Dignity and Duty: A Dignity Based Account of Human Rights and their Associated Duties

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Candidate Declaration

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Summary

This thesis is primarily motivated by a perceived gap in the literature on human rights in how that literature deals with the duties associated with human rights. I argue that we do not have a clear and coherent understanding of what the duties associated with human rights are nor do we have a complete understanding of the nature of the relationship between human rights and the various duties associated with them. This thesis seeks to address these issues.

Chapter one addresses the problem of a lack of understanding about what, precisely, is meant when we discuss the concept of a duty. The paper constructs a general model of a duty by breaking it down into its constituent, or molecular, components.

The paper offers a modified version of the model of rights and duties proposed by Wesley Newcomb Hohfeld (‘Fundamental Legal Conceptions’, 1919). He terms the different components a duty, a no-right, a disability, and a liability. By adapting this terminology I construct a model of a duty that combines these different concepts to explicate the concept of a duty. This allows us to understand more clearly what action(s) or inaction(s) is required in specific circumstances.

Chapter two examines human dignity as the foundation for human rights. I explore the concept of human dignity, its possible meaning and significance. I then combine the idea of human dignity as a lofty status with an interest theory of the functions of rights. By doing this I will show that dignity can, and does, provide a solid and coherent foundation for human rights. I finally, in chapter two, examine the implications of using human dignity as a foundation for human rights in the area of the associated duties.

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Chapter three explores the substantive content of the status of human dignity. I define this content as normative agency (following James Griffin). I then critically examine the Universal Declaration of Human Rights by investigating whether the different rights it enumerates can be justified by an appeal to normative agency. I then examine the substance of the duties associated with human rights in detail. I do this by utilising a wave model of duties that explains how a variety of duties can correlate with a single right. I then identify and explore two non-correlative duties that are derived from human dignity – the duty of social co-operation and the duty to build human rights respecting institutions. These duties are derived from human dignity (thus sharing their justification with human rights) but do not correlate directly with a single right.

Chapter four explores how the theoretical insights developed in chapters one to three would impact political practice in the area of a specific human right – the right to not be enslaved. I use descriptive data from the Global Slavery Initiative to frame the problem of slavery prevention and enforcement. I then look at how different waves of correlative duties attach to different actors on the global political stage. Next I look at the implications of two non-correlative duties that I identified and outlined for our political practice in this area. Finally, I look at the duties that a borne by individuals and agents that are relatively deprived. I do this to counter a somewhat anti-autonomy streak within some elements of the literature on human rights and global justice.

Finally, I conclude the thesis by indicating some possible avenues for future research.
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General Introduction

“We the peoples of the United Nations determined…to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women…”

- Preamble to the Charter of the United Nations

The preamble to the Charter of the United Nations sets out a commitment to protecting human rights, human dignity, and the worth of all humans, irrespective of appearance, gender, creed, or race. This is one of the noblest commitments that the peoples of the planet have ever collectively made—a commitment to respect each other no matter what. Unfortunately, over 70 years later we have not fully realised that commitment. Respect for human rights and dignity is still highly contingent upon who and where you are. The overarching aim of this thesis is to contribute to the eventual realisation of this commitment. This aim is inspired by a question asked by Kwame Anthony Appiah that remains inadequately answered—“Is it enough simply to say ‘I know there are unmet entitlements, but I have done my part’? After all, the unmet entitlements are still unmet, and they’re still entitlements” (Appiah, 2007: 164-165). In relation to the human rights project this question is absolutely vital—without a clear understanding of how to assign different obligations to different actors there is no way for us to be certain whether we have to do more to ensure entitlements are met. There are two primary problems I am seeking to solve which will contribute to this aim, and thus to answering Appiah’s question. The first problem is that our understanding of what duty and obligation are is deficient; we are chronically unclear in the ways in which we use the term ‘duty’. The

1 Available at https://treaties.un.org/doc/Publication/CTC/uncharter.pdf.

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second is a lack of solidity in the philosophical foundations of human rights and their associated duties for which I will propose utilising human dignity as a solution. These contributions are derived from two fundamental critiques of both the academic literature on human rights and the political practice of human rights, both of which have been articulated, in various forms, by Onora O’Neill. Before setting out the problems which I am seeking to solve in detail it should be noted that the subject of this thesis is moral human rights – not legal human rights. This distinction is important as, as Allen Buchanan has argued, there are important differences between any scheme of moral rights and any scheme of legal rights. Even when we think that there is a relationship between the two schemes (as even Buchanan would probably accept there is in the case of human rights) this does not mean that what Buchanan calls “The Mirroring View” – the argument that “international legal human rights are the international legal counterparts of those moral human rights that” (Buchanan, 2013: 15) are properly considered to be human rights – is necessarily correct. Whilst I am inclined to think that Buchanan’s critique of the Mirroring View is somewhat overstated he is correct in his observation that legal rights and moral rights do not and should not be involved in a strict one-to-one relationship. Thus my argument is limited to the question of moral human rights and duties – I will leave the best way to determine a legal system of human rights to one side.

Two Critiques

Onora O’Neill is one of the most effective critics of the human rights project, whilst at the same time a significant supporter of the broad aims of the human rights movement. O’Neill argues that the specification of duties within both the academic literature and the political practice of human rights is at best unclear and at worst non-existent. O’Neill correctly observes that “without the obligation there are no rights” (O’Neill,
2005: 431). Regularly, duties associated with human rights are simply assumed to be held solely, or at least primarily, by states without any understanding or consideration of how we came to this assignment or of the implications it might have for the overall human rights project. This problem is one that has been cited by critics of the human rights project at the least since Maurice Cranston articulated it in his oft cited article ‘Are There Any Human Rights?’ in 1983. There is within international human rights practice an unwarranted degree of certainty about the way in which duties are assigned. Generally speaking duties are assigned solely to states. This is problematic as if only states bear duties for realising human rights then many rights will go unrealised as some states lack the resources to provide the content of specific rights. This complacency is highlighted by O’Neill who observes that “On the face of it, the boundaries of states limit many rights and duties to a certain territory, and this fundamental institutional structure requires justification rather than bland acceptance” (O’Neill, 2016: 151). The bland acceptance of this structure results in a common assumption that, as Cranston put it in 1983, “How can the governments of those parts of Asia, Africa, and South America, where industrialization has hardly begun, be reasonably called upon to provide social security and holidays with pay for the millions of people who inhabit those places” (Cranston, 1983: 13). The short, and obvious, answer is that they can’t. The problem is that by assuming that states are the only duty holders in relation to human rights then Cranston’s critique is forceful. If we challenge this assumption, and present a better alternative, then Cranston’s critique loses its force. As a result of this flaw that O’Neill perceives in the human rights literature she has suggested that rather than focusing on a theory of human rights, we should instead focus on a theory of human obligations.
O’Neill argues that “We do not know what a right amounts to until we know who has what obligation to do what for whom under which circumstances. When we try to be definite about rights, we always have to talk about obligations” (O’Neill, 1987: 150). Following from this O’Neill argues that we should focus on what obligations are owed by us according to justice. As O’Neill points out, by constructing a theory of duty and obligation we are viewing human beings as having a greater level of autonomy and agency than if we view them from a rights-based perspective. A human rights perspective “does not see them [humans] as fully autonomous: Claimants basically agitate for others to act” whereas “when we talk about obligations, we are speaking directly to those agents and agencies with the power to produce or refuse change” (O’Neill, 1987: 149). O’Neill, thus, calls for a shift in the human rights movement away from focusing on the rights, and towards focusing on the duties that fulfil the rights.

A second criticism of the human rights project is that despite the Universal Declaration of Human Rights (UDHR) having been drafted over fifty years ago there is still significant academic debate over the justification of the rights enshrined within it. O’Neill is, again, an insightful observer of this problem. “If human rights are independent of institutional structures, if they are not created by special transactions, so too are the corresponding obligations; conversely if obligations are the creatures of convention, so too are the rights” (O’Neill, 2005: 431-432). If the duties associated with human rights are created by conventions and treaties, then human rights exist only as a result of these conventions. If human rights exist only as a result of these conventions then the justification for these rights rests upon our justification for the conventions. This would leave both human rights and their associated duties open to significant attacks by questioning the nature of their justificatory foundations. This is further
problematic as if human rights are mere institutional constructs then we have no clear basis for stating which rights are human rights and which are special rights generated by our institutional ties. This is more than merely a problem of labels as rights that are generated by institutional ties are qualitatively different to those that are pre-institutional. If human rights rely upon conventions for their justifications then they cannot be said to be genuinely universal rights held by all humans.

Much of international political practice focuses on the rights side of the equation – we have many declarations and covenants that enumerate the rights to which people are entitled. We have no major documents that set out precisely who is required to ensure that these rights are enjoyed. Similarly, political theory in this area has a tendency to focus more on the rights-- seeking to figure out what sort of creatures are entitled to human rights and which rights count as human rights. There is little discussion of the issue of duties. Regularly, when duties are discussed, it is simply assumed that states are the duty bearers. However, this is an overly simplistic view of the situation. There are clearly scenarios in which individuals are the appropriate primary bearers of duties associated with human rights. Similarly, there are scenarios in which the appropriate primary duty bearers are neither states nor individuals, but rather non-state collective agents (whether they be business corporations or NGOs).

It should be noted that the critiques O’Neill presents of the human rights project and literature are not limited to those I have discussed here. Her most famous critique, the claimability objection, is not one that I am going to directly respond to in this thesis. The aim of this thesis is to tackle issues surrounding the understanding of duties – what they are and how to assign them. O’Neill’s claimability objection applies to social and

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economic rights and is, in short, that it is often difficult (if not impossible) to know from whom to claim the content of these rights. Whilst being able to better define and assign duties might be of some assistance in solving the claimability objection it cannot wash it away in its entirety as it is a question about the claimability of a right, not the assignment of a duty.

