



RECONSTRUCTING HUMAN RIGHTS

A PRAGMATIST AND PLURALIST INQUIRY IN GLOBAL ETHICS

JOE HOOVER



OXFORD

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For mom and dad, who always encouraged my curiosity

Preface

Intellectual works are creative works, though we rarely acknowledge this fact. As creative works they are also biographical, which again we try to hide. Why do we hesitate to bring this human element into the open? Why do we articulate our ideas with the trappings of authority that is both surer and more impersonal than it really is? This is not the place to answer these questions at length, but I feel compelled to say that I worry that appearing dispassionate, impersonal, and authoritative is ethically dangerous.

Any of us who think and write about politics today has chosen an urgent subject, as we live—as perhaps all humans have—in difficult times. To study politics, to reflect on what it means to be good, to articulate how we should respond to injustice: all of these tasks are personal and vital, they are tasks only taken on by human beings, passionately concerned with the state of their world. This work is not dispassionate in its attempt to know something of human rights and what they might contribute to our shared lives, rather it is a work of desire—the desire to find some sense in the ambiguity of our confusing human rights world. My reasons for taking on this study—partial, emotional, and personal though they are—matter to the reader wanting to follow my argument. I have always been struck by the ambiguity of human rights. Over a decade ago, I marched in anti-war demonstrations as the United States prepared to go to war in Iraq in 2003, in no small measure because the idea of an aggressive war justified in human rights terms, especially one carried out by a neo-conservative administration unapologetic in its imperial ambitions, was repugnant. Yet, I am stirred by an appeal to our common humanity, to see the world from the perspective of others, to extend consideration and love to others regardless of their social or political identity or status. It seems to me among the best impulses we human beings have and worthy of cultivation.

Human rights are imperialistic as well as emancipatory, and my feelings about them are ambivalent but strong. This sense of contradiction and tension has profoundly shaped the work here. For those who do not share this emotional and intuitive sense, much of what follows may fail to resonate. I cannot say that I am right and they are wrong, but rather that we are seeing the world differently.

Along with being driven by a desire to make sense of my own ambivalence about human rights, I am also guided by a pragmatic and pluralist sensibility. I was quite far along in my education before I had words for my disposition but I have long known that I do not want my questions or, especially, my answers to dominate the thoughts of others. Where I have made sense of the

world I am fairly sure that the sense I have made is dependent on my perspective and experience, and though I hope it may be of interest and use to others, I am very comfortable knowing that what I know will never be more than a truth with a very small 't'. I am a pluralist and a pragmatist by orientation, and while I hope the arguments presented here make the position defensible and attractive, I know that they are at root a feature of the way I feel about the world. This work is a reflection of my sense of reality.

This work, then, is also my attempt to explain human rights to myself, and to share that explanation with a wider audience—and while in the writing of this explanation one finds the authority of the narrative voice, it is not the authority of the detached expert or the enlightened prophet, but only the enactment of a particular perspective, putting my understanding of human rights to the test by rehearsing it, first with myself and then with you, the reader. And what do I hope I to explain to myself and to you?

Human rights are ambiguous but ubiquitous; they have become one of the primary ways we understand, talk about, and do politics. At their best human rights provide an ethical perspective that includes everyone and challenges existing social conditions in the name of larger and more profound justice. At their worst they are a universalizing standard that allows the powerful to justify their privilege and justify a great many of their crimes. Human rights do the work they do by mobilizing our 'humanity', which is an identity that is formally inclusive but empty. What it means to be human is never a given, it is constructed and contested, which means the inclusiveness of humanity is sacrificed when it is specified. This is the key to the ambiguous consequences of human rights. When we appeal to humanity we upset the existing regime of protections and privileges, justifying calls for political transformations. Yet, when we take the standard of humanity as universal and final, rather than partial and contested, we create an ethical logic of domination as the bearers of the standard of humanity make themselves the authors and agents of justice. It is the forgetting of this contestability that imperils the radical potential of human rights. In what follows I try to think about human rights without this forgetting, to think of them as a mode of political contestation in which the question of humanity is never closed.

