This is an interesting divergence from Griffin, who thought that to make Human Rights a matter of complete justice was a mistake. He thought that Human Rights, as a concept, could not satisfy its need for determinacy when its aim, broadly speaking, is to support some notion of justice. But I struggle to see how that could be. If not justice, what?

But, all that said, Skorupski does not think that Mill's definition is enough. He turns to Hart to illustrate a shared objection that there are many reasons for one being guaranteed a right, and there could be many reasons for a society to guarantee other non-right things. But society simply guaranteeing something does not automatically make that which is guaranteed a right. As

---

[64] *Id.* 359
[65] *Id.* 359

they both note, there are many things which one could be guaranteed but not by virtue of any legitimate rights-based claim. This brings us to Skorupski's suggested approach: "the point we should focus on is that rights give rise to morally permissible *demands*."[66] In essence, demands are more than requests. And it is by virtue of Human Rights being demands which gives them a power which can stand in the face of the kinds of injustices which result in Human Rights violations. After all, it would be rather meaningless if it were the case that Human Rights were not demand-like and thus relied on nation-states' (those who are very often the actors of Human Rights violations) good will to accept what would otherwise be 'requests'. It is because of their having this demands status that, as Skorupski says such actions are "morally permissible to enforce."

This framework succeeds to capture, I think, a great deal of the Human Rights Doctrine's content. Specifically, as Skorupski notes, there are cases where permissible enforcement of demands invoked by Human Rights would be justified.[67] However, it is not always the case that such enforcement is appropriate given that another critical component to these kinds of demands is the degree to which such demands ought to be made in the first place. In other words, it would be foolish to have the UN security council demand, on pain of military repercussions, that a nation-state be required to uphold the Human Right to paid holidays off. But Skorupski wants to go even a little further. He explains that he is not just concerned with those demands for compensation because of Human Rights violations, he is also concerned with compensation. That is, there is also the issue of just how compensation ought to be demanded in cases where one is justifiably demanding an enforceable action. Skorupski is wise to articulate the fact that

[66] *Id.* 360
[67] *Id.* 361

the one who is being demanded to act need not necessarily be in violation of something, rather they are "making up for a loss."

Given this, and a few other points I won't mention here, Skorupski comes to a definition of rights:

> "With these points taken into account we define rights as follows: X has a right to Y against Z if and only if it is morally permissible for X or X's agent to demand that Z does not take Y from X, or does not prevent X from doing Y, or delivers Y to X (as appropriate), and to demand compensation for X from Z in the event of damage resulting from Z's non-compliance. We can also define a duty of right (a right-based duty): Z has a duty of right to X in regard to Y if and only if X has a right to Y against Z. Thus, Z's duty of right is a duty not to take Y from X, or not to prevent X from doing Y, or to deliver Y to X, as appropriate."[68]

Most notably, all rights revolve around this notion of demand, as is illustrated in Skorupski making it the necessary and sufficient condition of the above logical formula. Thus all rights have moral enforceability. Hence, all Human Rights having moral enforceability. It is also here that Skorupski, as reflected in this quotation, further extends the definition of rights to incorporate this concept of "duty of right". What I take him to mean here is that, assuming an actor can justifiably claim their or another's rights were violated and can rightly demand compensation, the actor who finds themselves justifiably responsible to compensate has a rights-based duty to deliver to those who can make demands of it. Those with rights-based duties may not withhold compensation of this kind, most notably, even in cases where they may not themselves be responsible for the damage being caused.

Given what has been articulated about the duty of rights, Skorupski provides the following framework to make clear that concept's implications: first, not to seize others, their

[68] *Id.* 362

possessions, resources, or services, illegitimately, or acquire them through fraud or threat. Second, not to cause damage, harm, or injury to others, or to their possessions, resources, or reputation, without legitimate grounds. Third, not to withdraw unilaterally from obligations one has freely (without force, fraud, or threat) undertaken. Fourth, to play a fair role in implementing legitimately arrived at collective decisions, including legitimately arrived at decisions as to fair distribution of jointly owned resources. Fifth, to play a fair part in supporting legitimate institutions which enforce observance of one, four, and even five to rectify violations thereof. While he does admit that this model is incomplete, in that it does not account for what constitutes something being legitimate or not, the model is defined, according to Skorupski, in a way that establishes each of these clauses corresponds to rights and that there are no rights that do not correspond to these clauses. Thus, finally, we are making some headway with respect to what Griffin sought to better articulate: just what is the content of Human Rights and how do we ensure that its definition is clear and determinate? Granted, these are the guidelines which only pertain to those who are the sort of executors of rights-based compensation, not specifically Human Rights. But still, such perspective is necessary if we are to get at all closer to making determinate the concept of Human Rights.

But how does this all complete the picture of Human Rights he has been aiming at: What then should we be trying to do with our talk of *Human* Rights? He claims that it is not the place for any nation or collection of nations to try and utilize Human Rights to assert a moral agenda; nor is this the place to try and defend one's personal views of the good life through Human Rights practices. Such a claim has "is far too broad an aim to try and suggest that Human Rights be made to guide the ideals of nation-states." To do so would fail to try and bridge these sometimes radically different world views. The entire ground upon which Human Rights stands

is a kind of moral assent. If we aim to change/police people's morals in a way which extends beyond or misuses Human Rights doctrine, then we will fail (as we have) to achieve any kind of significant assent on the part of the world's many and differing nation-states. It is through this moral enforceability of all rights that Human Rights-based demands can be made in principle. But, practically speaking, to become too bold with Human Rights will only result in nation-states growing cynical and deaf of them.

Hence, while we ought not use Human Rights to bend nation states into a moral mold, "Human rights have in practice come to be thought of as rights which it is permissible for all, including all states, to demand that all states should positively protect and promote." That is, we look to nation-states as the bearers of rights-based duty as they are often the ones with the power, resources, and responsibility to compensate when appropriate AND hold others accountable as well. An implication of this is the notion of "cross-state demandability": the principle that one may extend a Human Rights claim beyond the sovereignty of their nation-state. And this is only because of the fact that some rights are essentially universal, otherwise their ability to justifiably transcend every nation state would not exist (to be clear, those rights, in this case, are Human Rights). This is to say that anyone, or any collective, such as a nation-state, can legitimately demand that Human Rights be observed on threat of justified duty to compensate.