It is clear that there are rights and duties created by membership of institutions. However, if human rights are simply those rights that are called such in international treaties then they are justified for all only if all states have signed up to the relevant treaties. Some states could be said to be doing wrong by not joining the convention but they could not be criticised for violations of the rights enumerated in the conventions. This is worrying as it would leave individuals in those states without any recourse to make claims for the content of their human rights. Criticising a state for not joining a convention is an entirely different critique from criticising a state for violating human rights. From this it follows that by not having a solid, pre-institutional justification for human rights and their associated duties it is difficult to assign duties to actors that are not party to specific conventions or to non-state actors. This problem arises because if human rights are only created by treaty and institution then only those agents party to these treaties and institutions can be assigned any associated duties. If the foundation of the rights is ephemeral then the assignment of the duties is also going to be ephemeral. As Jerermy Waldron has observed “Foundations matter: they are not just nailed on to the underside of a theory or a body of law as an after-thought.” (Waldron, 2010: 233), and as a result how we justify human rights will have a significant impact upon how the duties associated with those rights are specified and assigned.

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Overview of Solutions to the Problems

I propose separate solutions to these two problems before looking at how the two solutions, when taken together, would impact political practice in the area of slavery prevention and enforcement. The solution that I propose to the first problem, that our understanding of what a duty is, is to analyse the concept of a duty in detail. I do this utilising an adapted Hohfeldian framework. I seek to determine the different sort of actions that can be stipulated by the term ‘duty’ and how they fit together as a complete concept. This analysis is inspired by a similar analysis conducted by Leif Wenar for the concept of a ‘right’. The aim of this is to bring clarity to our discussion of duties. We need to be clearer and more specific about precisely what is required in given situations. The term ‘duty’ can be used to mean a variety of things and this solution, developed in Chapter 1, seeks to make it considerably easier to understand the nature of the different actions that can be required when we have a duty.

The solution I propose to the second problem, of indeterminacy in our philosophical foundations for human rights and the implications this has for our assigning and understanding of the associated duties, is to justify human rights through an appeal to human dignity. I argue that human dignity is best understood as a status, comprised of a bundle of interests and duties, and that, as per the interest theory of rights, this grounds a range of rights and concurrent duties. This is a solution to the indeterminacy of foundations that plagues the human rights project and also moves beyond the state-centric model of duty allocation that is so often assumed. This solution is developed in chapters 2 and 3 building on work done by Michael Rosen, Jeremy Waldron, James Griffin, Martha Nussbaum, and Pablo Gilabert. I conceptualise dignity as a status that involves the potentiality for normative agency and cash normative agency out in terms of the capabilities that are necessary to allow individuals to effectively exercise it.
These two solutions, when combined, allow us to more effectively understand “who ought to do what for whom” (O’Neill, 2016: 10).

Overview of thesis chapters

The first chapter of this thesis examines the concept of a duty – what it is and what sorts of actions might be required by a duty. The analysis in this chapter will largely be based on a model developed by Wesley Newcomb Hohfeld. In his seminal work *Fundamental Legal Conceptions*, Hohfeld sought to bring greater clarity to how we use language when talking about rights and duties. Hohfeld’s argument was that the concepts of a right and a duty, when used in ordinary language, were too vague to be useful. And so Hohfeld breaks both a right and duty down into 8 separate concepts – 4 on the duty side and 4 on the right side of the equation. These 8 concepts are a right, a privilege, a power, and immunity, a duty, a no-right, a liability, and a disability. Hohfeld defines all eight in terms of each other, specifying them as correlative and opposites. Hohfeld argues that these 8 concepts are to a significant degree separable. I will argue, following Leif Wenar’s analysis of rights, that we are better served by thinking of the four duty-side concepts as the fundamental components of a duty and the four rights side concepts as the fundamental components of a right. In doing so I will seek to make clearer how we can use the four duty concepts to better understand what is meant by the statement “person x has a duty.” Thus, in chapter 1, I will be seeking to better understand what a duty is and how it functions as a concept.

Chapter 2 begins my analysis of the philosophical foundations of human rights. This chapter first examines and critiques the ‘political’ conception of human rights. There is a discernible trend in current theorising about human rights that seeks to justify them
through appeals to some aspect of the global political practice of human rights. Whilst this group might more resemble “a ragtag band,” as Galston termed ‘realists’ in political theory (Galston, 2010: 385), they are unified by their commitment to finding the foundation for human rights in our use of the concept in global politics. Human rights are, for this group, justified by their political function. I examine three theorists that differ in how they utilise political practice as a justificatory tool, but who are undoubtedly members of this broad grouping--Charles Beitz, Joseph Raz, and Thomas Pogge. All three of these theorists seek to justify human rights through some form of appeal to the current political practice of human rights. Beitz and Raz are more overtly concerned with the issue of justifying human rights, whereas Pogge adopts this approach largely for strategic purposes (as he is more concerned with the issue of alleviating global poverty than the precise philosophical justifications for human rights). These three theorists are reasonably representative of the general political conception of human rights. After setting out the political conception I then critique it for being unable to provide concrete answers to certain key questions raised within the human rights literature. Specifically, the political conception is unable to provide a justification for human rights that is not contingent upon the vagaries of current political practice and cannot provide for anything other than a rough ad hoc assignment of duties to states. The political conception cannot respond to the challenge put forward by O’Neill that “If human rights are independent of institutional structures, if they are not created by special transactions, so too are the corresponding obligations; conversely if obligations are the creatures of convention, so too are the rights” (O’Neill, 2005: 431-432). For ‘political’ theorists rights and duties are merely creatures of convention. This

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2 That is not to say that advocates of the political conception are necessarily realists. Galston’s terminology is merely a useful description.
is not to say that rights should not be enshrined in conventions and treaties. Rather it is to say that they are more than merely creatures of convention.

The second part of chapter two examines the role of the concept of human dignity in justifying human rights. This builds from the first part of the chapter as after rejecting the political conception of human rights an alternative is required. The alternative I propose is a more metaphysical approach than the political conception. Rather than seeking to justify human rights by appealing to some component of political practice I appeal to some aspect of the rights holders, namely, humans. The aspect that I appeal to is human dignity. I examine different conceptions of human dignity, drawing upon the work of Michael Rosen, Jeremy Waldron, and James Griffin. I determine that the conception of human dignity that can effectively ground human rights is that of dignity as a status. I interrogate how this conception functions by looking at two different theories of the functions served by a right— the will theory and the interest theory. I conclude that when considering human rights we should think of human dignity as a status that is comprised of a bundle of interests and duties. These interests generate a certain set of rights via the interest theory of rights. I conclude chapter two by looking at three distinct implications of the justification of human rights via human dignity for how we think about the duties associated with human rights. First, a human dignity foundation provides greater rhetorical weight to the fulfilment of duties than other approaches. Second, because a status is comprised of both rights and duties, there might be duties associated with human dignity (and thus human rights) that do not correlate directly with a specific human right. This renders the relationship between rights and duties as conceptual rather than causal. What this means is that rather than rights causing duties to come into existence both rights and duties are derived concurrently from human dignity. Third, the social nature of human dignity allows us to more easily

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conceive of an individual being denied their rights but being able to act with dignity by fulfilling their duties than other approaches.

Chapter three outlines the specific content of the status of human dignity. As human dignity is best understood as a status we must be clear about what the content is of the bundle of interests and duties that make up the status. One of my central criticisms of the political conception of human rights is its inability to determine which rights should count as human rights and which should not. Chapter three begins by examining the central content of human dignity—what it is about humans that provides us with dignity. I argue, following James Griffin, that the central capability characterizing agents with dignity is normative agency, or the ability to form and pursue one’s own conception of a good life. I diverge from Griffin as I argue that it is the potentiality for such agency that is important— that all creatures that are of a type which, without physical or mental impediment, would possess normative agency possess human dignity. I then utilise a capabilities approach inspired by Pablo Gilabert and Martha Nussbaum\(^3\) to elucidate what it means to exercise normative agency. I then work through the UDHR’s list of rights in order to examine which of the rights there enumerated should be included and which should not. This shows the strength of my approach in opposition to the political conception. The political conception is unable to critique current practice in the same way as it derives its normative justification from current practice.

The final section of chapter three engages in two additional tasks—examining the nature of those duties directly correlated with specific rights and examining the nature of the non-correlative duties that were identified in chapter two. I examine how correlative duties are generated using a wave model adapted from a concept floated by Jeremy

\(^3\) Amartya Sen is an additional, notable, theorist who espouses a capabilities approach. I do not refer to Sen here solely for reasons of space. Gilabert and Nussbaum are sufficient for my purposes.

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Waldron (also leaning on Henry Shue’s tripartite division of duties) to allow us to understand how one specific right can correlate with a multitude of duties and how these different duties can attach to different forms of agent. I then identify two non-correlative duties associated with human rights, a duty of social co-operation and a duty to construct human rights respecting institutions. I elucidate how these two non-correlative duties function and how different components of them are attached to different agents in global politics. The aim of chapter three is twofold. Firstly it is to establish, by providing a critical examination of the UDHR, that my approach to justifying human rights does not fall afoul of my own critique of the political conception of human rights of being unable to provide a clear delineator between human rights and other forms of rights. Secondly it is to identify and explore the nature of the two different forms of duties that are associated with human dignity and human rights both correlative and non-correlative duties.