My most important thought about human rights is that they have profound democratic potential. Human rights enable new challenges to the basis of legitimate authority and community belonging, by providing a grounds for appeal outside of the existing code of rights. When we claim a human right we are making a claim that exceeds the given, or at least we can—as human rights claims can also be appeals to established standards. In appealing to standards beyond existing convention, we are able to challenge the basic principles of political life, including what is required of authority, as well as who belongs and who is excluded. Given the work that human rights can do, I see them as powerful democratizing tools that can serve the ends of

increasing the power each of us has over our own lives, and ensuring greater equality by calling on us to ensure each of us counts in the great social drama that is our collective life. This democratizing aspect of human rights also means that I think human rights are rightly and unavoidably plural. The reality of human differences means we will make very different things with human rights, and a commitment to a democratic ethos entails a celebration of that plurality of human rights.

Aside from a record of my journey to these conclusions, this work also traces out the development of an approach. I understand human rights as I do because I have thought through particular traditions—in particular agonistic pluralism and Deweyan pragmatism, but also strains of postcolonialism and feminism. I have tried to be honest about this journey by thinking with a specific group of thinkers throughout the text. John Dewey, Cornel West, Isaiah Berlin, William Connolly, and Bonnie Honig will all be familiar names by the end. Yet, while I think there is a compelling perspective here, a critical pluralist pragmatism, I recognize that its appeal is not universal nor is it the only possible path to the conclusions I reach. Again, our intellectual works are deeply personal.

This is the work of ten years of wrestling with the question of what we should make of human rights. Its long gestation means the learning and confusions of that journey are still present, but I hope that in the journey from not-terribly-successful master's dissertation to published book, what remains constant is a sense that we can make human rights into something more inclusive, more rebellious, and more democratic.

Acknowledgements

It is a virtue to respect an honest debt, especially in a world in which so few debts are worthy of repayment. I believe, however, that we have an even deeper obligation to acknowledge those borrowings that cannot ever be repaid, not because of some material or spiritual poverty, but because they are transactions of a more humane variety. Woody Guthrie, rethinking the concept of debt, wrote 'I borrowed my life from the works of your life. I have felt your energy in me and seen mine move in you.'¹ In completing this work I have taken on many debts that cannot be settled, only acknowledged joyfully, for they mark the exchanges of life that sustain the respect and affection of true community. I am lucky to owe so much to so many.

I am indebted to my teachers. They have made me much better than I was and still motivate me to be better than I am. My profound thanks are owed to Claudia Mills, Simon Sparks, Sheralee Brindell, Kirsten Ainely, and Kim Hutchings. I am indebted to my colleagues, a word I hold in high esteem. Their generosity, brilliance, energy, and friendship sustain me. This work would not be what it is without Meera Sabaratnam, Laust Schouenborg, Paul Kirby, Elke Schwarz, Diego de Merich, Myriam Fotou, Michael Bloomfield, Kathryn Fisher, Marta Iñiguez de Heredia, Roberto Roccu, Nick Srnicek, Aggie Hirst, Chris Emery, George Lawson, Anthony Langlois, and Robbie Shilliam.

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¹ As cited in Rob Aitken, 'Embedded Liberalism in Counterpoint: Reading Woody Guthrie's Reciprocal Economy,' *Millennium: Journal of International Studies* 37, no. 2 (2008): 451.

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Reconstructing Human Rights

I am a human being. You are a human being. We are human. These simple propositions have become ethical claims of the highest order. They express expectations of recognition, concern, and equality. Those expectations take social form as rights: rights that protect us from torture, from arbitrary imprisonment, from hunger and deprivation, which entitle us to standing within our communities, participation in politics, productive work, engagement in cultural life, privacy sufficient to live without undue interference, and many other protections and privileges. In promising these protections and privileges human rights redefine political relationships by altering how we see ourselves and how we share our lives with others. Human rights are a transformative political idea, although one that many of us now take for granted. Yet, if we take the ethical value of human rights seriously then we need to recognize the profound claims they make along with the radical social changes they demand. Human rights assert that everyone (whether alone or in community with others) counts for something; that we are owed respect and voice whomever we are, irrespective of existing hierarchies of protection and privilege; and they assert that political authority is only legitimate when everyone counts. These profound claims force us to reconsider the known coordinates of social justice and in doing so upset the given order. Human rights are disruptive.