Then, after all of this, we finally get to the point where Skorupski can derive from these previously stated principles his framework for Human Rights. A) they are essentially universal ('universality'), (B) whose active enforcement and promotion it is permissible for anyone, including all states, to demand of any state ('cross-state demandability'), (C) and which it is efficacious to distinguish and recognize in international law as demandable of any state ('efficacy'). Interestingly, Skorupski takes the opportunity to address some of Raz's assertions.

Namely, Skorupski takes issue with Raz's claims that "there is no reason to think that such [human] rights must be universal". But, and I agree with Skorupski in this following complaint, if it is the case that Human Rights need not be universally applicable, then where is the effective force supporting the notion of cross-state demand-ability? If there is no universality to Human Rights, it seems that the very principled nature of those rights falls apart, in that we can no longer claim that by virtue of humanness a certain group can be justified in demanding compensation (no matter their location). I think this (provisional mistake) on the part of Raz in his formulation of Human Rights is reflective of the fact that he seeks to make Human Rights too political. By this I mean that it seems like he attempts to merge international law with the concept of Human Rights in a way which gives too much power to state sovereignty.

Let's take a moment now to transition to the bidirectionality of rights and duties, as it will help us wrestle with the concept of state sovereignty. In the spirit of trying to clarify the issue of the Right/Duty bidirectional, we begin with Skorupski noting Mill's following assertion about the nature of rights: "Duties of justice are distinguished from moral obligations in general by the existence of corresponding rights." But, according to both Hart and Skorupski, Mill's definition of what a right is is "unconvincing". According to Hart, Mill's definition "puts the cart before the horse" and Skorupski agrees; we can explain why society has an obligation by appealing to the existence of a pre-existing right, but there may also be other explanations. It doesn't follow that a societal obligation implies a right. There may even be very strong moral reasons for one to impose upon themselves a kind of self-given duty, but such an imposition does not equate to someone having the right to be read to at night by their father, for example. This is where Skorupski returns to the subject of morally permissible demands; this is another approach to the right/duty bidirectional that maybe adds a third dimension. Note the following examples:

> *"If you have not given me permission to use your computer I have a moral obligation not to use it without asking you. More strongly, it is morally permissible for you to demand that I do not use it without asking you. When I have promised to meet you at a given time, you are permitted to demand that I do."*

To demand, in Skorupski's mind is to compel. Thus, to demand is, according to Skorupski, "is morally permissible to enforce." Note that there is an important distinction to be made between capability to enforce and the permissibility to enforce; note the following example:

> *"I do not mean that it is actually possible to enforce it: we may intelligibly demand the return of hostages even if we have no power to enforce this."*

Thus, we see that enforcement/power, if permissible, is entirely necessary. Thus, very importantly, one cannot rightly say that, without qualification, a right-holder has permission to demand but no permission to enforce that demand again, the principle of the demand implies permissibility of enforcement. Even if one doesn't immediately demand, the permissibility of the demand doesn't go away, it only remains latent. Note the following example: "As can be seen from the fact that if society is unable to act as the right-holder's agent (for example in situations requiring immediate self-defence), moral permission to enforce reverts to the individual or an agent other than the state."

This leads us to his key assertion, the main question of interest for this particular inquiry, "Z has a duty of right to X in regard to Y if and only if X has a right to Y against Z," the extension of duty, those against whom morally permissible demands can be made assuming they have the requisite rights, is secondary in the right/duty binary for Skorupski (there can be no duty without a right according to this definition).[69] Latent within this discussion of duty and rights are

---

[69] *Id.* 348

two concepts of importance to Raz: legitimacy and fairness, in addition to group membership (though to a lesser extent). Of note, legitimate collective decisions assume that fair and legitimate conditions can be made within a group that seeks to pursue some common aim and thus binds its members to be dutiful in fulfilling their end of the bargain. Skorupski utilizes an example of children coming together to collectively support ailing parents: again, assuming legitimate and fair conditions "In an appropriate moral setting, the decision may be legitimate even if a particular child was not consulted, or does not agree; either way it may be binding on that child." In this case, a collective decision without a pre-existing obligation (it isn't necessarily the case that the children needed to come together to care for the parents in a given way, if at all) doesn't require unanimous consent. It can be binding even to those who may disagree with it. Skorupski says: "Such decisions must observe pre-existing duties of justice; but requiring a contribution from those who disagreed is not itself, already, a violation of justice."

Importantly, however, Human Rights are not simply matters of collective moral missions. That would, actually, be very much like moral relativism, as if this were all that were needed for Human Rights to be established, then they could simply be a matter of varying convention relative to time and space. As Skorupski offers: "Human rights ought not be merely desirable ethical objectives." That said, Skorupski insists that the rights not to be tortured or enslaved are essentially universal. That said, universality is important because it isn't the case that collective action, which itself implies the possibility of disagreement, makes Human Rights what they are. Note his conclusion here: "I have a right that you do not torture me because like everyone else I have a right not to be tortured by anyone. Similarly, a right not to be enslaved is not a right against some particular people who have promised not to enslave. Suppose someone says: 'In this polity there has been no collective decision to outlaw slavery. I can appreciate that there are

practical and humanitarian reasons for abolishing it, but at the moment children have no right not to be sold by their parents as slaves.' That would be a false conclusion: children have a right not to be sold into slavery, whatever the polity may have decided."

Having given descriptive summaries of some scholars' respective viewpoints, I find my own view most akin to Skorupski and his notion of Human Rights, for reasons that will be expanded upon in what follows. However, I think it's important to note here that I do not at all think that Raz, Griffin, or any of the other scholars listed are completely out of bounds with their views either. In actuality, the reason for this section in particular is to bring together these scholars, all of whom I regard to contain necessary components in their respective conceptions that, when combined, do not at all result in a contradictory position. To return to the framework established by Griffin: the concept of Human Rights will necessarily exist on a spectrum with functionality and morality at the poles. The degree to which elements of both Raz's and Skorupski's respective arguments satisfy the need for both functionality and moral importance, I hope, results in a product of intelligibility and appropriate moral weight—the kind that allows this struggling subject to be rekindled and strengthened in its attempt to survive its critiques. The paper will outline multiple common points of contention between the authors: the bleeding lines of the moral good vs Human Rights; the definition of Human Rights; the notion of universality and its relationship with the concept of Human Rights; and the notion of justice and its relationship with the concept of Human Rights. If nothing else, through putting these three authors, at various parts, in conversation with each other, I hope that their views on the matter of Human Rights will be elucidated and tested against each other.