Chapter four takes the theoretical insights gained in chapters one, two, and three and applies them to political practice in one specific human rights area. The area I examine is the issue of slavery in the modern world. I have selected this area for two reasons. Firstly, it is highly salient. Many people assume that slavery is an issue that has been dealt with. We freed the slaves in the 19th Century, and that was that. However, modern research shows that slavery is far from a problem of the past. The Global Slavery Index estimates that over 35 million individuals were in slavery in the year 2014. So this is an incredibly salient political issue--how to combat slavery, and importantly for my work, what are we required to do to combat slavery. As Kevin Bales and Zoe Trodd observe, “Making slavery illegal hasn’t made it disappear, only disappear from view” (Bales and Trodd, 2008: 2). The second reason for my selecting slavery as an area to examine is that it is one of the least contested human rights. Irrespective of justificatory approach
or political ideology everyone agrees that slavery is wrong (as evidenced by it being officially outlawed in every country on the planet, bar North Korea). I work through the two types of duties, correlative and non-correlative, identified in chapter three and explore how they attach to different actors in the specific context of combating modern slavery. I examine various different policies that might combat modern slavery and show that by utilising a Hohfeldian understanding of a duty and the human dignity justificatory approach I have outlined we can make clearer what specific duties different individual and collective agents have and thus make combatting slavery more effective.

The final section of chapter four examines the nature of the duties possessed by individuals living in deprived countries. This section discusses how individuals who have been deprived of a right or who are geographically proximate to individuals who are deprived of a right have more immediate duties. One of the central aims of this section is to show how a human dignity based approach can return agency to the deprived; rather than solely focusing on what those of us in ‘the west’ must do for the deprived, it allows us to coherently discuss what individuals are required to do for themselves. The overall aim of chapter four is to show how the theoretical insights developed in the first three chapters can impact the global political practice of ensuring human rights enjoyment by examining the impact in one specific policy area.

**Final Remarks**

The overarching aim of this thesis is, to return to the quotation that opened this introduction, to help drive humanity towards fulfilling the promise to “reaffirm [our] faith in fundamental human rights, in the dignity and worth of the human person, [and] in the equal rights of men and women.” The social justification for pursuing this

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The dream of the human rights project, that all people be afforded the rights to which they are entitled and that no-one be denied the basic dignity of the human person, has not been realised. Seventy years after the foundation of the United Nations, when the people of this planet came together and vowed to pursue a time when no-one is treated as less than human, we have yet to achieve this goal. I am not going to achieve this goal in this thesis. My aims are much more modest than that. I will, however, contribute towards the achievement of this goal. I will contribute primarily by interrogating the relationship between human rights and duties in order to determine a clearer and more coherent way of understanding the nature of this relationship, and, in particular, how the duties associated with human rights function. O’Neill refers to the problem of the under-fulfilment of duties associated with human rights as ‘the dark side of human rights’—the side that we do not often see but that is fully half of the equation. Finding a way to coherently understand the different duties that attach to different types of actors is thus incredibly important. If we don’t understand which duties attach to individuals and which to the various collective actors then it will be incredibly difficult to construct a coherent narrative of how to move towards greater fulfilment of our duties. If we do not have a clear and coherent narrative of how different duties attach to different actors then we will be unable to accurately identify who is required to act in specific circumstances. If we are unable to identify who is required to act in specific circumstances then we will be unable to identify a clear path to greater enjoyment of human rights.

The primary aim of this thesis is to help build a path towards greater enjoyment of human rights. I will not be able to chart the path in its entirety. There are key parts of a complete theory of human rights and duties that I will not be able to address in this thesis. The question of the use of force to ensure enjoyment of human rights is perhaps
the most glaring of these. Additionally, I do not tackle the issue of motivation in this thesis. The problem of motivating individuals to act in the ways that global theories of politics claim they should is one that I do not have room to tackle here. The central achievement of this thesis is to construct an understanding of human rights and their associated duties that makes sense of how the two concepts relate to each other and how they function in conjunction with each other in global politics.

In concluding this introduction I want to draw inspiration from the words of Elie Wiesel in his speech titled ‘The Perils of Indifference’-

Of course, indifference can be tempting -- more than that, seductive. It is so much easier to look away from victims. It is so much easier to avoid such rude interruptions to our work, our dreams, our hopes. It is, after all, awkward, troublesome, to be involved in another person's pain and despair. Yet, for the person who is indifferent, his or her neighbour are of no consequence. And, therefore, their lives are meaningless. Their hidden or even visible anguish is of no interest. Indifference reduces the Other to an abstraction. (‘The Perils of Indifference’, Speech- 12 April 1999, Washington D.C.)

Wiesel’s words, calling on us to not stand idly by- to not allow the pain and despair of others to go unchecked for our own comfort- summarise the central motivation behind this thesis. My aim is to ensure that we have the understanding of our duties necessary to allow us to properly ensure that we are able to never again be seduced by indifference.
Chapter 1: What is a Duty? A Hohfeldian Approach

Introduction

The aim of this chapter is to furnish us with a better and more coherent understanding of what precisely a duty is. In order to do this I will construct a model of duty adapted from the work of Wesley Newcomb Hohfeld. This model will allow us to be more precise about what a duty requires in specific situations. This chapter will thus contribute to solving the problem of the lack of a complete and coherent theory of the duties associated with human rights. Onora O’Neill argues that “We do not know what a right amounts to until we know who has what obligation to do what for whom and under which circumstances” (O’Neill, 1987, in Pogge and Horton ed.: 150). This thesis is seeking to provide a clear answer to one of these problems posed by O’Neill. This chapter is a contribution towards answering the question about “what obligations to do what.” It will do this by bringing greater conceptual clarity to the concept of a duty – we cannot be clear about what obligation to do what someone has if we are not clear about what sort of thing a duty is. This is not necessarily motivated by a lack of understanding in the human rights literature generally. In fact much of my argument in this chapter is probably relatively uncontroversial. However, this conceptual analysis is valuable as it clarifies the different possible ways in which the term “duty” can be used. This will make it easier to follow the arguments of subsequent chapters. The conclusions of this chapter are much more modest the next three chapters and will have the smallest impact on the overall conclusions of the thesis. This does not, however, make the analysis conducted here useless. This chapter will first outline Hohfeld’s model of rights and duties, then provide a critique of Hohfeld’s methodology, and then adapt his model to depict a single duty more clearly. Finally the chapter will discuss the

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example of the duty not to torture and how this understanding of duty would affect how we talk, think, and act regarding this duty.

O’Neill also views the way in which human rights are commonly justified as being problematic, with knock-on problems for how we specify the duties associated with human rights. As O’Neill discusses, the international human rights regime assigns these duties on the basis of being party to certain treaties or conventions. This is problematic as “If human rights are independent of institutional structures, if they are not created by special transactions, so too are the corresponding obligations; conversely if obligations are the creatures of convention, so too are the rights” (O’Neill, 2005: 431-432). If the duties associated with human rights are created by conventions and treaties, then human rights exist only as a result of these conventions. Following on from this, by not having a solid justification for human rights and their associated duties it is difficult to be specific about who bears those duties. I will deal with this problem of justification in chapters two and three. I mention this problem here as this problem of justification has significant ramifications for the way in which the duties associated with human rights function. As a result, further work on human rights and their associated duties will contribute significantly to solving these problems. This chapter will only deal with the problem of the lack of clarity in our understanding of what is meant by the term “duty”.

Before beginning my analysis I have two preliminary issues to deal with. The first is a very brief comment on terminology and the second are some less brief comments on a

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4 This can include customary human rights law that does not arise on a strict treaty basis. Such law would be considered as part of human rights convention.

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Kantian understanding of duty. The first is simply to ensure that there is no confusion in how I use the terms “duty” and “obligation.” I examine the Kantian understanding of duty as it is highly prevalent in modern understandings of the duties associated with human rights and so is very salient for my discussion. I use the term “duty,” as opposed to “obligation,” throughout my argument. Some use these terms interchangeably. Thomas Pogge, however, suggests that “Duties are general; obligations are specific” (Pogge, 2011: 5). For Pogge, a duty is general in that there is a duty to keep one’s promises, and obligations are specific in the sense that I am obligated to keep the promise I made to you to water your plants. This is simply a terminological differentiation, although one which can be helpful for analytical purposes. Following from this I will use the term “duty” throughout this chapter as I will be discussing general duties as opposed to specific obligations. When discussing examples it might be appropriate, on Pogge’s definition, to use the term obligation. However, I will normally still use the term “duty” as the aim of this chapter is to construct a general model. If I deviate from this and use the term “obligation” in the Poggean sense then I will indicate that I am doing so.

Finally for these introductory comments I want to look briefly at how Kant defines a duty as his definition is a particularly clear one that is also problematic due to its relative simplicity. Kant defines duty as “the necessity of an action executed from respect for law.” (Kant, 1969: 19). By this Kant does not simply mean that duty is obeying the law of the land. Kant is using the term ‘law’ to refer to any moral laws. On this definition, a duty is any action that it is necessary to perform based on a particular law. This definition is, as we shall explore, far too narrow and restricted. Whilst Kant’s definition of a duty is not seeking to solve the same problems as Hohfeld’s more
fine-grained approach, it is a definition that is often implicit within the human rights literature. The wording of Kant’s definition appears to allow only for duties to mandate positive action, although Kant quite clearly intended for it to allow for inaction. However, this fails fully to take into account the possible discretionary nature of certain duties. By this I do not, of course, mean that individuals can pick and choose whether to fulfil certain duties or not. Rather, what is meant by this is that some duties will only pertain if invoked by the holders of certain rights. So if “A has a duty to obey B,” this duty only comes into force once B issues a relevant instruction to A. The discretion is not on the part of the duty-bearer but the duty-enforcer. Kant likely recognises the possibility that the action that is necessary would be to obey (and thus have an element of discretion built into it). However his definition provides no detail regarding the ways in which these different forms of action fit together as a unified concept of a duty. This is not necessarily a criticism of Kant. As mentioned his aims were not my aims (nor were they Hohfeld’s). The Kantian conception of duty served Kant’s purposes, and served them well. My aim with this discussion of Kant is to provide a mild contrast to my own conception to show how the additional specificity provided by my molecular approach is beneficial at least when discussing human rights.

