



POVERTY, JUSTICE, AND THE LAW

New Essays on
Needs, Rights, and
Obligations

Edited by

George R. Lucas, Jr.

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POVERTY, JUSTICE, AND THE LAW

EDITOR'S PREFACE

In the wake of renewed widespread interest in human rights questions in the aftermath of the 1975 Helsinki Accords, no single issue has emerged with more urgency or controversy than that of the legal and moral status of human *needs*. Whether one talks about social or economic rights or welfare rights, the fundamental question is this: In what sense, if at all, do true human needs constitute some sort of basic set of claims fully equivalent to other, more traditional claim-rights and liberty-rights? Is the very notion of human existence itself, along with the civil liberties to which traditional rights theory has always given precedence, based upon a prior understanding of the minimal requisite conditions for such existence, as well as for agency and liberty? If so, do not these requisite conditions constitute a peculiar, urgent, and justifiable claim of sorts by impoverished and marginal individuals and communities upon the goods, services, and other basic human resources invested in societies and states generally?

The debate over this dimension of human rights—the question, that is, of rights to well-being or “welfare”—has shown itself to be every bit as morally troubling and politically destabilizing as the questions about superpower military strategy and nuclear disarmament. Nevertheless, Dr. Philip Alston of the United Nations High Commission on Human Rights in Geneva reports a growing cynicism among international legal scholars and diplomats regarding these fundamental questions of human rights.¹ Welfare rights especially have come to be regarded as little more than rhetorical claims founded upon private interests—and hence lacking in broader meaning, merit, and enforceability.

Much of the cynicism, Alston claims, stems from a problematic isolation of practicing international lawyers and statesmen engaged in the practical and political issues of human rights enforcement and reform, on the one hand, and philosophers engaged in research on the foundations of human rights or political scientists and sociologists examining the significance and impact of welfare rights programs in specified contexts, on the other. The work of these latter scholars is frequently viewed by the former groups as abstruse, abstract, and largely irrelevant to the requirements of international law and statecraft. According to this prominent human rights lawyer, the resultant impasse can be remedied only through serious *interdisciplinary* investigation of the most basic theoretical and applied questions surrounding the welfare rights issue.

This volume of essays intends in part to answer that perceived need for significant interdisciplinary investigation of the problems of welfare rights.

The course of individual entries moves from foundational questions in theoretical and historical-textual studies, through considerations of the normative understanding of welfare rights in contemporary jurisprudence, to a host of practical problems in the specific identification, justification, application, and enforcement of welfare rights.

Alan Gewirth argues that needs, claims, and the protection of liberties are not fundamentally distinguishable: such basic human rights can be shown to follow logically from the generic requirements of consistency in action which hold for all rational agents equally, simply by virtue of their status as autonomous agents. By contrast, **Onora O'Neill** charges that "rights language" itself has become part of the contemporary dilemma of human welfare: "rights talk" emphasizes individuality, passivity, and rhetorical demands to "receive" goods and services at the expense of emphasizing a more fundamental network of duties and obligations which constitutes the irreducible social matrix of all action and responsibility. Obligations are more fundamental than rights and frequently mandate general duties of beneficence to unspecified others which cannot be classified as superogatory (and hence optional) charity or philanthropy, even in instances where no discernible or justifiable "claims" may be lodged by the proposed needy and vulnerable recipients of beneficence.

The theoretical approaches to human rights issues adopted by both Gewirth and O'Neill illustrate the recent revitalization and ascendancy of rationalist, universalist, and formalist reasoning in moral and legal theory over the more established traditions of utilitarian and consequentialist analysis. This "rationalist" approach to moral and legal reasoning is, of course, preeminent in the thought of the German Enlightenment philosopher Immanuel Kant, and it is noteworthy that contemporary moral and legal theorizing by leading scholars such as Gewirth, Alan Donagan, and John Rawls reflects this renewed interest in Kantian social thought. In this context, **Mary Gregor's** careful study of the treatment of welfare legislation in Kant's *Rechtslehre* reveals a significant historical source of contemporary Western (and especially continental European) thought about community responsibilities for individual well-being.