The following is a list of some main summary conclusions I think are important to derive from various points made by the mentioned authors. The way by which I conclude my points

will be by asserting what I am going to call my Unification Thesis: that is, the summary conclusion derived from a combination of Raz and Skorupski's respective frameworks. Before we get to that, however, I'm going to attempt to summarize the ways these authors define Human Rights.

1: Raz: a right is a Human Right if first it is deemed to be a moral right, conceived by the social circumstances and facts which presently comprise a given society, and that right can be utilized to supersede and transcend a nation-state's sovereignty (hence, they need not be universal). Human rights need not be universal if they don't apply to certain peoples and if certain peoples don't have the right to certain things in some places on account of the previously mentioned social facts.

2: Skorupski: Human rights are moral rights which are essentially universal, whose active enforcement and promotion it is permissible for anyone, including all states, to demand of any state, and which it is efficacious to distinguish and recognize in international law as demandable of any state (hence, they need to be universal). Human rights, by definition, are universal. It is not the case that Human Rights don't exist as Human Rights depending on their temporal/social context, rather the degree to which is it morally justified to invoke them, due to the efficaciousness clause, determines whether or not is good for a society in a given time to promote them as Human Rights (but they remain Human Rights even if they are not invoked). This is to say that to not be a slave was always a Human Right, but there were contexts in history where that right was not able to be effectively known or promoted as such.

3: Griffin: a Human Right is a moral right whose content necessarily contains some representation of human dignity; they are protected thresholds at which autonomy is sufficiently realized. It must also necessarily exist as a combination of functional purpose and substantive

grounds. The two grounds which constitute this are as follows: personhood and practicalities. Therefore, Human Rights are moral rights which establish someone's personhood and where its content is defended in part due to practical considerations (situations conducive to the defense of 'minimal' Human Dignity).

All of the authors agree that the modern conception of Human Rights is in need of clarification. For far too long, they argue that there have been issues with respect to the notion of Human Rights being thrown around as a term without anyone sufficiently clarifying just what they mean by their use of it, and they are right about that: the justification for these concepts is often assumed, often understandably so but still assumed. The Human Right against arbitrary punishment, for example, seems like a good fit for the concept, though the extent to which arbitrary punishment is defined is often taken for granted. Even further, for those few who would offer some explanation, they often don't provide a sufficient argument as to why the thing that they believed to be a Human Right was deserving of being called such. For what reason ought people be entitled to the Human Right of play? Because such a right allows for human flourishing?[70]

Even further, there is disagreement about the implications of what Human Rights mean for the international sphere, despite our ever-developing age of pluralistic globalization. That said, even in our present attempt to establish some clarity on the matter, the following concern remains: ought Human Rights be laced with some notion of the good life and, if not, what ought to be done to ensure that we are not injecting some notion of the good life by accident into our definition of Human Rights? Though, as Raz would be quick to point out, it is too often the case

---

[70] Note the arguments of Martha Nussbaum (though this is not a good justification given the lack of a definition of human rights) to be explained later.

that while some authors believe themselves to not be bleeding the lines, their work is actually laced with such conceptions. This type of blurring between some notion of moral goodness and Human Rights, in combination with the issue of indeterminacy as it relates to the concept of Human Rights, undermines the concept of Human Rights and makes it lose both credibility and effectiveness. Note too that these issues are very often comorbid with each other. Maybe some moral injection is inevitable because of Griffin's framework that establishes both functional and moral reasons for the concept of Human Rights. Maybe then a more appropriate way of addressing this point is the following: there is great danger in the injection of overly specific moral conceptions guiding the way that Human Rights manifest themselves, rather than simply stating that the concept in general cannot be divorced from generally belonging to the moral sphere.

It is due to this failure of sufficiently articulated and insufficiently defines conceptions of Human Rights that Raz believes. Griffin ultimately fails at not injecting what I am going to call a "world view" orientation into his conception of Human Rights. Note the following example from Griffin's work that we have previously seen:

> "I propose, therefore, two grounds for human rights: personhood and practicalities. The existence conditions for a human right would, then, be these. One establishes the extent of such a right by showing, first, that it protects an essential feature of personhood, and, second, that its determinate content often results from the sorts for practical considerations that I have roughly sketched."[71]

Griffin suggests that an acceptable definition of Human Rights requires that we couple this notion of personhood with a safety margin, so as to not be left with another indeterminate and insufficiently clear picture of Human Rights. Through the central tenet of personhood, we

[71] See first citation

will be left to know what constitutes a moral right worthy of being called a Human Right and what the implications of that Human Right are. And the notion of the safety margin in conjunction with the theme of personhood will be sufficient to ensure that Human Rights are protected, because they are limited to that which can be protected, and allow us to efficiently generalize the Human Right without it being too narrow.

What constitutes personhood? What informs Griffin's notion of a safety margin? These are the mistakes we ought to be cautious against. Griffin basically means in his assertions here that we need to be flexible in our understanding of Human Rights, so as to ensure that all cases of Humans Rights violations can be protected, without such rights overextending themselves in inappropriate ways; we need to assume that difficult cases will exist and account for them in this safety margin. But it remains the case that this roughly sketched paradigm does nothing except cause us to ask more questions, not answer the ones we already had.