Despite this, Kant’s definition is a useful starting point as it grasps one of the fundamental features of our thinking about duty--it is not optional. When one has a duty, one must fulfil it or be in violation of some law. It should be noted here that when discussing the concept of a duty there is an assumption that whatever is specified by a duty is possible. To borrow an example from Thomas Nagel, “There could not…without incoherence, be an absolute prohibition against bringing about the death of an innocent person” (Nagel, 1972: 129, emphasis in the original). So we can say that

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there can be a duty to not commit murder, that is to deliberately cause the death of an innocent person; but we cannot say that there is always a duty to not bring about the death of an innocent person.

The scenario that Nagel envisages is something similar to a situation in which a natural disaster, such as an earthquake, has put such a strain upon our resources that we can only save a certain number of people. In this case, our decision over who to save will bring about the death of some innocent people; we cannot say that you have failed in your duty in this particular case (unless, of course, you opted to save no-one at all). However, by restricting duty to the narrow understanding of simply action or inaction it fails to grasp some of our basic intuitions about duty. The statement “A has a duty to phi” can be, and often is, understood to mean other than simply “A has to perform action phi.” For example, it is often understood to mean “A must obey the commands of person B” or “A must not perform action C” or “A must not seek to coerce person B.” A simple understanding of duty, such as Kant’s one, makes it harder for us to specify what, precisely, is required from us to fulfil our duty. This is neither merely casuistry nor semantics, but involves different understandings of what the term “duty” means. By saying that a person has a duty, I could be saying that they have a duty to do a specific thing, to obey a specific person, or to refrain from a specific action. The problem here is that we do not have a clear understanding of how these different forms of a duty fit together. Nor do we have a systematic understanding of these different components of a duty. To return to Nagel’s example from above if we say that there is a duty to not deliberately and wilfully cause the death of an innocent person this can be, and often is, interpreted as meaning simply that there is a duty to not kill someone else (to commit murder). However, in the scenario Nagel envisages our duty to not wilfully

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cause someone’s death becomes much more complex. In the case of a natural disaster we might have duties to perform certain actions, to obey certain individuals, to refrain from certain actions, or a combination of all of these. A simple Kantian understanding of duty can make it difficult to make sense of one duty statement simultaneously meaning various things at once. A molecular approach, as outlined in this chapter, finds this task considerably easier. What is clear from this brief discussion of Kant’s understanding of a duty is that a duty is significantly more complex than it initially appears and that a more detailed understanding of its functioning is required. In order to provide a more complex definition of a duty I will now turn to Hohfeld as he examines in detail the different understandings of duty in our ordinary language and helps us to render the concept of a duty more intelligible.

Hohfeldian Concepts

*Fundamental Legal Principles*, Hohfeld’s classic work of legal and political theory, was an attempt to bring greater clarity to legal discussions. Hohfeld argues that “One of the greatest hindrances to the clear understanding, the incisive statement, and the true solution of legal problems frequently arises from the express or tacit assumption that all legal relations may be reduced to ‘rights’ and ‘duties’” (Hohfeld, 1919: 35). In order to solve this problem Hohfeld constructs an eight-part model of concepts that he believed represented all of the instances in which the terms “right” and “duty” were being used. In his view, some of the time people were correctly using the terms “right” and “duty” but that in many cases the two terms were being misused. Thus, his model of legal conceptions includes both rights and duties as specific and separate entities. However, he includes six additional concepts to replace the terms “right” and “duty” in specific legal circumstances. This model is presented in figure 1 below.

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Table 1: Hohfeldian Jural Concepts

<table>
<thead>
<tr>
<th>Jural Opposites</th>
<th>Right</th>
<th>Privilege</th>
<th>Power</th>
<th>Immunity</th>
</tr>
</thead>
<tbody>
<tr>
<td>No-right</td>
<td>Duty</td>
<td>Disability</td>
<td>Liability</td>
<td></td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Jural Correlatives</th>
<th>Right</th>
<th>Privilege</th>
<th>Power</th>
<th>Immunity</th>
</tr>
</thead>
<tbody>
<tr>
<td>Duty</td>
<td>No-right</td>
<td>Liability</td>
<td>Disability</td>
<td></td>
</tr>
</tbody>
</table>

As we can see in figure 1 above, Hohfeld sets the eight concepts out in two different ways; one pairs them as opposites, and the other pairs them as correlatives. Hohfeld provides detailed definitions of those concepts which he believes represent the four different ways in which the term “right” has been used. He defines these four concepts as:

A right is one's affirmative claim against another, and a privilege is one's freedom from the right or claim of another. Similarly, a power is one's affirmative "control" over a given legal relation as against another; whereas an immunity is one's freedom from the legal power or "control" of another as regards some legal relation. (Hohfeld, 1919: 60).

As we can see, Hohfeld defines a right as being a claim. That is, to have a right is to be able to claim the content of that right (which might be a specific object or some specific action or maintenance of a particular state of being) from some specified other. He views a privilege as being when others are unable to claim something from you or the lack of a duty to behave in a particular way, thus a privilege is a right to not have someone else claim something from you. Hohfeld further defines a power as allowing you to exert control over your relation with another person, and an immunity is freedom from such control.
An example of a right, in Hohfeld’s terminology, would be if I promised to feed your
goldfish while you were on holiday. This would give you a right that I feed your
goldfish. The example which Hohfeld uses is “if X has a right against Y that he shall
stay off the former’s land, the correlative (and equivalent) is that Y is under a duty
toward X to stay off the place” (Hohfeld, 1919: 38), and so in Hohfeld’s example X can
has a claim that Y should stay off his land. An example of a privilege would be, to
continue our example from above, if I have not promised to feed your goldfish then you
have no right that I feed said goldfish and I have a privilege to not feed your goldfish.
A more pertinent example might be seen in the right to property, which is the example
that Hohfeld also continues to use. If I own a field, then I have a privilege to enter that
field; as Hohfeld puts it, “whereas X has a right or claim that Y, the other man, should
stay off the land, he himself has the privilege of entering on the land; or in equivalent
words, X does not have a duty to stay off” (Hohfeld, 1919: 39, emphasis in original).

An example of a power is when an arrest warrant has been issued for a specific person
and a police officer then orders that person to stop. The police officer has a power over
that person. Hohfeld utilises two examples to articulate the nature of a power. He first
uses the property example again-- “X, the owner of ordinary personal property ‘in a
tangible object’ has the power to extinguish his own legal interest…through that totality
of operative facts known as abandonment” (Hohfeld, 1919: 51). The owner of some
specific object can voluntarily give up ownership of that property, so they have a
power. Hohfeld also uses the example of what he calls agency cases. Hohfeld argues
that the “creation of an agency relation involves, inter alia, the grant of legal power to
the so-called agent…That is to say, one party, P, has the power to create agency powers
in another party, A, -- for example, the power to convey P’s property” (Hohfeld, 1919:

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So for Hohfeld a power allows someone to alter the way in which they are legally related to someone--they have control either over the individual or over some part of the individual’s property.

An immunity is simply the lack of an affirmative power. For example, if a police officer comes to your door and asks to be permitted entry, he has no power to force you to allow him to come in, assuming that he does not have a legal search warrant. You have an immunity from the police officer entering your home.5 Hohfeld again used the landowner example. “X, a landowner, has, as we have seen, power to alienate to Y or to any other ordinary party. On the other hand, X also has various immunities against Y…for Y is under a disability…so far as shifting the legal interest either to himself or to a third party is concerned” (Hohfeld, 1919: 60). So, we can see that in the landowner example X is immune from Y alienating X’s property. Hohfeld goes on to note that if “a sheriff has been duly empowered by a writ of execution to sell X’s interest, that is a very different matter” (Hohfeld, 1919: 60). In that case, X would in fact have a liability which is the opposite of an immunity.

Hohfeld goes into slightly less detail on the definitions of the duty-side concepts as he relies on our extrapolating their definitions from their opposites and correlatives. Hohfeld works through the definitions of the eight concepts he sets out by examining them in relation to their paired correlative; so he examines rights and duties, privileges and no-rights, powers and liabilities, and immunities and disabilities. As he does so Hohfeld focuses in each case on that concept which is associated with the rights side of the equation, simply using the correlative duty concept to help illustrate the definition

5 This example of a police officer is borrowed from Leif Wenar. I will discuss his analysis of Hohfeld in more detail below.

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of the right side concept. This is not particularly problematic as it simply means that we are unable to define the duty side concepts by quoting directly from Hohfeld as we have been able to for the right side concepts above. However, as he clearly sets out these duty side concepts as both opposites and correlatives of the right side concepts, and utilises them to illustrate the right side concepts, we can walk through their definitions in more detail.