Robert E. Rodes, Jr., a historian and professor of law, explores another, more recent source for such thinking which currently holds sway in many developing countries: the confluence of Marxism and Christian social teaching known as liberation theology. Rodes attempts to explore the ramifications for international legal and political thought of this remarkably vigorous, highly original, and (as yet) poorly understood social trend which is

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proving influential and inspirational among a sizeable percentage of the world's poorest populations.

From these foundational approaches to theoretical and historical-textual issues in the philosophy of law, we turn to the vigorous interpretation of welfare rights in contemporary jurisprudence. **James W. Nickel** examines some of the prevailing fallacies of legal and moral reasoning which stem from the presumed opposition between private philanthropy and state-administered welfare. Absent from the widespread public debate over this prevalent but specious dichotomy are considerations of the ruinous economic burdens imposed on *families* by the extensive requirements of individual members who suffer lengthy illness or disability, or are unemployed, or who require prolonged special care in old age. But it is *these familial* burdens, with which private philanthropy seldom deals, that constitute the driving force behind legislative trends toward state-supported welfare. **Rudolph V. Vanterpool** documents the sense in which such special claims, once established as rights under prevailing law, have come to be regarded as a special type of "property" which cannot be "confiscated" (in this case, revoked or cancelled) by the state without full considerations of due process under law.

The remaining five essays explore specific problems in the justification, establishment, and protection of welfare rights in a variety of specific contexts. The concerns here embrace the growing "feminization" of poverty, the perennial problems of equality and rights to well-being encountered by minorities, conflicts over health care delivery, the need to work versus the evident need to guarantee the occupational safety of the worker, and the particular dilemmas of need and vulnerability among migrant laborers.

Collectively, these essays focus the attention of law, philosophy, and several related disciplines on the problems which arise when communities and nation-states begin to assess their economic and political *abilities*, as well as their moral and legal *responsibilities*, to care compassionately for the most vulnerable of their members. How we can continue to care for those in need who directly and rightfully lay claim to our compassion, while simultaneously mustering sufficient resources and collective will to care for others in need *beyond* this pale of immediacy, remains one of the great moral and legal dramas of our time.

George R. Lucas, Jr.

NOTE

1. Alston, currently on leave from his United Nations post to teach at Harvard Law School, delivered the keynote address at an interdisciplinary law and philosophy symposium on welfare rights at Santa Clara University in February 1985. The present collection of essays was derived from that symposium.

ECONOMIC RIGHTS

Alan Gewirth

The economic sphere raises many controversial questions about rights. Most obviously, there is the question of who has rights to what economic goods, i.e., to wealth, income, and the material objects and services that these can buy. Closely related to this question are questions about the connection between rights to economic goods and to work: such questions as whether anyone has a right to the work or employment by which economic goods can be obtained; whether anyone has a right to receive such goods without working for them; and whether anyone has a right to require that persons who are given money by welfare or related processes must do work to compensate for what they receive. Subsumed under these questions are further questions about rights in the workplace, including whether or to what extent persons have rights to control their conditions of work, and how these are related to the rights of owners and entrepreneurs to close or move industrial plants, thereby throwing thousands of persons out of work.

Undergirding all these questions are questions about the very relevance of the concept of rights to the economic sphere and indeed to the whole field of morality in general. For, concomitantly with the enthusiastic development of the idea of human rights in the modern world, there have been currents, going back at least to Burke, Bentham, and Marx, which hold that moral rights language is senseless, that it is a sinister cover for egoism, anarchy, or vested interests, and that the whole recent proliferation of claims to rights on behalf of various submerged groups in our society is conceptually confused or morally illegitimate or both.

I cannot, of course, deal with all these questions here. Instead, I shall try to establish two main theses that are quite basic to the whole subject of economic rights. The first thesis is that it can be shown by a rather rigorous line of rational argument that the concept of rights, and especially of human rights, is central and, indeed, indispensable to the whole field of morality, including the normative questions about the economic sphere to which I referred before. The second main thesis is that human rights include certain basic aspects of work and welfare, and that these contents of human rights can also be proved or justified by a rational line of argument that is continuous with that which establishes the general indispensability of rights for morality.

