New directions in theorizing human rights

Eileen Hunt Botting
University of Notre Dame, USA

Introduction

This symposium gathers together into a philosophical conversation some of the cutting-edge trends in human rights theory. Each of us engages the question of the contested definition of human rights, offering new political, philosophical, and narrative approaches to conceptualizing the basis, content, and scope of the rights of humans. Our analyses break down some of the typical binaries that have governed human rights theory since Jeremy Bentham (2002 [1791–1795]) declared the concept of natural rights “nonsense on stilts” (2002: 317). Following a recent trend in human rights theory (Douzinas, 2007: 9–10; Gilabert, 2011; Montero, 2014; Valentini, 2012), the essays push past the long-standing philosophical divide between “naturalistic” conceptions of rights (or moral rights), on one hand, and “juridical rights” (or legal rights), on the other (Beitz, 2009: 23–27, 49).

Naturalistic conceptions of rights (or what John Stuart Mill called “moral rights”) are those rights of humans that obtain independently of positive law insofar as they are rationally justified by way of a conception of the nature of the human being (Mill, 1963–1991 [1861]: 242, 247). Such naturalistic conceptions of rights may or may not rely on a conception of the state of nature or a pre-political state of humanity (Beitz, 2009: 49). They also may or may not rely on deep and divisive moral, metaphysical, supernatural, or religious ideas. For example, Mill’s liberal utilitarian conception of moral rights was grounded on a conception of the human being that was explicitly secular, empirically grounded, and non-metaphysical (Botting, in press). By contrast, juridical rights are those rights of humans that are defined, articulated, and changed within the tiers of international and national legal systems. Rather than accept the limits set by this more than 200-year-old philosophical division between naturalistic/moral and juridical/legal rights, we each treat the practical possibility of defining, justifying, and defending concepts of human rights both within the context of international and national law and without them. At the same time, we each retain a sense of the moral power of human rights discourse, struggles, and argumentation to construct in law and culture a set of contestable, revisable, yet translatable normative standards that resonate with people’s needs and interests.
around the globe and can transform their lives and political institutions for the better (Douzinas, 2007: 10; Grewal, 1998; Merry, 2006).

The symposium opens with essays by Regina Kreide and Brooke Ackerly. They explore newer, broader definitions of political rights versus older, narrower conceptions of rights—both moral and juridical. Each of their definitions of political rights begins within the framework of the international legal consensus on human rights that has been built since the 1948 Universal Declaration, rather than appealing to deep and divisive moral, metaphysical, natural, or supernatural foundations for the concept of human rights. Yet, Kreide and Ackerly move beyond a strictly juridical (or purely legal, constitutional, or state-based) understanding of human rights, too. Instead, they treat the ongoing historical struggles of people for rights as the broader cultural, social, and political context within which ideas of human rights are made and remade in law and other formal political practices and institutions of states worldwide.

Kreide identifies three further features of political conceptions of human rights: (1) human rights are placeholders for the public thematization of oppression, humiliation, marginalization, and despotism; (2) human rights raise claims to a rule system that permits access to the freedoms and resources formulated by human rights; and (3) the obligations imposed by human rights are not duties of assistance but institutional duties to realize the conditions for exercising human rights. Kreide follows Thomas Pogge (2010) in contending that the state must remain a central feature of human rights theory because it is the state that either violates or tolerates the violation of human rights (as distinct from civil or constitutional rights, which may be violated by individuals; 2010: 59–63). On the other hand, Kreide also joins Pablo Gilabert (2011) in underscoring the creative, moral force of rights claims, as enacted by and within people’s struggles for justice. As she puts it,

The normativity of human rights draws its sustenance from a non-legal element, namely, the moral arguments in terms of which human rights can be justified, arguments for taking universalizable interests and needs into consideration in political discourse—for example, not to be exploited or oppressed and to be able to live a free and self-determined life. (Kreide, this volume)

Situating herself within the Frankfurt school of critical political theory, she insists, however, that such moral arguments for human rights “must prove themselves in public discourse” in order to have legitimacy and advance justice (Benhabib, 2006; Kreide, this volume).