When we look past the everyday ubiquity of rights talk to measure the depth of the demands they make of us, we see why human rights generate a powerful need for justification—a need for certainty. If the ethical claim contained in the simple proposition ‘we are human’ can call into question the social and political order, then what gives that claim such power? Its power engenders a desire in us to unearth what is truly worthy of concern in our shared humanity and to define clearly what privileges and protections our social institutions must uphold. Yet this is the juncture where human rights get tangled, and where the first signs emerge that the ethical postulate that each of us should count for something is also a decidedly political question, a question of who determines what our humanity consists in and which protections and privileges it should grant us. The ethical demands entailed by our common

humanity can lead to ubiquitous rights claims, as asserting a definite meaning to our humanity and articulating a specific programme of rights engenders a dizzying multiplicity of claims. Human rights are ambiguous.

For some the meaning of human rights seems as obvious as their widespread use is welcome—even where the difficulty of agreeing on a final understanding means dissent persists, this is only a practical limitation on the otherwise transcendent authority of rights. For critics, however, the impossibility of achieving a final account of human rights is a consequence of the unacknowledged partiality of all universal claims, which suggests that rights claims multiply because they are fundamentally about the exercise of power rather than the realization of transcendent moral authority. A great deal of effort goes into thinking about, defending, criticizing, and agitating for human rights, but their meaning seems to remain stubbornly contestable and their value worryingly debatable. What if this lack of consensus is neither a temporary step on our way to a more complete understanding of rights, nor a consequence of the fundamentally ideological nature of universal rights claims? If we reject this dichotomy, then we can start with the idea that human rights are endlessly contested because the meaning of humanity is itself inherently contestable, such that the uncertainty we have about human rights is an indication of their power to disrupt the given order of things in multiple ways. Rather than defining what human rights are in an authoritative way and defending their status as principles necessary in our contemporary condition, what we need is an assessment of the goods that human rights might achieve and the dangers they may present. Human rights are political.

Despite their everyday appearance human rights are a troublesome idea that resists easy or final evaluation. Governments invoke them as reason for military intervention, while they also provide a frame for opposition and protest—sometimes against the very same governments. They are part of the technocratic mandate of institutions of governance, while they are also used by the marginalized and oppressed in their struggles for justice. At their most grand, human rights aspire to lay the foundation for a global order that protects and empowers every individual, allowing them to realize their full freedom and autonomy under the rule of law. While at their worst, human rights are little more than ideological dross left over from a Western project of global expansion and dominance, justified as a civilizing project but delivering violence, oppression, and inequality. My question then, looking through this morass, is what should we make of human rights? The double meaning in that question is important. How do we judge human rights? Their salience and ubiquity demands an evaluation. Also, what can human rights do for us? Given the reality of human rights as an existing and ambiguous set of ideas and practices, we must consider what, if anything, they are good for.

Human rights are what we make of them. Taking their disruptive, ambiguous, and political qualities as a starting point, I argue that human rights are

only as good as the ends they help us realize. This claim rests on a view that we must attend to what ethical principles actually do in the world to know their value, on both the conceptual and practical levels. So, for human rights we need to consider how the identity of humanity and the concept of rights shape our thinking, while also attending to the effects that human rights practices have on us. Neither the conceptual or practical moment is privileged, rather they are always intertwined. Further, our judgement of the value of human rights must be conscious of both what rights have been as well as what they might become. This work, both archaeological and prophetic, is done with the presumption that human rights are multiple, that there are many histories of rights, some celebrated and others silenced,¹ and that there are many human rights futures to be realized, again some claiming the mantle of progress and others working in more subversive ways.²

1.1 THE WORK THAT RIGHTS DO

Many authors have appealed to the positive consequences of human rights, claiming that the good work they do provides a justification for both the dominance of rights discourse and the exercise of political power to uphold those rights.³ Michael Ignatieff is among the most influential figures making this argument.⁴ He grounds his defence of rights on the claim that they represent the West's best response to its own barbarity and that human rights provide a set of political practices that are good at preventing the worst abuses of individuals by the modern state.⁵ Further, he argues that human rights are not addressed to victims or perpetrators so much as bystanders, that they appeal to the powerful to do something, and provide needed legitimacy to acts

¹ Compare, for example, Gurinder K. Bhambra and Robbie Shilliam, *Silencing Human Rights: Critical Engagements with a Contested Project* (London: Palgrave Macmillan, 2009); Paul Gordon Lauren, *The Evolution of International Human Rights: Visions Seen* (Philadelphia, PA: University of Pennsylvania Press, 2003).