I

Rights and Action

My first main thesis, then, is that the concept of rights, and especially of human rights, is central and, indeed, indispensable to the whole field of morality. This indispensability can be shown through the connection of both morality and rights with *action*. Specifically, I shall show that morality logically involves the concept of action and that action, in turn, logically involves the concept of rights.

The connection of morality with action is well known. For all moral and other practical precepts, amid their enormous variety, are concerned directly or indirectly to tell persons how they ought to act, especially toward one another. Hence, the general context of all morality is action.

The connection of action with rights is, in certain important respects, less well known. It is indeed clear that actions are among the main objects of rights, in that moral as well as legal rights include rights to act in certain specific ways, for example, to move about freely, to express opinions, to join in association with other persons, and so forth. But what is less well known is that the concept of rights is crucial to all action, because the most fundamental rights of persons or, as they are also called, human rights, have as their objects the necessary conditions of action and successful action in general.

What makes human rights so important is that without them persons either cannot act at all or cannot act with general chances of success in achieving their purposes. From this it follows that if these rights are withheld or denied, then either persons are directly deprived of the conditions they need to have in order to be agents and successful agents in general, or else their possession of these conditions is rendered precarious and unstable.

Let me put this point in a related way. Human rights are justified requirements that all persons have certain important goods as their due, as what they are entitled to, as what they can justifiably demand that other persons respect either by noninterference or, in certain circumstances, by positive assistance. And the contents of these goods are the necessary conditions of action and successful action in general. Thus, what human rights require is that these necessary goods not be removed or interfered with by any other persons or groups, and also, in certain circumstances, that these necessary goods be provided for all persons who cannot obtain them by their own efforts.

Hence, human rights are normative property in goods that every person

must have either in order to be an agent at all or in order to have general chances of success in fulfilling the purposes for which he or she acts. It is for this reason that human rights are uniquely and centrally important among moral concepts. For no morality, together with the goods, virtues, duties, and rules emphasized in diverse moralities, is possible without the necessary goods of action and successful action which are the objects of human rights.

There may, indeed, be other moral approaches to the necessary conditions of action and successful action that do not directly proceed in terms of rights. Utilitarianism is the most famous example of such an alternative approach. But in utilitarianism the central focus is not on the distributive question of what is due or owed to each person for his own sake, including especially each person's needs of agency. Instead, the basic moral criterion of utilitarianism is aggregative: actions and policies are morally right insofar, and only insofar, as they serve to maximize utility overall. Hence, in utilitarianism, individual rights, if accepted at all, are ancillary to and dependent on the attainment of the greatest whole of collective goods. But since such attainment may require the overriding of the individual's fulfillment of his own agency-needs, the rights of individuals are rendered precarious by the utilitarian criterion. Hence, the approach to morality in terms of the concept of human rights is indispensable if fulfillment of each person's needs of action, which are the central concern of morality, is to be the chief focus and primary criterion of moral rightness.

What I have said so far is perhaps already sufficient to establish my first main thesis, that the concept of rights, and especially of human rights, is central and indeed indispensable to the whole field of morality. But questions may still be raised on two interrelated points: first, whether human rights do indeed have as their objects the necessary conditions of action and successful action in general; and second, whether such rights exist, i.e., whether all humans do indeed have rights to these necessary conditions.

I have dealt with these two questions in considerable detail elsewhere.¹ Here I want briefly to present what I think is the only kind of argument that can answer the questions successfully. This argument is *dialectical*, in that it involves showing that every agent logically must hold or accept that he or she and all other actual or prospective agents have rights to the necessary conditions of action and successful action in general. The argument for human rights, then, must in this way be agent-relative, i.e., relative to what every agent logically must hold or accept.