The opposite of a right is a no-right; thus, a no-right is the lack of an affirmative claim. So, using Hohfeld’s landowner example, Person Y has no-right to claim entry onto Person X’s property. That is, Person Y cannot make a justifiable claim to be allowed entry to X’s property without X’s permission. Similarly, a duty is the correlative of a right, so a duty is the requirement that you fulfil the claim of another. If we again use the example of a landowner that Hohfeld drew upon we can illustrate this more clearly. If person X owns a piece of land, person Y has a duty to not enter onto that land without X’s permission. So Y is required to not enter onto X’s land. The opposite of a privilege is a duty, so a duty is the lack of freedom to ignore another person’s claim. Or, in other words, is the requirement to fulfil that claim. So if we use the goldfish example from above, if I promise to feed your goldfish while you are on holiday, I am required to feed your goldfish. The correlative of a privilege is a no-right, and so a no-right is the lack of an ability to require another person to act in a particular way. So, in the landowner example, Y is unable to require that X allow him entry to X’s property.

A power is the opposite of a disability, and so a disability is the lack of control over a given relation. Using Hohfeld’s landowner example again, a disability is the inability to control a specific relation. So Y has a disability from changing his relation with X as
regards X’s property. That is to say that Y cannot obtain control over X’s property. X can grant Y some form of control over his property through the granting of powers via agency, or a court could grant Y some level of control through a warrant or writ of some description, but Y cannot himself alter his relation with X as regards X’s property. Similarly, a power is the correlative of a liability, and so a liability is another person having control over a given relation with you. If we modify the landowner example slightly, a police officer with a search warrant has a power over X to enter onto his land. So X has a liability to that police officer. The police officer has the power to coerce X as regards a given relation between them and thus X is liable to the police officer’s control.

An immunity is the opposite of a liability, and so a liability involves being restricted by the legal control of another as regards a particular relation. So in the goldfish example, I am under the control of the person to whom I have promised to feed their goldfish. They can release me from my promise if they so wish, and if I fail to feed their goldfish they are justified in demanding some form of recompense from me. The former places me under a liability and the latter creates a second requirement (as a result of not fulfilling the original requirement). Similarly, an immunity is the correlative of a disability, so a disability is the inability to influence a particular legal relation. So if we return to the modified landowner example from above, if person Y, a police officer, approaches person X’s property without any form of warrant or writ allowing them entry to X’s property then they are unable to demand that X allow them entry onto X’s property. Person Y may, if X grants them permission, enter onto X’s property.

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6 It is a logically coherent possibility to imagine a promise from which no-one, not even the promisee, could release me. This would not place one under a liability and would simply be a requirement. Such a promise, though possible to imagine, is unlikely in the real world and so is not a major concern.

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However, Person Y is disabled from enforcing the matter (just as X is immune from Y enforcing the matter).

For ease of observation I have presented a brief summary of these definitions in Figure 2 below.

Table 2: Definitions of Hohfeldian Jural Concepts

<table>
<thead>
<tr>
<th>Rights</th>
<th>Definition</th>
<th>Duties</th>
<th>Definition</th>
</tr>
</thead>
<tbody>
<tr>
<td>Right (Claim)</td>
<td>Affirmative claim against another</td>
<td>Duty (Requirement)</td>
<td>Requirement that you fulfil the claim of another</td>
</tr>
<tr>
<td></td>
<td>One's freedom from the right or claim of another</td>
<td>No-right</td>
<td>The lack of an ability to require another person to act in a particular way</td>
</tr>
<tr>
<td>Privilege</td>
<td>One's affirmative &quot;control&quot; over a given legal relation as against another</td>
<td>Liability</td>
<td>Being restricted by the legal control of another as regards a particular relation</td>
</tr>
<tr>
<td>Power</td>
<td>One's freedom from the legal power or &quot;control&quot; of another as regards some legal relation</td>
<td>Disability</td>
<td>The inability to exert control over a given legal relation</td>
</tr>
<tr>
<td>Immunity</td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

As the table shows, the terms “right” and “duty” are alternatively named a “claim” and a “requirement” respectively. This is largely a semantic change. However, I will argue that the Hohfeldian concepts are less separable than Hohfeld suggests and that they are better understood as the molecular components of the larger concepts of duty and right. As a result to continue referring to components of a duty and a right as a duty and a right would become confusing. I have substituted the term “duty” for “requirement” within Hohfeld’s construction in order to reflect the fact that I am arguing that a duty can be made up of any combination (or one alone) of the four duty side concepts and so it would be confusing to refer to the four together as a duty whilst also calling one of

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the molecular components a duty. I have used the term “requirement” as it seems the
most appropriate description of what is meant by Hohfeld that a duty should be – it is a
requirement to fulfil a claim.

A Hohfeldian Model of a Duty
Leif Wenar adapts Hohfeld’s framework and examines the different ways in which the
four incidents (as he calls them) that make up a right can be combined. Wenar and
Hohfeld disagree over both the extent of the separability of these concepts and the way
in which these concepts form part of our ordinary language. This latter disagreement is,
at heart, a methodological one. Before I tackle this methodological disagreement I will
provide a brief summary of Wenar’s argument and then I will examine the
disagreement over separability. I will engage in an analysis of how the duty-side
concepts can be combined that is similar to Wenar’s analysis of the right side concepts.

Wenar’s argument is simple--“that all assertions of rights can be understood in terms of
four basic elements, known as the Hohfeldian incidents” (Wenar, 2005: 224). Wenar
thus seeks to show that a right can always be expressed in terms of the four Hohfeldian
incidents. He does see the possibility of specific rights claims being comprised of only
one of the four incidents but he argues that “Most rights are complex molecular
rights…made up of multiple Hohfeldian incidents” (Wenar, 2005: 234). He uses the
Hohfeldian framework for “its capacity to display in exact terms various interpretations
of what people might mean when they assert a broad or indeterminate right” (Wenar,
2005: 235). When explicating this Wenar uses the example of the right to free
expression. An author might claim that his right of free expression has been violated if
a book shop refuses to sell his work. Wenar shows that whilst the right to free

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expression is usually expressed as a privilege—I am entitled to say what I like and no-one should interfere with that—in this case the author is asserting a claim that others be required to assist him by spreading his work. Thus, we can see how understanding the way in which different rights map onto the Hohfeldian framework leads to a better understanding of rights. This may prove useful when a rights-related claim is controversial (as in the case of the author discussed above) or uncontroversial (if the author had not taken issue with the book shop). It is my aim to be able to provide similar conceptual clarity for the duty side of the equation. So that when we say “A has a duty to phi” we can more clearly understand the nature of the statement that we are making.

I will now examine the methodological disagreement between Hohfeld and Wenar. Hohfeld’s argument begins with his observation that “One of the greatest hindrances to the clear understanding, the incisive statement, and the true solution of legal problems frequently arises from the express or tacit assumption that all legal relations may be reduced to ‘rights’ and ‘duties’” (Hohfeld, 1919: 35). He sees this as a deficiency with our normal language that “arises from the fact that many of our words were originally applicable only to physical things so that their use in connection with legal relations is, strictly speaking, figurative or fictional.” (Hohfeld, 1919: 30). Thus, Hohfeld argues that “the above mentioned inadequacy and ambiguity of terms unfortunately reflect, all too often, corresponding paucity and confusion as regards actual legal conceptions.” (Hohfeld, 1919: 35-36). Hohfeld’s argument can, thus, be summarised as stating that the way in which much of our discussion reduces all of our legal conceptions to being merely “rights” and “duties” is an inaccurate portrayal of our fundamental legal furniture. Hohfeld’s solution to this paucity of legal conceptions is to furnish us with six conceptions adapted from his existing understanding of legal terminology that can fill in
the gaps and to allow us to develop a much clearer understanding of our fundamental legal conceptions. Hohfeld restricts his arguments to legal conceptions. However, the terms “right” and “duty” are very commonly used outside legal discourse, and so a lack of understanding of these terms is applicable outside of said legal discourse.

Leif Wenar adopts a different methodological approach. Whereas Hohfeld felt that the ambiguity of ordinary language as regards rights and duties necessitated the generation of new, albeit related, concepts, Wenar argues that ordinary language is quite sufficient and that problems only arise when individuals use it inaccurately. Wenar states that “Philosophers of law sometimes complain that the ordinary language of rights is loose, or confused. Yet there is nothing wrong with ordinary language. The word ‘right’ in ordinary language is merely systematically ambiguous, like many other words, such as ‘free.’” (Wenar, 2005: 236). Wenar goes on to state that mistakes in common usage of the terms “right” and “duty” are “not the result of a defect in ordinary language. It is rather a defect in the speaker’s understanding of the various meanings of the word ‘right.’” (Wenar, 2005: 236-237). Thus his argument is that ordinary language is entirely sufficient--we merely need to be more rigorous in our understanding of that language.

This difference of opinion between Hohfeld and Wenar appears to be caused, in part, by the fact the Wenar views the Hohfeldian concepts as being part of our ordinary language regarding rights and duties. For Hohfeld this was quite clearly not the case. Thus Hohfeld’s argument that new concepts are needed to supplement ordinary language was almost certainly correct. However, when Wenar argues that ordinary

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language is sufficient so long as “speakers understand how assertions of rights map onto Hohfeldian incidents” (Wenar, 2005: 237) then he is also correct, in large part because Hohfeld’s concepts augmented ordinary language and have allowed us to be much clearer about what is meant by the term “right” and the term “duty”. I share Wenar’s view there is nothing wrong with our ordinary language so long as we are clear about how to use it. The problems that Hohfeld identified were due to our inaccuracy in using the terms “right” and “duty” and not in the nature of the terms themselves. Thus our ordinary language is perfectly adequate, so long as we have a clear and precise understanding of how the different Hohfeldian concepts fit together. Wenar deals solely with the “right” side of the equation; this chapter deals with the “duty” side.