Ackerly places a special emphasis on the importance of grassroots activism, group advocacy, and social networking for enabling people’s enjoyment of human rights. According to this grounded yet normative framework, human rights should no longer be understood as a purely formal political issue that is primarily shaped by heads of state, UN officials, judges, legislators, diplomats, and other representatives of national and international governmental bodies. Rather, human rights must be articulated from the ground up—beginning with the grassroots political perspective of the people who stand to benefit the most from their provision and instantiation in society, culture, law, and policy. In contrast to the political conception of human rights advanced by John Rawls in
The Law of Peoples (1999), Ackerly does not proceed from a hypothetical international consensus on rights or any prior justification of rights distinct from actual political practice. Like Kreide, she also rejects the abstract approach of natural rights theory because it idealizes the rights-bearing and rights-claiming agent as an individual separate from the broader political struggles that give meaning to his or her activism in practice. In this vein, Ackerly critically assesses the 2013 motivational film Girl Rising from a rooted feminist perspective in order to show why human rights should be understood as grounded upon the ongoing political struggles of groups of people, rather than the supererogatory examples of individuals. As she quips, the film would have been more aptly titled “Girls Rising” because there is no lone individual who can advance the cause of human rights on her own. Through this case study, she provides an example of how a critical theory of human rights is not a theory of entitlements, but rather a theory of what we and others are able to do in the world and for each other. It is a theory of what we need to be for each other, of what we need to do to support and build our processes and relations so that they tie us together as we work for our rights and the rights of others. (Ackerly, this volume)

Ackerly thus broadens and deepens the political aspect of human rights theory far beyond the domains of the law or the state, by rooting her approach in participant observation of the networks and communities that engage the questions of what human rights are and should be for all of us.

At the center of the symposium is an essay that provides a new philosophical frame for justifying the human rights of the disabled. While remaining agnostic on the question of the justification of moral rights, Nancy Hirschmann uncovers the current limitations of national (focusing on the United States) and international legal definitions of the rights of the disabled. Like Kreide and Ackerly, she grounds her theory of the human rights of the disabled within and upon the actual historical struggles of the disabled for recognition and respect of their different human abilities—first and foremost, their diverse capacities for the experience of freedom. But she challenges the “social rights” orientation of disability rights, arguing that this framework ironically undercuts the rights claims of disabled persons by situating them within the concept of justice rather than freedom. Without dismissing the value of justice-based approaches to justifying rights altogether, such as by Rawls (1971), she points out the problems of such an approach and argues that a freedom-oriented approach is better suited to conceptualize human rights in a truly inclusive way that recognizes and respects the disabled as rights-bearers in the first place (1971: 52). By applying such a freedom framework, a human rights theorist opens up the moral view of the disabled as human agents with rich and distinctive capabilities for freedom. From this perspective, the disabled require and deserve rights guaranteed by international and national law because the actualization of their diverse capacities for freedom depends on this comprehensive approach to social justice. For example, the freedom framework allows us to see even an extremely disabled infant as deserving of rights that would, according to the justice framework of Peter Singer, be deemed too expensive for the state to distribute to her (Kuhse and Singer, 1985). Although liberal thinkers such as Rawls (1971), James Griffin (2008), and Laura Valentini (2012) have made the human capacity for freedom fundamental to their...
justifications of equal rights, the freedom framework for theorizing human rights should not be understood as solely a liberal idea. Alongside the other essayists, Hirschmann bridges the supposed divisions between liberal theory and critical theory—in her case, by applying the insights of critical disability studies to contribute to the theory of human rights.

The final two essays in the symposium explore the practical ethical question of how rights can be claimed for the powerless, when law and culture fail to afford them (or their rights) protection. They build on Amartya Sen’s (2000) conception of an “alleged” right—or a right that has been claimed before it has been protected by law or disseminated in culture (2000: 497). Eileen Hunt Botting and Marina Calloni ask how such alleged rights can be meaningfully demanded by and for historically oppressed groups such as women and children.

The penultimate essay responds to Alasdair MacIntyre’s (1984) skeptical claim that human rights are like “witches” and “unicorns”—as in, they don’t exist, and thus cannot be subject to abstract rational justification (1984: 68–71). Botting puts aside the issue of abstract rational justification of human rights and its methods, however, and instead focuses on the more urgent practical ethical question of how human rights might be meaningfully alleged when they do not yet exist within society, culture, law, or policy. Borrowing from MacIntyre’s narrative theory of ethics to undermine his skeptical view of human rights, she contends that human rights—whether understood as moral rights (like Mill) or as political rights (like Kreide, Ackerly, or Hirschmann)—can be coherently alleged through the same kind of narrative framework that MacIntyre argued was essential to any intelligible ethical system of thought. In particular, imaginative narrative frameworks—such as those found in stories and films—have been crucial for the enterprise of demanding human rights for the powerless, especially girls and women. Putting at its center a feminist interpretation of the classic American film, The Wizard of Oz (1939), the essay playfully, yet ultimately seriously, challenges MacIntyre’s dismissal of rights as “witches and unicorns” by showing how allegations of women’s human rights derive much of their power for fighting human wrongs from their historically (although not essentially) imaginative character as well as their deeper narrative structure. While agreeing with Ackerly that human rights are not magic, but rather emerge from the struggles of politics, Botting’s analysis of The Wizard of Oz shows how the “magic” of the imagination—especially in creating parallel universes, alternate realities, and subversive stories—plays a crucial role in the formulation of “new rights” for the marginalized people and other sentient beings (such as Toto and the Scarecrow) who need them the most (Honig, 2009: 40–64). Botting also defends the validity of emotional bases for allegations of human rights. Contra MacIntyre, she challenges the notion that emotive claims for rights are necessarily groundless and incoherent. She rather highlights the ways that affect and reason can work in tandem to bring compelling conceptions of “new rights” out of the stories of the imagination and into the narratives of culture and law (Honig, 2009: 40–64; Rorty, 2010 [1993]; Sen, 2009: 392).