This relativity to agents and their claims does not, however, remove the stringency either of the rights themselves or of the argument for their

existence. For since agency is the proximate general context of all morality and indeed of all practice, and since all humans are actual, prospective, or potential agents, whatever is necessarily justified within the context of agency is also necessary for morality, and what logically must be accepted by every agent is necessarily justified within the context of agency. Because of this actional context, the moral conclusion that all humans equally have rights to the necessary conditions of action can then be stated assertorically as well as dialectically.

The Dialectical Argument for Human Rights

I shall now give a brief outline of how this dialectical argument for rights on the part of every agent proceeds. To begin with, we must be aware of what are the necessary conditions of action and successful action in general. For this purpose, it must be kept in mind that the sense of "action" that is relevant here is that which is the general object of all moral and other practical precepts. Taken in this sense, actions have two generic features and necessary conditions, namely, *freedom* and *well-being*. Freedom is the procedural generic feature of action; it consists in controlling one's behavior by one's unforced choice while having knowledge of relevant circumstances. Well-being as here understood is the substantive generic feature of action; it consists in having the purpose-related general abilities and conditions that are required either for being able to act at all or for having general chances of success in achieving the purposes for which one acts. The components of such well-being thus fall into a hierarchy of goods, ranging from life and physical integrity to self-esteem and education.

I turn now to the proof of the dialectical proposition stated above, namely, that every agent logically must hold or accept that he or she and all other actual or prospective agents have rights to freedom and well-being. The argument is in two main parts. In the first part, I argue that every agent logically must hold or accept that *he* has rights to the necessary conditions of action and successful action in general. In the second part, I argue that each agent logically must admit that *all other agents* also have the same rights he claims for himself, so that in this way the existence of certain universal moral rights, and with them certain criteria of economic justice, must be accepted within the whole context of action or practice.

The first part of the argument proceeds as follows. Since freedom and well-being are the necessary conditions of action and successful action in general, every agent must regard these conditions as necessary goods for himself, since without them he would not be able to act for any of his

purposes, either at all or with general chances of success. Hence, every agent has to accept (1) "I must have freedom and well-being."

This 'must' is practical-prescriptive in that it signifies the agent's advocacy of his having the necessary goods of action, which he needs in order to act and to act successfully in general. Now, by virtue of accepting (1), every agent has to accept (2) "I have rights to freedom and well-being." For, if he rejects (2), then, because of the correlativity of claim-rights and strict 'oughts,' he also has to reject (3) "All other persons ought at least to refrain from removing or interfering with my freedom and well-being." By rejecting (3), he has to accept (4) "Other persons may (i.e., It is permissible that other persons) remove or interfere with my freedom and well-being." And by accepting (4), he also has to accept (5) "I may not (i.e., It is permissible that I not) have freedom and well-being."

But (5) contradicts (1). Since every agent must accept (1), he must reject (5). And since (5) follows from the denial of (2), every agent must reject that denial, so that he must accept (2) "I have rights to freedom and well-being." I shall call them *generic rights* because they are rights to have the generic features of action and successful action characterize one's behavior.

The first main part of the argument has thus established that all action is necessarily connected with the concept of rights. For every agent logically must hold or accept that he has rights to the necessary conditions of action and successful action in general. Many questions may, of course, be raised about this argument. I have dealt with these questions elsewhere,² and the interested reader is invited to consult these other sources for additional analysis of the issues.

I turn now to the second part of the argument. On the basis of his having to accept that he has the generic rights, every agent also logically must accept that all other actual or prospective agents have these rights equally with his own. This generalization is an application of the logical principle of universalizability: that if some predicate P belongs to some subject S because S has a certain quality Q (where the 'because' is that of sufficient condition), then P logically must belong to all other subjects S_1 to S_n that also have the quality Q. Thus, if any agent holds that he has the generic rights because he is a prospective purposive agent, then he also logically must hold that every prospective purposive agent has the generic rights.

Now every agent logically has to accept (6) "I have rights to freedom and well-being because I am a prospective purposive agent." For suppose some agent A were to object that the necessary and sufficient justifying condition of his having the generic rights is his having some property R that is more