² Compare, for example, Upendra Baxi, *The Future of Human Rights* (Oxford: Oxford University Press, 2007); John Charvet and Elisa Kaczynska-Nay, *The Liberal Project and Human Rights: The Theory and Practice of a New World Order* (Cambridge: Cambridge University Press, 2008).

³ Charles Beitz, *The Idea of Human Rights* (Oxford: Oxford University Press, 2009); Jack Donnelly, 'Human Rights: A New Standard of Civilization,' *International Affairs* 74, no. 1 (1998): 1–23; Conor Gearty, *Can Human Rights Survive?: The Hamlyn Lectures 2005* (Cambridge: Cambridge University Press, 2006); Michael Ignatieff, *Human Rights as Politics and Idolatry* (Princeton, NJ: Princeton University Press, 2001); Anthony J. Langlois, 'Human Rights: The Globalisation and Fragmentation of Moral Discourse,' *Review of International Studies* 28, no. 3 (2002): 479–96.

⁴ Ignatieff, *Human Rights as Politics and Idolatry*, 53–8.

⁵ *Ibid.*, 4–5.

of intervention.⁶ Ignatieff moves away from a deontological defence of rights, which he sees as unsustainable, and instead appeals to their positive consequences. My starting point is different, and my claim that the value of human rights depends on what they do in the world rests on an understanding of ethics that rejects the conventional dichotomy between deontological and consequentialist theories, and instead begins from the specific situations in which ethics are put to work. Whether we are thinking in terms of principles or outcomes, or even sentiments and virtues, the value of our ethics rests in how they enable us in those situations where we are called upon to act, not in their capacity to provide an absolute rule. So, to know the value of human rights it is insufficient to gesture to their positive consequences as general norms, rather their value must be proven in context, and it must be proven continually by looking to what they enable us to do and become. A problem with Ignatieff's argument is that he speaks of the consequences and practices of human rights as if they were singular and uncontested. This is a fundamental point of contrast with the approach taken here. Across time and space human rights vary; both the meaning and practice of rights shifts, such that we cannot casually say that the human rights regime developed in the United Nations from 1945 is the same tradition that inspired eighteenth-century revolutions in Europe and North America,⁷ nor can we claim that the invocation of human rights by George Bush prior to the invasion of Iraq in 2003⁸ is the same practice as human rights claims made by third world social movements.⁹ So, along with attending to the specific situation, an understanding of what we can make of human rights also requires that we attend to the politics of human rights, their contestability and multiplicity, as well as the way they work within already existing hierarchies of power.

The philosophical merits of human rights are the subject of constant disagreement among theorists.¹⁰ For social scientists, the effects of human rights in political life are equally contested.¹¹ This implies that there are no

⁶ Ibid., 8.

⁷ Samuel Moyn, *The Last Utopia: Human Rights in History* (Cambridge, MA: Harvard University Press, 2010).

⁸ George W. Bush, 'President's Remarks at the United Nations General Assembly' (New York, 12 September 2002).

⁹ Balakrishnan Rajagopal, *International Law from Below: Development, Social Movements and Third World Resistance* (Cambridge: Cambridge University Press, 2011), 163–232.

¹⁰ For a recent and invigorating example of the diversity of philosophical debate on human rights see Costas Douzinas and Conor Gearty, *The Meanings of Rights: The Philosophy and Social Theory of Human Rights* (Cambridge: Cambridge University Press, 2014).