However, I think to argue for things like a safety net is a common-sense-ical approach, similar to the way lots of other laws work: make it sufficiently specific to address the thing to which the law ought to apply, but sufficiently general so more difficult cases can be interpreted under universal law as well but in a still applicable sense. This often works in cases where there is a legitimate arbitrating body, but such people are appointed by the state. Questions of ambiguity relating to law are settled by those with the authority and jurisdiction. But such institutional means of executing that system's protocols are not obviously appropriate, practical, or even possible for Human Rights. I say this because of the likely possibility of various nations disagreeing about the definition of personhood, from which, in Griffin's conception, all Human Rights stem. An international definition of personhood may work, but it is unlikely to be agreed upon. Even still, here too we run into the issue of interpretability resulting from ambiguity. One

example of a practical problem with making Human Rights its own state-bound justice system is that the nation-states themselves are very often the perpetrators of their own respective Human Rights violations. The question becomes the following: if the state cannot be trusted with this duty of interpreting the safety margin, on account the fact that it is most often the violator of Human Rights within its sovereignty, who else? Griffin is quiet in this regard. Maybe under ideal conditions it could work with an international arbitrator, but then we come to the question of sovereignty. I struggle to see much success come of this conception, assuming we can even get such a safety limit to work. Griffin offers little in the way of explaining how such tenets, personhood and safety limits, ought to be structurally manifested.

> "Is it really true that someone who is dominated by his powerful mother, or controlled by his commitment to his employer (having signed a 10-year contract, on condition that the employer first pays for his education) is less of a person than someone who is not so dominated or controlled?"[72]

Where in here are we to define personhood? What establishes it and what overrides it? To what degree are we then obliged to call this oppressive mother or benevolent boss violators of Human Rights? In part, what adds to this issue of indeterminacy of Human Rights, is that they are too often unknowingly or intentionally married with some notion of the good life; this conception opens the door for that mistake to be made. Human rights may not be enough to secure a good existence, so understood as something that helps us secure a more human life. But this is precisely his point: Human Rights need to be first defined with sufficient determinacy so that they may then be—they *must* be—distinguished from some notion as to what the good life is. Fundamentally, the people who find themselves in the midst of slavery, dealing with an oppressive mother, or contractual obligation with employer, despite what they may think about

---

[72] *Id.* 325

their circumstances, are still people. There is a difference between living well and living as a human. Therefore, it's too simple, and also too extreme, to suggest that personhood is the metric by which candidacy for Human Rights is measured.

In particular, this conception often bleeds beyond the line of that which is 'minimally essential' for constituting personhood; there is no metric by which we can ascertain what constitutes minimal education, minimal dignity, minimal satisfaction, etc. Raz makes the argument that by just existing and being alive, humans have at least some knowledge, but this minimal kind of knowledge is clearly not the kind of education for which Griffin is advocating. Hence, we are left wondering what defines minimal.

We turn now to Skorupski and Raz: for both authors, there is a bidirectional connection between rights duties. There is no such thing as a duty coming before the right, lest we wish to follow in the steps of Rawls and put "the wagon before the horse". Assume the following definition of what a right is: A right is something that someone is morally permissible in demanding against someone whose duty it is to do/not do x. I argue that one cannot make a morally permissible demand against someone/something else who lacks the respective duty to uphold that right. Hence, there cannot be a right without a respective duty. Note that, importantly, the reverse can work, but in a limited way: there are indeed duties without rights. But often it's the case that these duties are of a self-imposed kind: does a father, who maybe greatly values the act of reading to his children every night, and who maybe even argues that it is morally correct for him to do so, have a duty to read to his children? Do his children have a right to be read to by him?[73]

[73] Example courtesy of the thoughts of Dr. Kelly Sorenson

Let’s make up the second part first: no, one’s children do not have the right to be read to by their father. Let’s utilize the aforementioned definition to see why: to be morally permissible in one’s demanding that their father read to them at night would mean that a child is morally justified in their securing that right from their father through justified actions; that is, it is not a mere matter of a child’s protesting that limits the child’s actions if what they had was a real right, they must have more (moral justification). But, what, if anything, could a child be permitted to do to enact their demands to be read to in a way that satisfies the moral weight of possessing a right? They cannot because the father does not have a duty to read to their child, save maybe the self-imposed one that a father may assert upon himself.

This brings us to the first part: yes, one could actually have a duty without one having a right to x. This is because one can impose upon oneself a duty to thus extend onto another a kind of quasi-right. By this, I mean one can create for themselves a duty to read to one’s children at night, on the grounds that such actions are what morality influences them to do. Note though that still, there remains no right by which the child can hold his father accountable for the one night he is unable to read and demand reparations. It is instead a kind of, again, self-imposed duty that speaks to the weight of the father’s moral justification for reading to his child.

In returning now to the subject of Human Rights: both authors, again, are of the belief that Human Rights are a special set of moral rights that have a great deal of importance in our world today, though their respective understanding/frameworks, while arguably similar, have radically different consequences (intended or otherwise). It is these consequences that become the matter of interest, I believe, when discerning the worth of each respective viewpoint. Even further, while each of the authors have different points of contention and different subjects of interest, they remain, actually, very much on the same side. Because I have already illustrated

elsewhere the views of these two authors, I want to instead focus here on where and how they diverge and conflict.

One point of contention between the two authors is found in the notion of efficacy with which Skorupski conceives of Human Rights. It is precisely these kinds of arguments that make the assumptions about the Human Rights tradition that Raz criticizes. Skorupski argues for a principled kind of system wherein Human Rights are omnitemporal. This raises a really important point, because with this one can make the claim that Human Rights can exist, but lack the knowledge of how to enforce them or even conceive of them. To take this further, one can have a Human Right to something and thus someone or some institution may have a duty of which it is ignorant. This is profoundly different than the argument of moral rights only being Human Rights if they can be effectively enforced, which is what Raz asserts. Of course, that leaves us with a lot of work to do with respect to the remaining question of how we ought to go about enforcing various Human Rights rightly, as there are many cases where enforcement would not be inappropriate, specifically within the context of Skorupski's framework. But that isn't necessarily a divergence between the two authors by virtue of Skorupski's framework still being able to exist alongside Raz's wanting to remain concerned with state sovereignty and the degree to which universalizability is limited by social relativism.