As discussed above, Hohfeld and Wenar disagree over how the eight Hohfeldian concepts are related to each other. Hohfeld views them as relatively distinct concepts that make up the fundamental building blocks of legal conceptions. Wenar, in contrast, views them as being the molecular components of two more broadly defined concepts – a right and a duty. Thus, Wenar argues that the extent to which we can think of each concept as being separate from the others is much more limited than Hohfeld suggests. Wenar makes this argument by looking at how, when discussing the concept of a right, we can mean a number of different things that involve one or more of the four right-side concepts that Hohfeld defines. Where Hohfeld argues that his concepts tend to be largely separable from each other – they might occur together by coincidence but are not necessarily linked – Wenar argues that they are all different components of the same concept – a single component might appear on its own by coincidence but they are more likely to appear together than they are to appear apart. By disagreeing about how these eight concepts fit into our ordinary language Hohfeld and Wenar also disagree.
over how they are connected to each other. By siding with Wenar in this disagreement, and arguing that these eight concepts form a fundamental part of our ordinary language regarding rights and duties, I am also arguing that Hohfeld overestimates the extent to which they can be considered as separated. However, Wenar only makes this argument in relation to the right-side concepts. I will now examine the four duty-side concepts in order to determine how they fit together and how they can be constructed into a model of a single duty.

The most common way of making a statement about someone’s duty is to say something along the lines of “Person A has a duty to phi” where phi is a verb of some kind. A more specific example would be saying that “John has a duty to collect his children from school.” So we can see that phi becomes some form of action that John is required to perform. However, the statement “Person A has a duty to phi” can also become “David has a duty to obey the commands of a police officer.” The action that David is required to perform is both substantively and theoretically different from the action John is required to perform. David is required to obey a specific other person, rather than perform a clearly defined task. So we could re-state the general duty statement for David as “Person A has a duty to obey Person B.” A third way in which the statement “Person A has a duty to phi” could be interpreted is that “Mark has a duty not to command/coerce Paul.” This statement is the opposite of a power and so is a disability. Its correlative is an immunity. We can re-state Mark’s duty in general terms as “Person A has a duty to not coerce Person B.” Finally, the statement “Person A has a duty to phi” could also be interpreted as meaning “James has a duty to refrain from throwing stones at John.” In this case rather than being required to perform a specific act James is required to refrain from performing a specific act. So we can re-state the
general duty statement for James as “Person A has a duty to refrain from phi.” As we can see there are four different possible ways of understanding the general statement “Person A has a duty to phi.” I will now explore how these four different understandings can be mapped onto Hohfeld’s four duty-side concepts. It should be noted that in all of the diagrams that follow the arrows indicate the logical basis of the relationships between the various molecular components – they do not indicate that one implicates the existence of the other.

**Figure 1: A Hohfeldian Requirement (Duty)**

In Figure 1 we can see a diagram of an individual requirement. As discussed above this is defined as being required to fulfil the claim of another. A requirement is probably the most common of the Hohfeldian concepts and correlates quite clearly with the statement “Person A has a duty to phi.” Put simply a requirement is a duty to perform a specific act. However, this can be, and often is in our ordinary language, paired with a liability. In this case the requirement to fulfil the claim of another is paired with your inability to change your relation with the person whose claim you are required to fulfil. What is meant by this is simply that the statement “A has a duty to phi” often implies that the only way in which the relationship between A, the duty bearer, and B, the

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7 There can also be duties to obey a specific actor or to refrain from a specific act. I will discuss these below.

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subject of the duty, can be altered is through B waiving the duty. So in this case person A is both required to perform the specific action, but must also refrain from altering their relation towards Person B in this context. Thus, the phrase “A has a duty to B to phi” often involves a paired requirement-liability. By this what is meant is that A’s requirement to perform phi for person B can be disregarded or enforced at the discretion B. So, for example, in the case of the police officer at your door from the example above, his requirement to not enter your home can be waived by your inviting him in, or invoked by your refusing to grant him entry. Thus, the police officer has a requirement, but also a liability as regards you. This can be observed in figure 2 below with the arrow indicating that the two incidents are functioning as a pair.

**Figure 2: A Paired Requirement-Liability**

I will now examine some other common pairings of Hohfeldian duty-side concepts, before examining how all four concepts fit together as a complete model. Firstly, I will look at a paired requirement-no-right. A requirement paired with a no-right is typically found in the statement “Person A has a duty to phi/not to phi.” This statement can best be understood if we look at the example of the right of free speech. A no-right exists here as we are duty-bound to not infringe another individual’s privilege-right to speak
their mind.\textsuperscript{8} However there are also certain requirements associated with this right. We must arguably fulfil the claim of individuals to have access to the ability to speak their mind – so a free and fair press would have to be maintained as well as laws regarding protection of free speech. The no-right component of this duty is best characterized as non-action – a duty of non-interference. I do not have the right to demand that another person speak or not – I lack the ability to require them to act in a particular way. The requirement component is best understood as a need to act to ensure certain claims are fulfilled. This pairing is shown in figure 3 below.

\textbf{Figure 3: A Paired Requirement – No-right}

A second common pairing is of a no-right with a disability. A no-right constitutes a lack of a claim, whilst a disability constitutes a lack of a power. It is easy to see that there are scenarios in which you will both lack a claim to a particular thing and will also be unable to exert control over the behaviour of anyone else. This specific form of a duty is an inherently negative one. It requires you to refrain from performing a specific action, and disables you from altering the situation so that you can perform that specific action. For example, in the case of a police officer coming to your door with a warrant

\textsuperscript{8} The right of free speech is a privilege – I can choose to exercise it or not without making any claims upon the actions of another.

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for your arrest, you have a disability regarding him--you are unable to prevent him from executing the arrest warrant (either by physically preventing him from arresting you or by declaring the warrant invalid, only a judge can do the latter). At the same time, you have a no-right as regards the police officer as you are unable to make a claim for your freedom of movement to be respected. This form of a duty can be seen in the phrasing “Person A has a duty to not phi” and is a largely negative form of duty. In essence, you have a duty to simply refrain from restricting the police office in conducting his job. “A has a duty to not phi” can, in this example be phrased more specifically as “A has a duty to not resist arrest.” As we can see the no-right and the disability are paired with each other. This can be observed graphically in figure 4 below.

**Figure 4: A Paired No-right – Disability**

![Diagram showing paired no-right and disability]

However, these examples, a paired no-right – disability, a paired requirement - no-right, and a paired requirement - liability do not always capture the entirety of the statement “A has a duty to phi.” In the example of the police officer used above you also are under a liability to obey the police officer as you are unable to alter your relationship with said police officer. Thus, the statement “A has a duty not to resist arrest” involves not simply a no-right paired with a disability, but also a liability. Following from this, a paired no-right – disability can be further supplemented by a liability.

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These are merely some of the ways in which different Hohfeldian duty components can be combined. I will graphically display how all four of the components are related to each other in figure 5 below. Before I do so, however, I want to discuss how both a liability and a disability almost always feed into a requirement. When one is under a liability it is likely that the individual to whom you are liable will be able to make a claim against you. Similarly, when you are restricted by a requirement to someone, you will by necessity be unable, ceteris paribus, to change your legal or moral relation to that individual and will thus also have a disability. So, when one is restricted by a requirement there is almost always also both a liability and a disability at play. This is shown by the arrows in figure 5 that direct both a liability and a disability down into a requirement. An example of this can be seen in the goldfish example that I have already drawn upon. If I promise to feed your goldfish then I have a requirement to feed your goldfish. In addition to this, however, I have a liability to you as I must feed your goldfish in the way in which you instruct me to (that is with the correct food etc-in short I must obey your commands regarding the feeding of your goldfish), and I have a disability as I am unable, ceteris paribus, to release myself from that promise. This is all encapsulated in the statement “A has a duty to phi” and so we can see that simply saying someone has a duty can encompass one, two, three, or all four of the different Hohfeldian concepts.

Before moving on to examine a methodological issue with Hohfeld’s work I will discuss in more detail how this model is able to assist us in being more accurate about what is required by a duty. As we have observed, the four different concepts that
Hohfeld developed can operate both on their own and in conjunction with each other. They are all connected to each other as we can see from the fact that the statements “Person A has a duty to phi” or “Person A has a duty to Person B to phi” could, conceivably, indicate any of the four concepts are present. However, in order to be properly considered a duty a requirement must be part of the equation. The primary function of a duty is to indicate which actions (or inactions) are required to be taken. Thus, if a requirement does not appear at any point then there is not a genuine duty present. These are the two most common ways of expressing that someone has a duty. In the first statement person A simply has a duty to do whatever is required by the verb phi. That may be to fulfil the claim of someone else; it may be to refrain from a particular action; or it could be something else. In the second statement person A is required to perform whatever is required by the verb phi only as regards their specific relation with person B. That may be to fulfil B’s claim; it may be to obey the commands of B as regards a specific object or task; it may be to refrain from certain actions towards person B; or it could be something else. Additionally, both of these statements can, as we have seen, indicate various different combinations of the four concepts developed by Hohfeld. When we make a statement like “A has a duty to phi” what we are really stating is that A has at least one (normally more than one) of the components of a duty in the above model.
Which specific concepts are the relevant ones is contingent upon the specific scenario in which the duty occurs.