¹¹ Emilie M. Hafner-Burton and James Ron, 'Seeing Double,' *World Politics* 61, no. 2 (2009): 360–401; Emilie M. Hafner-Burton and Kiyoteru Tsutsui, 'Justice Lost! The Failure of International Human Rights Law to Matter where Needed Most,' *Journal of Peace Research* 44, no. 4 (2007): 407–25; Oona A. Hathaway, 'Do Human Rights Treaties Make a Difference?' *Yale Law Journal* 111 (2001): 1935–2042; Kathryn Sikkink, *The Justice Cascade: How Human Rights Prosecutions are Changing World Politics* (New York: W. W. Norton, 2011).

simple answers to the questions generated by the ascension of human rights as an ethical and political ideal. Understanding human rights is a task always only half-finished, despite the efforts of many to clarify the confusions and contradictions that human rights throw up. Therefore, my aim is to begin by taking human rights as they are, while also suggesting what we might make of them, without trying to reconcile contradictions or deny tensions. This starting point subverts the kind of authority that a philosophical account of human rights would normally require, as I begin with the presumption that human rights are not one thing and that their consequences do not speak for themselves in a singular voice. The work here, then, aims to reveal some important aspects of human rights and gestures towards one way we might develop them in the future, but it does not aspire to a complete account of what human rights are or a final judgement on their value.

This alternative approach is necessary because human rights cannot be justified, or even known, with finality.¹² While defenders of human rights have been engaged in an extended project of philosophical justification, those justifications fail to move critics from their sceptical starting points. Each contortion of reason performed to show that some feature of human experience is definitive of the ethical worth of the individual cannot help but draw distinctions¹³—a distinction between what is privileged and what is devalued in our malleable human nature. This distinction, however, always rests on some appeal to authority, often to the authority of reason, but no matter how carefully crafted the argument there comes a point where authority as power is simply asserted.¹⁴ Likewise, the insights of critics do not penetrate the intellectual armour of human rights believers despite the debilitating power those critics imagine their attacks to have. Critics point to the way rights shape our subjectivity so that we see ourselves as individuals dependent upon

¹² Or so it would seem given the intractable debate over human rights, and universal moral principles more broadly, which is an issue taken up in greater depth in Chapter 2.

¹³ The arguments of Alan Gewirth, James Griffin, and John Tasioulas show this line of thinking, as the account of what is special about human nature is made more pedestrian and plural, but the need to distinguish the valuable from the contingent persists. Gewirth focuses on the rational necessity of the value of autonomy, which Griffin defends in looser terms of personhood, and which Tasioulas undermines by suggesting that there are a plurality of things we find valuable in our humanity—yet none of the three are willing to question the move to privilege some aspect of human experience over others. See, Alan Gewirth, 'The Epistemology of Human Rights,' *Social Philosophy and Policy* 1, no. 2 (1984): 1–24; James Griffin, *On Human Rights* (Oxford: Oxford University Press, 2008); John Tasioulas, 'Human Rights, Universality and the Values of Personhood: Retracing Griffin's Steps,' *European Journal of Philosophy* 10, no. 1 (2002): 79–100.

¹⁴ In Chapter 2 these claims will be looked at in greater depth, particularly the discourse ethics of Jürgen Habermas, who grounds the authority of communicative reason on the idea of a performative contradiction, such that denying certain principles is impossible, or at least irrational. The argument to be made will focus on the way even this appeal rests on the asserted rather than necessary authority of the imperative to be rational.

government authorities¹⁵ and tied to each other primarily through contractual relationships,¹⁶ and they reveal how rights can reinforce the power of the sovereign, as the guarantor of individual rights, over the democratic political community.¹⁷ As vital and penetrating as these critiques are, they miss aspects of our experience of rights. First, they do not address in detail how rights go about shaping us as individuals and societies at the psychological and sociological levels.¹⁸ This not only leaves open the question of how far philosophical critique can shift our subjectivity in response to the distinctly liberal subjectivity supposedly inculcated by human rights, but it also reveals that critics of rights often fail to account for how and why individuals and communities continue to make use of rights. Human rights advocates are happy to exploit this lacuna, pointing to the necessity of human rights as an account of justice in our supposedly post-ideological age. The critic's abstraction from our variegated experience of rights also reveals the presumption (shared with human rights advocates) that rights are one thing and that we can know them with certainty, as critics often fail to trace the complex ways human rights are used and understood by the people taking them up. The impasse between critics and advocates is not the result of intellectual dishonesty on either side, but rather substantive disagreements about what human rights do as well as a rarely acknowledged agreement that human rights are a single thing that can be known and judged in abstract rather than practical terms.