But it certainly is the case that the two scholars operate from difference conceptions of primacy: Skorupski begins with Human Rights as a primary moral good and Raz begins with state sovereignty as a primary moral good. This manifests itself as the emphasis Raz puts on state sovereignty and its being the primary good worth defending, which stems from his value of social relativism. Given what has been established above, Skorupski would argue that the principles violated by things like slavery are sufficient to warrant protection by Human Rights

irrespective of time and place. That said, he would also agree that there are cases where to intervene for the sake of slavery based Human Rights violations would be inappropriate. For example, if freeing all slaves, in this hypothetical scenario, resulted in a kind of circumstance for these newly freed slaves that was somehow worse for them than their being enslaved, there would be questions about the moral appropriateness of doing so. Raz is more concerned about focusing on the degree to which it would be inappropriate to do so because the social facts that inform that society's motivations are born of state sovereignty and thus any action to challenge that at the international level, by an intervening nation, warrants a great deal of caution and respect. In short, the degree to which something is obviously a Human Right that can be universalizable, to Raz, is very, very small. However, this does not mean that slavery is not a Human Rights violation. As previously articulated, people may have the Human Right to be protected from x, but remain with the question of how. Note here that Raz has Skorupski's formula reversed. Specifically, if a combination of both the conditions of a society and the conditions of the international arena are conducive for people to universally enjoy moral right A, then and only then is A a Human Right. Skorupski does something different: for x, y, and z moral reasons and corresponding rights/duties (which may or may not be intelligible) Human Right A is a Human Right, but the ways in which Human Right A are enforced depended on the conditions of both the conditions of the international arena and the society in which a violation occurs. Thus, instances of Human Rights violations ought not be subject to some rigid formula, but should be individually and carefully studied on a case by case basis according to Raz, during which all the social facts surrounding the circumstances of the violation and international arena at the time are accounted for. But this leads then to one of the main divergences between the two:

Raz doesn't believe that Human Rights must be, as a matter of necessity, universally applicable. The question we are left with is what such an assertion does to the framework.

I want to turn now to where I think the consequences of each respective view leaves the authors and the Human Rights paradigm. There is a very large merit to one being able to universalize Human Rights: it allows for the action whereby state sovereignty can be justifiably overruled, by people who know nothing about that country, other than the fact that something universally wrong is being done against people whose right it is to x. Absent that, the degree to which one can intervene on Human Rights grounds becomes null and the defense "none of your business" or even "you simply don't understand, this is the way we do things" becomes the new Human Right; it becomes the ONLY Human Right, full stop. The degree to which conversation and discourse can be had about Human Rights becomes vastly diminished and much more cryptic with Raz's frame work when it needn't be: if the extent of one's ability to have a Human Right is limited and determined by the extent to which that right can be enforced, within society's current circumstance, then such rights become hopelessly relative and groundless; they become entirely subject to the whims of a nation-state and its various motives, which are often contrary to the upholding of moral goods like rights. Skorupski, while remaining ambiguous in his framework when assuming sufficient moral justification/efficaciousness, allows for space to be made in which discussion can be had about BOTH Human Rights and the way about which, if at all, they can be enforced. Specifically, the latter decently determines the former. Note that with Raz's depiction, it is not just the way about which we go and try to enforce violations of Human Rights that remains indeterminate and subject to circumstance, it is also Human Rights themselves. That is crux of the issue. If we dispute Human Rights themselves, then not very

much legitimate power can be utilized to support the more indeterminate question of how to enforce those same disputed Human Rights.

While still loyal to Skorupski, I also want to take a moment to agree with Raz's very justified caution and even more responsible dedication to his social relativism. It is a necessary caution that I think Skorupski overlooks in his framework. Particularly, the recognition of the fact that some communities' social circumstances are different from others informs how, if at all, Human Rights makes sense for them, which raises the issue of universalizability: how is it that people in the stone age are entitled to due process, as a Human Right, Raz would probably say to Skorupski. Fair question, as there are still circumstances where communities lack not just the knowledge but the concept of how certain rights are theirs, if they have them at all. But I think this question, again, leads to more harm than good in its being conducive to less talk about Human Rights, revisions, new ones, declarations of new understandings, etc. To say that social facts and lacking concepts prove an inability for discussion in any meaningful sense assumes that no value can be derived from any participation in the conversation, or even that the capability of having the conversation at all is without any intrinsic value. I strongly disagree. There is value in the fact that Skorupski's notion of Human Rights promotes discourse, even for (and about) people within the Stone Age. That discourse is the same thing that will best protect the social relativism, the differences represented by various communities' respective social facts, that will allow for headway with regard to efficacious enforceability, if x is at all worthy of being called a Human Right.

Before we delve into that discussion of addressing the Unification Thesis, I want to return to one more fundamental component differentiating Raz and Skorupski: the subject of Human Rights being necessarily universal in their applicability. Raz informs us that an immediate

consequence of his functional conception of Human Rights is that they don't need to be universal or foundational. He argues that a right is a Human Right if it can override a nation-state's sovereignty, and that to do so is inherent in this conception; rights are valid against states in the international arena, and "there is no reason to think that such rights must be universal."

> "The right that people who made promises to us shall keep them depends on the desirability, that is the value, of being able to create bonds of duty among people at will. **That desirability—consisting in improved ability to plan for the future, to form common projects, and to forge common bonds—governs the scope of the right: only people for whom the ability is valuable have the power to make promises** (and that may exclude very young children, intellectually disabled people, etc., and only matters regarding which it is desirable to be able to form such bonds at will, can be the object of promises and that may exclude commission of immoral acts, etc.)…Human rights are moral rights held by individuals. But individuals have them only when the conditions are appropriate for governments to have the duties to protect the interests which the rights protect." [emphasis added][74]

Raz makes the claim that certain rights, promises for instance, can only be correctly called rights if the ones who find themselves making the promises are located in a society which values the power of making promises, and whose social circumstances are conducive to making promises a valued practice. The moral rights which extend themselves into being Human Rights can only be Human Rights when the circumstances make it such that governments have the duty to protect that which the Rights protect for the individual. Further, a Human Right must be conducive to someone being able to trump state sovereignty in the event of that Human Right being violated. But that Human Right can only be called so if it is first a moral right which is clearly valued by a society and which that society claims to be entitled to by the state. This is precisely the issue Raz is concerned about with respect to universality of Human Rights: given that the social circumstances which constitute the differences between various nation-states influence the values of each respective nation-state, these Human Rights, on account of these