The symposium concludes by grappling with the problem of how narratives can both serve and disserve the marginalized, through close examination of the case of domestic violence against children. Whether they are allegorical philosophical arguments as found in Thomas Hobbes’ De Cive (1642) or fairy tales by the nineteenth-century Brothers
Grimm, narratives have often used the psychology of fear to encourage unquestioned obedience by the powerless (especially children) toward the powerful (especially adults). Building upon both critical theory and feminist theory, Calloni exposes how philosophies of human rights have often denied or ignored the exploitation and harm of human life in the domestic or private realm precisely because they have been focused on the justification of rights in the formally political or public domain. However, human rights theories—as well as the imaginative stories that psychologically and culturally support their implementation—can be rewritten or retold in a truly egalitarian way. Much like the narratives of popular struggles for rights that have motivated progressive or reform-oriented politics of different kinds over the generations, human rights theory allows for new philosophical and literary narratives to be composed and shared that empower children and adults to see the absolute necessity of recognizing, respecting, and institutionalizing the rights of people across the life span. In revealing the gender and age-based biases that shape the division between the public and private spheres in theory and practice, Calloni’s argument subverts several views common in contemporary human rights theory. First, she undermines the view that domestic violence is not a “first-order” human rights violation for which the state is ultimately responsible, by showing how the public/private split masks the political basis of such violence often committed by individuals against other individuals (Montero, 2014: 146). Second, she undercuts the view that children’s, especially infants’, rights are not human rights by reminding us that domestic violence is perpetrated against not only women but also very young children (Griffin, 2008: 83–95). As with Martha Nussbaum and Rosalind Dixon (2012), Calloni places children’s rights on the agenda for human rights theory as the “fourth frontier of justice” (after the rights of the disabled, rights across national boundaries, and rights of nonhuman animals) that demands further exploration (2012: 493).

Calloni picks up another theme from Botting’s essay—namely, the role of the emotions in the narratives that construct human rights and the persons entitled to them. As with her broader discussion of narratives, Calloni focuses on the dark side of the emotions, especially the role of fear in the literary and philosophical stories that have imposed stark divisions between the domestic sphere and the public sphere, children and adults, individuals and the sovereign state, and the powerless and the powerful in Western political thought. Akin to Douzinas and Derrida, as well as the later Foucault, Calloni shows how these binary oppositions can and should be broken down such that new narratives of human rights may be constructed in a way that genuinely encompass the needs and interests of the whole of humanity, not solely the privileged and powerful among us (Golder, 2010; Moyn, 2014: 146). As Douzinas (2007) points out, human rights—as written in law, shared in society, created in culture, reasoned in philosophy, or demanded in activism—are constructed by humans but in turn construct who is (and is not) human (2007: 57). As with Hirschmann’s freedom-centered defense of the human rights of the disabled infant and Ackerly’s grounded feminist defense of the human rights of girls to education, Calloni reminds us that infants and other children need to be included in the definition of the human rights–bearing subject, in order for the conceptual narratives that inform and govern human rights practices and laws to become both coherent and just.

Thus, each of the contributors to this symposium found their arguments upon the moral importance of understanding the scope of human rights as applying to each and
every member of humanity, beginning with children. At the same time, they carve broader and deeper political and cultural bases for conceptualizing the content and operations of the rights of humanity. In accomplishing this dual task, they strike out new directions for human rights theory, particularly in rethinking (1) the relation between moral and political rights, (2) the depth and breadth of the political basis for rights, (3) the justification of new human rights (especially for women, children, and the disabled), and (4) the roles of narrative and emotion in alleging new human rights and constructing who is entitled to them.

References


Author biography

Eileen Hunt Botting is an Associate Professor of Political Science at the University of Notre Dame. She is the author and editor of several books, including Wollstonecraft, Mill, and Women’s Human Rights (forthcoming, Yale University Press).