A final note on the model presented above is that there does appear to be two distinct categories into which we can split the Hohfeldian concepts. These are duties to perform/refrain and duties to obey. The top two concepts in the model presented in Figure 5 always involves some form of either obeying another person or refraining from issuing commands to another person. The bottom two concepts in Figure 5 always involve either performing a specific act or refraining from a specific act. The top two concepts, liability and disability, do filter down into the bottom two in most scenarios – which then turns the molecular incident a duty. However, by splitting the four concepts into two categories we can make it easier to determine what sorts of actions are required in specific circumstances. To express this analogously, a requirement is akin to the

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nucleus of an atom, the other three incidents are the electrons; they can be split away from the nucleus but they cease to be a duty and are separate incidents.

This chapter has elucidated how Hohfeld’s “duty” concepts relate to each other and how they can be of use in determining what sort of behaviour is required of us according to our duty. The analysis presented here is inspired by similar analysis performed by Wenar, but where Wenar focuses solely on the right-side concepts in Hohfeld’s conceptual map, I have focused solely on the duty-side of the equation. I will finish this chapter by examining in detail some real-world examples of duties associated with human rights, and how this understanding of the term “duty” enables us to be more specific about what needs to be done.

An Example from Human Rights – Torture

I will now illustrate how the model of a duty that I have outlined above is useful when analysing human rights by looking at the example of a duty not to torture, along with other duties associated with the issue of torture. I have chosen to look at the issue of torture as there is a broad consensus that we should not torture and it is, on the surface, a relatively simple duty. Despite this, however, torture is still prevalent in many countries and, as illustrated by the recent report from the US Senate Intelligence Committee, is an issue that is of political salience. The model presented above simply tells us what a duty is in its abstract form. It allows us to say what might be meant by the statement “Person A has a duty to phi” but does not tell us anything about who person A is or about what action phi might be in any given scenario. As a result, I will, in the course of explicating this example, make a number of assumptions about both the assigning of duties and the content of those duties. I will highlight these assumptions as they occur. These assumptions are not concerning as the aim in this chapter is to show

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how a duty functions – the substance depends on the source of the duty which in the case of this thesis will be human dignity and human rights. I will also note ways in which people might sometimes refer to there being a duty but in which no duty actually exists.

As Oona Hathaway has observed, despite the ‘Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment’ being signed and ratified by over 130 countries “Torture…is not just a practice of the past” (Hathaway, 2005: 229). Additionally, Hathaway observes that “our enemies in the war on terrorism are not the only ones who have made use of what had previously been seen as unthinkable practices” (Hathaway, 2005: 229). Hathaway, writing in 2005, did not have the benefit of the recent Senate Report on the United States use of torture. However, despite this she was still able to observe numerous examples of western states engaging in practices that are considered to be torture. Thus there are numerous specific examples we could look at in which a human right to not be tortured has been violated. In this particular case the substantive content of the initial rights and duties set out in the Convention against Torture (CAT) are relatively clear. Additionally, there are also broader human rights at play that are codified in numerous treaties and conventions and which, arguably, exist irrespective of their codification and institutionalisation.\textsuperscript{9} Despite the substantive content of the duties being relatively straightforward (do not torture being one such duty), there is more going on than this. We can state the individual’s duty not to torture simply as “You have a duty not to torture another person.” However, most cases of torture are committed by individuals acting on behalf of the state; thus, a more useful statement of the duty to not torture would be “The government and its

\textsuperscript{9}The justification and status of human rights is an issue that I deal with in chapters two and three.

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agents/employees have a duty to not engage in or sanction the torture of an individual.”

As we can observe from the US Senate Select Committee on Intelligence’s report on the torture practices of the CIA, the United States government failed in this duty.\textsuperscript{10} I will now turn to a rigorous analysis of the specific duties the US failed to fulfil by engaging in its torture program.

The specific duty that the U.S. government has failed in is, firstly, a lone requirement. All individuals have a claim that they not be tortured, and so all other individuals and governments have a requirement not to torture. Additionally, all governments are restricted by a no-right to not require others to torture on their behalf. That is to say, that they are unable to claim that another person or government engage in torture on their behalf--they lack a justifiable claim. We can correctly term this a duty as the no-right filters into a requirement to not torture – by lacking a justifiable claim the government is required to not act in a specific way. If we apply this to the US case we can see that the US failed in both of these aspects of its duty not to torture. Based on evidence from the Senate Report we can see that the US not only engaged in activities that many would consider to be torture,\textsuperscript{11} but also utilised the assistance of other countries in order to do so (although the names and even the code names of these countries are redacted from the Senate Report). The United States failed in its requirement not to torture individuals. Additionally, it failed to fulfil its no-right to not seek others to torture on their behalf by engaging other countries assistance in their torture program and thus acted contrary to its duty. This analysis is not seeking to show that the U.S. government was wrong in how it acted – no one disputes that it was – but is rather to show precisely in what ways the U.S. failed to fulfil its duties.

\textsuperscript{10}http://www.intelligence.senate.gov/study2014.html

\textsuperscript{11}For a detailed definition of torture see David Sussman, ‘What’s Wrong with Torture?’ in Philosophy & Public Affairs, Vol. 33, No. 1, (2005).

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Furthermore, all governments are under a liability regarding their usage of torture. Governments are unable to alter their relations as regards the use of torture upon individuals. The duty to not torture is one that is, substantively, considered to be absolute. As discussed by Rosa Brooks in *Foreign Policy*, the arguments in favour of utilising torture always appeal to utility calculations that are, at best, difficult and more likely impossible to make in real world situations. So, whilst some might argue that in the case, such as the one Brooks discusses and which is common in the literature on torture, of a ticking time bomb scenario you are duty-bound to torture the bomber in order to prevent the bomb from detonating, the prohibition on torture is not considered, substantively, to be discretionary (Brooks; *Foreign Policy*, 10/12/2014). Thus, the US government, indeed no government, is able to grant itself the permission to torture individuals in the way that the US government granted the C.I.A. permission to torture through the use of executive memos. This liability filters into a requirement to not engage in torture – governments are required to not alter their relationship with individuals in such a way as to make torture legal.

In the case of a claim that there is a duty to torture a bomber in a ticking time-bomb scenario we can use this Hohfeldian approach to determine whether or not there is actually such a duty. By understanding the nature of the duty to not torture we can identify this false duty-claim. This duty does not exist due to the fact that the duty to not torture involves a disability – this duty, or relationship, cannot be changed or waived. Thus, by understanding the nature of the duty to not torture we are able to more clearly see that it is not a duty that is conditional. In addition to this, in order for a

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requirement that you torture to exist there would need to be a corresponding claim—that some individual could claim that you torture someone else. Even in the ticking time bomb scenario it is not clear that such a claim might exist. It is true that the potential victims of the bomb would have a claim not to be killed by the detonation of the bomb, it is not clear that this leads to a claim that torture be used in order to prevent the bomb from going off.12

In addition to the duties, discussed above, associated with the prohibition on torture, there are also duties that come into play if a government or individual engages in torture. Since there is substantial documentary evidence that the United States government did engage in practices that constitute torture we do not need to construct a hypothetical scenario in order to examine how these duties might map out onto the conceptual model developed above. Firstly, it is clear that the United States government has a requirement to provide some sort of recompense to those individuals it tortured. The content of this recompense cannot be determined by a conceptual analysis of a duty, but it is clear that those who were tortured have a claim to recompense of some sort, and the US government has a requirement to provide it.13 In addition to this the United States also has a requirement to all of those it is currently detaining not to torture them, to provide them with some sort of legal route either to being released or to defending themselves in a court of law, and to prosecute individuals involved in torture where possible.


13 This requirement is arguably even stronger in the case of the individuals the United States tortured who were not the individuals that the US thought them to be. There are over 20 such cases of mistaken identity documented in the Senate Report.

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As we can see, then, duties related to the prohibition on torture are by and large duties to perform/refrain and not duties to obey. They consist mostly of requirements and no-rights. However, there is also a liability involved in the common understanding of the statement “A has a duty not to torture.” By utilising the conceptual model of a duty developed in this chapter we have a better understanding of precisely what actions are required according to a duty to not torture. The duty to not torture is a relatively simple example, but this simplicity has allowed us to see that even in the case of something as apparently straightforward as a duty to not torture, there is more than simply a requirement not to commit acts that would constitute torture, albeit a series of requirements are at the heart of this (and all) duties. This conceptual analysis does not add to the substantive content of these duties, but it allows us to better understand the specific duties involved. By mapping these duties onto the Hohfeldian framework developed we are able to make sense of the complexities of the statement “A has a duty to not torture.” In subsequent work I will examine how this conceptual model would influence our understanding of a duty in more complex examples. My aim in this section has been to illuminate the content of the model through the use of an example. Subsequently my aim will be to determine how this understanding of a duty might necessitate changes in governmental policy and individual behaviour in specific circumstances involving human rights.

**Conclusion**

In conclusion, this chapter has sought to provide clarity about what is meant by the term “duty.” In order to do this the chapter has expanded upon work by both Wesley

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Newcomb Hohfeld and Leif Wenar. I have adapted Hohfeld’s conceptual outline into a clear and robust model of a duty. Using this we are able to be more specific about what sort of action (or inaction) is required in certain scenarios. The model has been illustrated using general examples throughout. I have then illustrated how the model would be apply to a specific human rights based example--the duty not to torture. Whilst the chapter is a part of a broader project on human rights and their associated duties, and is thus situated within that literature, the model of duty put forward is generally applicable to any circumstances in which a duty exists. The understanding of a duty put forward in this chapter is, similarly to Wenar’s, lagely a functional one. The function of a duty is to indicate which actions (or inactions) are required – thus only when a requirement is present can there be a duty. If something is not required then the basic function of a duty is not being fulfilled. This is a relatively weak form of functionalism – it does not have the same degree of substantive complexity as Wenar’s functionalism regarding rights where he identifies six functions of rights (exemption, discretion, authorization, protection, provision, and performance).