[74] *Id.* 335

differences in circumstance, need not be necessarily universal. If Raz is right about this social relativism, then who could on any just grounds challenge the malpractice of governments in their violation of Human Rights. Skorupski responds with the following:

> "For reasons that I do not understand, however, he [Raz] argues that such [human?] rights need not be universal. Like me, Raz thinks that 'International law is at fault when it recognizes as a human right something which, morally speaking, is not a right'. We also agree that which moral rights should be placed on a list of human rights depends, in part, on what rights-violations can permit intervention in the affairs of a state. **But if a violated right is not universal, why is it cross-state demandable? What explains why other states have standing to demand that such violations of non-universal rights be rectified?** As I noted, it is not true of all rights that anyone at all has standing to demand that they be respected by others against others. Precisely because 'disabling the defense ''none of your business,'' is definitive of the political conception of human rights', it seems to me that human rights must be essentially universal." [emphasis added][75]

To use the language of Skorupski, a right is constituted by a relationship of moral obligation. It is by virtue of these rights, and the moral obligations which comprise them, that they, and their actors, can be morally just in their demand for compensation of loss (even if such demands extend beyond their own nation-states' sovereignty). What makes this action morally enforceable is the fact that what is being invoked in the demand is a right, as all Human Rights are first rights. But why are Human Rights not universally applicable? When it is the case that governments and societies get to decide for themselves what is and is not their duty to protect (on the grounds of rights), or what is or is not conducive to their societies' values (what they ought to protect on the grounds of rights), is it the case that they are contesting the existence of, or the effectiveness of promoting, a right given a society's current circumstances? The

[75] *Id.* 370

consequences of this question have real practical implications. Raz seems to be claiming the former and Skorupski seems to be claiming the latter.

The very thing that constitutes a valid right-based demand at all assumes that one is in possession of a moral right. Just as Skorupski argues in response to Raz: imagine that slavery in this country was abolished by extraterrestrial beings and that the country at the time resisted this change. Assume that the circumstances of that society were such that slavery was deemed a valuable and integral part of the good of this society: there is still in this example no good reason as to why one, despite what that society then thought good for itself, couldn't rightly say that that those slaves deserved to be free and were morally justified to demand freedom from the society which held them captive; they had the Human Right to be free. But this still leaves us with some ambiguity regarding the distinction between rights and Human Rights. Yet, clause (c) of the necessary conditions that comprise his definition of Human Rights doesn't refer to a specific array of time-based circumstances of a given society and its respective social facts/norms. He suggests that we could easily amend (c) to include the following change: "a right is a human right at a time only if (c) is true at that time."[76] But he maintains there is no need to do so. This is because while (c)'s original form does imply that thousands of years ago there was a Human Right not to be enslaved, it does not imply that the defense of that Human Right would have been sufficiently efficacious for it to be recognized in a way conducive for it to be supported. And, as he states: we are faced with "a political question addressed to the social and political conditions that prevail today….These conditions do not prevail at all times, and so even if we

[76] *Id.* 371

should now declare a right to be binding on states it does not follow that it either could or should always and everywhere have been so declared."[77]

Of course, the question we find ourselves asking now is what Human Rights can and ought to be efficaciously supported (universally) at the international level, not whether Human Rights are universally applicable to all people throughout the 'international arena'. As Skorupski mentions, there are cases where permissible enforcement of demands invoked by Human Rights would be justified and others not. It is not always the case that such enforcement is appropriate given that another critical component to these kinds of demands is the degree to which such demands ought to be made in the first place. In other words, it would be foolish to have the United Nations Security Council demand, on pain of some severe repercussions such as military force, that a nation-state be required to uphold the Human Right to paid holidays off.

[77] *Id.* 361

A Potential Solution: a Two-Level Framework of Human Rights

Thus far in this paper, we have discussed a great deal about the extent to which a variety of factors influence how one can define the concept of Human Rights: there are conceptual factors, moral factors, and practical factors. The goal of what follows is to take that which has been discussed and bring it all together in a way which allows for more clarity to be achieved regarding the concept of the Human Rights. I attempt this by trying to utilize the binary of functionality and morality, illustrated by Griffin, in addition to conjoining key concepts created by both Raz and Skorupski, to achieve what I'm going to call the Unification Thesis. The authors I have wrestled with thus far have all done incredible work for the subject, but I have found that they all miss some key components from each other that leaves their individual views of the concept lacking, hence my trying to bring them together in this way. Now, let's turn to the following preliminary definition of the Unification Thesis: Human Rights are universal moral rights whose active enforcement and promotion is permissible for anyone, including all states, to demand of any state (irrespective of ability to efficaciously enforce said rights), **and** which can be recognized through international law as demandable of any state, should social circumstances permit such rights to be efficaciously recognized in international law as demandable of any state over and against state sovereignty.

Human Rights must be universal in terms of their applicability and demandability. All people across all localities and jurisdictions ought to be able to demand x from a state or institution if x is a Human Right. Let's start with Raz: I believe that there is real practical merit in upholding parts of his conception. Social relativism often prevents our ability to extend Human Rights over and against non-consenting sovereign states, and stateless people, without

considerable factors and support—more than what the current manifestations of Human Rights within the United Nations will likely ever have. This is an important result of the fact that a conception that does not sufficiently protect state sovereignty will allow for the possibility of inappropriate transgressions of state sovereignty by institutions with questionably legitimate authority, such as the United Nations, who may cite insufficiently determinant justifications for their doing so. Even further, the extent to which practical implications limits Human Rights is great: not every moral right that is defensible ought to be a Human Right. That's not surprising, but it's very difficult, practically speaking, to extend to someone, over and against a sovereign entity, rights that they may lack the conceptual foundations for as a result of certain social facts. For instance, someone within a society that lacks a legal institution likely wouldn't have the tools to be able to conceptualize a Human Right to due process in a court of law. Human rights needn't be universal in this framework because, in Raz's mind, they can't be: the very literal conception of Human Rights that Raz forwards doesn't allow for discrepancy regarding social facts and Human Rights: all social facts in all societies must be conducive for a Human Right to have universal application, and such universal application does not exist in his framework because not all societies have many of the same social facts. In fact, he argues that there are likely to be very few Human Rights that can properly exist within his framework because of this. Though, importantly, he also argues that Human Rights needn't be universal, accounting for the fact that there are some societies that may have social circumstances conducive for that society to then enact into law the moral right that they themselves regard to be a Human Right, and acceptance may constitute sufficient grounds on the part of another nation to trump their sovereignty should that society fail to secure that Human Right. For example, if country x decides for itself that free and quality education is a Human Right, applicable to at least itself,