Advocates and critics see different objects when they look at human rights, and the consequences of what they see are determined by how they understand their task. Advocates see ubiquity and paint it as consensus, as an emergent agreement on the rights due to every human being. Critics see ubiquity as well but paint it as the pervasive imposition of power, both discursive and material, which seeks to control the meaning of 'humanity' as

¹⁵ Wendy Brown, *States of Injury: Power and Freedom in Late Modernity* (Princeton, NJ: Princeton University Press, 1995), 96–134.

¹⁶ Fiona Robinson, 'The Limits of a Rights-Based Approach to International Ethics,' in *Human Rights Fifty Years On: A Reappraisal*, ed. Tony Evans (Manchester: Manchester University Press, 1998), 58–76.

¹⁷ Giorgio Agamben, *Means without End: Notes on Politics* (Minneapolis, MN: University of Minnesota Press, 2000), 15–28.

¹⁸ This work is starting to be done in sociological and anthropological studies, though even here the psychological aspect of how human rights ideas and practice shape individual subjectivity is underexplored. Mark Goodale, *Surrendering to Utopia: An Anthropology of Human Rights* (Stanford, CA: Stanford University Press, 2009); Mark Goodale and Sally Engle Merry, eds, *The Practice of Human Rights: Tracking Law Between the Global and the Local* (Cambridge: Cambridge University Press, 2007); Fuyuki Kurasawa, *The Work of Global Justice: Human Rights as Practices* (Cambridge: Cambridge University Press, 2007); Sally Engle Merry, *Human Rights and Gender Violence: Translating International Law into Local Justice* (Chicago, IL: University of Chicago Press, 2006); Kate Nash, 'Between Citizenship and Human Rights,' *Sociology* 43, no. 6 (1 December 2009): 1067–83.

a justification for ethical principles.¹⁹ Adjudication is hopeless, and to insist on a middle-way solution only hides the problem that despite our intellectual contrivances human rights are not one thing but rather many different things to different people. Our ethics are likewise more than a transcendent set of rules or an expression of force and control. Continuing to engage from within these confines limits our ability to see the harm and the good that human rights do by suggesting that the diverse practices and plural ideals of human rights can be judged in abstraction. The test of the worth of human rights, I argue, is in action, in their consequences in specific contexts. Those consequences, however, are plural, reflecting contrasting understandings of human rights and the diversity of how those rights are realized through political action. The way we have traditionally thought about rights makes it difficult to recognize their plurality and ambiguity. The limits imposed by our received understanding provides reason to rethink human rights, to reconstruct our understanding of what human rights are and reimagine what they might be. This starting point allows us to contemplate rather than resolve the ambiguity of rights.

In asking what human rights can become, the anti-foundationalist assumptions of my own position are revealed. Human rights are not only resistant to final justification, they are a social creation; on its own this is not a novel starting point, but my argument builds on previous work by focusing on the contestability of human rights. For example, Richard Rorty famously argued that human rights are nothing more than a liberal democratic construct.²⁰ Rorty suggested that our liberal human rights culture, which is primarily concerned with preventing cruelty and extending sympathy, was one of the better forms that the malleable human animal had created for itself. His argument has been influential because it is both philosophically sophisticated and politically appealing, especially to certain comfortable liberal audiences. Rorty's anti-foundationalism is neatly articulated: there is no essential human nature, or fundamental ethical truth,²¹ yet we are able to understand others and ourselves without those grand philosophical conceits. We are able to live together in ways that are less exploitative and violent. As malleable animals that have linguistic capacities for poetic redescription of ourselves, we are able

¹⁹ The divergence between defenders and critics of human rights can be seen in the contrast between Seyla Benhabib and Giorgio Agamben's accounts: Benhabib sees human rights as central to a renewed Enlightenment project that protects individuals from society and government, while Agamben suggests that human rights are the vanishing point at which political community disappears, leaving only the unrestrained power of the sovereign over the defenceless individual. Agamben, *Means without End*; Seyla Benhabib, *Dignity in Adversity: Human Rights in Troubled Times* (Cambridge: Polity, 2011).

²⁰ Richard Rorty, *Truth and Progress: Philosophical Papers Volume 3* (Cambridge: Cambridge University Press, 1998), 167–85.

²¹ Richard Rorty, *Contingency, Irony, and Solidarity* (Cambridge: Cambridge University Press, 1989).