then that Human Right can be rightly demanded and secured by its own people or even people acting on behalf of country x's people. A conception of Human Rights too stooped in moral rights makes for a framework that neglects to acknowledge the importance of recognizing the social facts that influence the extent to which a given Human Right can serve as a trump for state sovereignty. After all, it really can't serve as a trump of state sovereignty in a social system that lacks the institution, let alone the concept.

There are some social circumstances that result in certain Human Rights being illogical or somehow not relevant to these specific localities. This is illustrated by our returning to a previously mentioned example: certain communities that don't feature a legal system don't have the social circumstances conducive for the Human Rights to a fair and speedy trial to be applicable to these communities; that is, there are some Human Rights that *assume certain social facts*. Absent these social facts, the universality of Human Rights' applicability/remendability its seemingly challenged.

But this is an important matter of contention we need to make clear about the nature of universality as it relates to the concept of Human Rights. The assumption of certain social facts does not mean that a given Human Right *can't* be valid or applicable to a given society. Community x, that lacks a legal system in this current point in time, may have a legal system develop over time and, as soon as it does, the Human Right to a fair and speedy trial would be consequently relative to Community x. Importantly, this assumption of social facts does not mean that the Human Right to a fair and speedy trial doesn't exist or is not at all applicable for Community x because, as we have learned from Skorupski, the degree to which something can be rightly demanded from an institution, on Human Rights grounds, is relatively static compared to the degree to which that Human Right claim may be *efficaciously enforced*. This is important

because it is here where we see the assumption of social facts conundrum play out in the following way. Community x may have an individual who has broadly conceived of some kind of system of justice and arbitration that maps on well to the legal systems we have today, and that same individual may argue that the processes by which an altercation between herself and another party were handled was inappropriate and unfair. That individual, even if the community in which they find themselves lacks a legal system, may still be entitled to demand the Human Right to a fair and speedy trial of her community.

On the flip side, the degree to which such a demand can be efficaciously enforced remains rather small, if at all possible. Enforcement manifests itself as an extension of legal/institutional integration of Human Rights. Absent that integration with the institution, or even the institution with which the Human Right would otherwise be integrated likely cannot be efficaciously enforced. This dichotomy leaves us with the following conclusion: the extent to which one may demand x, on the grounds of Human Rights, from a state/institution is *not* restricted to communities in which social facts match the required social facts assumed by a given Human Right. Hence, to return to the beginning point, Human Rights are necessarily universal in their application and demandability if it is the case that all communities/societies have the possibility of developing the social facts that at least some Human Rights assume.

I argue this because one of the main aspects of importance regarding Human Rights is its being an effective instrument by which the individual can be protected from a transgressing or somehow lacking state/institutional authority. If protection for the individual is limited to that which can be derived from that which currently exists within the institution, or that which the institution currently supports, then insufficient room is allocated for new Human Rights to be conceived. If too much power is given to the procedural outputs of existing institutions and their

current respective social facts, most of which are riddled with systemic injustices that have oppressed many, then the individual is at the mercy of the state to decide not just how Human Rights claims ought to be reinforced, but what counts as Human Rights at all. Note the Civil Rights movement of the 1960's, where Black people protested the United States government's current social facts regarding the appropriateness of segregation and lack of integration. The institutional support of discrimination wasn't such that the Human Right could be enforced at the time because of the lack of legal integration within the then-current system, but it was rightly demanded by many thousands of people who sought change and demanded justice and protection from the institution that transgressed on many individuals of certain racial groups. Without a system where one can challenge a community's actions based on certain claims to morality they may perceive, despite a society that may disagree or is somehow lacking in social facts necessary to support a given Human Right, real and tangible moral change can be born of grounding a movement in Human Rights.

Thus, the Unification thesis is characterized by two levels of Human Rights: a level through which discourse can be achieved between individuals and institutions without legal enforcement or even social facts; and another level by which discourse can be achieved between individuals and institutions with legal enforcement and social facts. These levels do not at all detract from the potential of the definition. In fact, they extend the potential of Human Rights by allowing them to not be necessarily legal in their nature; that is, they don't need to be born through law, they are only recognized through it. This supports the aforementioned argument because, as we previously noted, there is a possibility for Human Rights to remain unknown and ready to be discovered by us. If that is the case, then it stands to reason that a good conception of Human Rights must include space for Human Rights to be discoverable, first, without their being

necessarily legal when they are discovered. Even then, as we see with the two-level framework, the extent to which the legality of Human Rights becomes much more apparent and relevant is found in contexts where they must be enforced. But again, the extent to which something within international law would ever be enforced assumes legal integration with the systems, institutions, and nation-states that exist.

The first level moral uncovering of Human Rights, however, remains important as well. This brings us to another important consequence of this two level framework: conceptual primacy. This conception puts Human Rights first, and sovereignty/institutional sanctity second, in terms of their moral weight. This, in turn, allows for Human Rights to be the determining constant for where state sovereignty ought to begin and end. If it weren't the case that Human Rights came before sovereignty, then the individual would, again, be at the mercy of what the state/institutions regarded to be not just appropriate measures of enforcement regarding Human Rights, but what Human Rights are at all. The individual would have no say in the matter of uncovering Human Rights as such. My conception allows for Human Rights, an important tool of moral discourse, to be a part of an individual's moral vernacular. By this, I mean that the extent to which good things can be enacted through the use of concepts as powerful as Human Rights is not limited to international law; they are tools with which very powerful moral discourse can be engaged—ones that may even result in the eventual transition into legal institutions such as the United Nations.

But what about the merits of a single level system, where Human Rights are inherently limited in the extent to which they can be leveraged by individuals? The limits before something can even be regarded as a Human Right assume institutional support and acknowledgment from social facts—both of which don't easily allow for new Human Rights to be discussed, nor does a

single level system allow for the concept to be leveraged in ways outside of what international law regards to be Human Rights. The merit of this framework, however, is the ability to capitalize on the extent to which the subject of Human Rights enjoys a certain exclusive, and thus powerful, use specific to international arbitration. In other words, in keeping the subject out of the mouths of the layman, and in the ring of powerful institutional forces, it retains its determinacy and focus with respect to what can and can't be called a human right; it has elevated status.

Razian barriers both limit, and heighten the importance of, contexts wherein the concept of Human Rights can be rightly discussed. But it needn't have such a strong divide; the institutional manifestations of certain societal values, so understood within the context of social facts, ought not stifle the potential conversations that can take place at levels other than those which occur at the institutional level. But Raz's counter would be that such conversations can indeed occur absent the inappropriate, or at the very least premature, labeling of the discussion as one concerning Human Rights. If anything, a more appropriate labeling would be a conversation that is simply 'morally concerned' if it were the case that both social facts, in addition to the legal integration of what would otherwise be a Human Right, weren't present.

Granted, these institutions and sovereignty ought to be protected too; I don't mean to suggest that anyone and everyone can and should declare that which they regard to be a Human Right as one, and demand action on the part of their respective nations or others in light of them thinking x to be a Human Right. What I do mean to suggest, however, is that because the institutions that we historically find ourselves in are the same antagonists that often act as the perpetrators of Human Rights violations, some power must be left to the individual. The power to be able to use the term cannot be solely left to the individual, nor can it be solely left to the

institution: it is not a mere product of international arbitration, and what can result from such institutions, that determines the course of Human Rights. As we learn from Griffin, a purely functionalist conception of Human Rights is insufficient. There is a necessary requirement for the concept to give power to the individual, lest we allow the institutional powers that be to decide, at all levels, what is important enough to be regarded as Human Rights. But maybe I'm going too far?

Does this then leave my argument to be a semantic one? Am I too concerned about the extent to which various levels of Human Rights enables us to simply use the words 'Human Right' in more contexts? Is my doing so even worthwhile, considering the previously mentioned response that Raz would likely offer (that limiting the extent to which one can discuss the concept to certain select contexts heightens its importance and makes it more determinate)? The question of whether the concept of Human Rights can easily exist at different levels is an easy one: sure it *can.* Yet, I think the question of whether or not we *should* agree with implementing my proposed two-level framework is the more important one. Raz's counter is one that asserts a kind of argument that extends back to those with which we engaged earlier in this work about the potential damages of unfettered conversation. While not exactly the same kind of situation here, the argument at hand is fairly similar: do the consequences of a more liberal use of Human Rights, and the consequent detraction it has in terms of determinacy, outweigh the potential benefits of a more restrictive framework that Raz proposes?

Human Rights, as a concept understood within the context of the United Nations, is limited by the legitimacy of the United Nations being questionable AND Human Rights themselves are also of questionable legitimacy because of their lacking determinant content. The forces of that institution of questionable legitimacy are limited to the extent to which state

sovereignty concedes shared right to rule. Hence, Human Rights, through Raz's single level framework, become limited in totality. By this I mean that Human Rights, as a concept, are entirely confined within this indeterminant and questionably legitimate sphere of international law. The goods achieved through Human Rights, in this case, are rather small on account of the fact that they begin and end with the extent to which institutions find them legitimate and also worthy of actually submitting/committing to. This sphere takes control out of the hands of the individual and reserves the concept's use not for the layman but for institutions, as an extension of their power to leverage their self-interests in the international arena. As a result, the crucial purpose of Human Rights, as a tool of self-defense to be invoked by individuals against transgressing states/institutions, becomes irrelevant.

I propose that Human Rights operating within a two level framework, the first being the kind that exists within discourse, where one can declare the moral force of Human Rights in a way that allows the concept to act as a living entity capable of inciting change powerful enough to augment and enhance the social institutions that so often fail us; and the other that exists at the institutional level that both accounts for socially relative circumstances in addition to efficacious enforcement of Human Rights; this results in more, not less, determinacy. If it is the case that the subject of Human Rights can actually extend beyond the sphere of international institutions of questionable legitimacy, wherein we find inconsistent and self-interested rather than intrinsic reasons to enforce Human Rights or not, AND if those spheres into which Human Rights can extend are less questionably legitimate, what results? If that sphere into which Human Rights can be extended is one owned and ruled by individuals that can discuss and wrestle with the concept and its limitations freely, it seems to me like this can breathe life into the subject at the cost of what is already an institution of questionable legitimacy.

The moral appropriateness of the public domain to which I refer raises questions about what kinds of people would overstep their boundaries and attempt to commit wrongful actions on the grounds of what they call *their* Human Rights. But even then, the extent to which first level discussions of Human Rights translate into action, which is to say legal integration and enforcement, is relatively limited. The first level sphere is meant to, again, breathe life into the concept as an instrument of declaration against what the individual perceives to be a morally antagonistic state or institution transgressing on their humanity. Human Rights are a powerful moral demand to be utilized by individuals, as Human Rights claims must be taken seriously, for the force of their weight comes not from their institutional enforcement, as we have seen, but from the people who rally behind their philosophical content. The core of the concept is such that any institution that doesn't take them seriously becomes a public danger to at least some people within the bounds of its jurisdiction. As history would inform us, some enemies, especially if those enemies are minority populations within a community, are no issue for an antagonist state. However, as history would also inform us, many of what we refer to be Human Rights today are violated by nation-states as they oppress and subvert minority populations on racial, ethnic, gender, religious, and other grounds. The exact definition of oppression won't be taken up here. Suffice it to say that a two-level framework that encapsulates the concept of Human Rights most accounts for the grey area that exists between Skorupski and Raz and also best legitimizes the concept as an individual's, rather than a state's legal means, to defend and protect core and universally applicable moral values.