The model is constructed by adapting Hohfeld’s map of legal concepts. Hohfeld felt that the ordinary language of “rights” and “duties” was deficient, and so he developed additional concepts to supplement our ordinary language. Wenar, in contrast, feels that our ordinary language is entirely sufficient so long as we are clear in defining our terms. In my view, following Wenar, our ordinary language is only sufficient if Hohfeld’s additional concepts are included and precisely defined in a complex conceptual map of the term “duty”. By developing such a model, or map, we are able to examine individual scenarios in which we think a duty exists and determine what sort of action or inaction is required. This model places a requirement at the heart of a genuine duty

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but explores the ways in which the additional concepts can filter into a requirement and most of the time travel in tandem with a requirement. Additionally, the model allows us to identify situations in which the term “duty” might be invoked, but in which no duty actually exists. This chapter has thus solved one part of the problem outlined at the beginning—that of defining precisely what a duty is. The next step will be to construct a second part of a complete model of a duty that shows how duties relate to human rights.
Chapter 2: Human Rights and Human Dignity: A Non-Political Justification

Introduction

Article 1 of the Universal declaration of Human Rights (UDHR) states that “All human beings are born free and equal in dignity and rights.” Despite the UDHR having been drafted over fifty years ago there is still significant academic debate over the justification of the rights enshrined within it. This chapter will provide a contribution to this debate by examining how we can justify human rights through appeals to human dignity.

Many of the problems that confront the literature on human rights have been articulated by Onora O’Neill. O’Neill has long been a vocal supporter of the idea of human rights whilst also critiquing both the theory and practice associated with this idea. She views the way in which human rights are commonly justified as being problematic, with knock-on problems for how we specify the duties associated with those human rights. As O’Neill discusses, the international human rights regime assigns these duties on the basis of being party to certain treaties or conventions. This is problematic as “If human rights are independent of institutional structures, if they are not created by special transactions, so too are the corresponding obligations; conversely if obligations are the creatures of convention, so too are the rights” (O’Neill, 2005: 431-432). If the duties associated with human rights are created by conventions and treaties, then human rights exist only as a result of these conventions. This leaves both human rights and their associated duties open to significant attacks by questioning the nature of their justificatory foundations, and gives us no clear basis for stating which rights are human

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rights and which are special rights generated by our institutional ties. My human dignity based approach will solve these problems as it allows us to justify human rights without appealing to institutions or special ties, ensuring that the corresponding rights are not merely conventional and it will allow us to clearly demarcate which rights should be considered as properly human rights. Whilst O’Neill incisively highlights these problems within human rights literature and practice she does not provide a clear solution to the problems she raises.

It is clear that there are rights and duties created by membership of institutions. However, if human rights are simply those rights that are called such in international treaties then they are justified for all only if all states have signed up to the relevant treaties. This leaves their justification on worryingly ephemeral grounds. Obviously there are often good moral reasons for states to sign human rights treaties – primarily the fact that codifying human rights into black letter law is a positive advancement in pursuit of greater enforcement of human rights – however that does not negate the fact that if human rights are only created by convention or treaty then human rights are only justified for individuals in states that have signed up to the conventions and treaties. Additionally, this can become somewhat circular as, if human rights are merely conventional, at least a component of what justifies claiming that states should sign the treaties or conventions is also an outcome of them signing the convention. Signing the convention would be justified by appealing to the goodness of the outcomes of the convention, namely human rights, without providing any argument for why those outcomes are good. A non-conventional approach does not have these problems.

\[14\] Maurice Cranston famously argued that many of the rights in the Universal Declaration should not be considered as properly human rights.

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From this we can deduce that by not having a solid justification for human rights and their associated duties it is difficult to be specific about who bears those duties; this is especially evident since we do not want to endorse an understanding of human rights that ties their justification to institutions. We want to avoid an institutional justification as it is not an effective approach to justifying human rights, but an institutional approach makes the assignment of obligations relatively easy – only those states that are party to the treaty/convention/institution are obligated to act. If we want to have a solid justification for human rights then we must come up with a better way of assigning duties. As Jeremy Waldron has observed the foundations of human rights are important and as a result how we justify human rights will have a significant impact upon how the duties associated with those rights are specified. If we accept that rights are merely institutional then however the legal instruments forming the human rights institutions assigns duties is how the duties will be assigned. This is not problematic if we are willing to accept that only states, and only those states that have signed the treaties, can have human rights based obligations. Otherwise we must seek a more effective justificatory strategy that will also allow for an effective assignment of duties. This problem of justification is the primary concern of this chapter.

The aim of this chapter is to articulate and defend a justification for human rights grounded in the concept of human dignity. This justification of human rights is in stark contrast to a currently dominant approach in the human rights literature which can be loosely termed as a ‘political’ or ‘practical’ justification. The political conception is subscribed to by a wide variety of theorists. However, each proponent of the political conception specifies it slightly differently. Charles Beitz describes a ‘practical’ conception, Thomas Pogge an ‘institutional’ conception, and Joseph Raz a ‘political’

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conception. I will refer to this broad school of thought as the political conception. These three theorists are a representation of some of the main different formulations of the political conception of human rights. There are significant differences between them (most notably between Pogge and the rest). However, all three are unified by utilizing a justificatory approach that is based in some component of politics, not in a metaphysical principle.

This chapter will achieve three distinct objectives. The first part of the chapter will describe and critique the political conception; the second part of the chapter will articulate and defend the human dignity approach; and the final section will examine the implications for how we think about the duties associated with human rights. The construction of the argument from human dignity will proceed in two parts: first, an examination of what human dignity is, and second, an articulation of how the concept of human dignity, when combined with an interest theory regarding the functions of rights, can generate human rights. The argument regarding the implications for how we think of duties will be that by basing human rights in human dignity we bring our duties to the fore, granting them equal priority with human rights in our moral furniture. This approach will help to solve some of the problems that O’Neill has with the human rights project—namely, the absence of coherent thinking about the justification for human rights and how this impacts our thinking about the obligations involved.

What is Wrong With the ‘Political’ Conception?

The political conception of human rights reflects an understanding of human rights that is common within the general literature on the topic. Different theorists call it by

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different names. Thomas Pogge calls it an institutionalist approach—“I focus, however, on a variant of institutional cosmopolitanism” (Pogge and Moellendorf, 2008: 357), Charles Beitz calls “a conception of human rights arrived at by this route a “practical” conception” (Beitz, 2009: 102), and Joseph Raz says “that accounts which understand their task in that way manifest a political conception of human rights” (Raz, 2007: 8). Whatever their differences, however, all three of these theorists take existing human rights practice as being in some way foundational for the concept of human rights. The main difference between these three theorists is that both Beitz and Raz explicitly reject a metaphysical foundation for human rights and seek to justify human rights based on some fact of global politics; whereas Pogge leaves the metaphysical question open for debate, but grounds human rights by defining them as a certain class of moral rights individuals can claim from coercive social institutions. The unifying thread running through all three theorists is their appeal to global social and political institutions in justifying and defining human rights. Beitz and Raz appeal to the way in which global institutions function to justify human rights, whereas for Pogge the mere existence of such institutions is sufficient. I will now examine these three theorists--Joseph Raz, Thomas Pogge, and Charles Beitz--explicating how their distinct theoretical standpoints fit into a single broad school of thought. I will then point out how the political conception mis-conceptualises human rights. Finally, in this section I will articulate why these flaws in the political conception necessitate a metaphysical (or non-political) conception of human rights.

For Pogge, the key component in his theory of human rights is that there is a shared institutional order. He argues that “We should conceive of human rights primarily as claims on coercive social institutions and secondarily as claims against those who
uphold such institutions” (Pogge, 2008: 50-51). Pogge’s argument is a Rawlsian one in that he views human rights as a necessary constituent part of any credible theory of global justice, and he believes that justice is, as Rawls famously stated, “the first virtue of social institutions” (Rawls, 1999: 3). Therefore, for Pogge, global justice requires global social institutions which should respect human rights. This makes his conception fit into the bracket of ‘political’ as it defines human rights in light of their roles in current global politics. On Pogge’s conception social and political institutions are required in order for human rights to become relevant. Pogge conceives of human rights as rights that can only be claimed from an institution. Pogge acknowledges that his conception struggles to account for the question of which rights should count as human rights. Pogge claims that he will “not address the ontological status of human rights” (Pogge, 2008: 59). However, he justifies his account of human rights by appealing to shared institutions and the idea that human rights protect basic human needs. “A commitment to human rights,” he writes, “involves one in recognizing that human persons with a past or potential future ability to engage in moral conversation and practice have certain basic needs, and that these needs give rise to weighty moral demands. The object of each of these basic human needs is the object of a human right” (Pogge, 2008: 64). Thus whilst Pogge claims to not tackle the issue of the ontological basis of human rights, he bases them on needs the objects of which can be claimed from institutions. In Pogge’s conception of human rights, without a sufficiently weighty shared, coercive institutional structure to claim them from human rights cease to be actively claimable, despite the needs, from which he seems to derive human rights, remaining as morally weighty. His conception is political in the sense that human rights are defined by reference to the existence of global political institutions.

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Beitz views “the doctrine and practice of human rights as we find them in international political life as the source materials for constructing a conception of human rights” (Beitz, 2009:102). Beitz states that his understanding of human rights is implicit within John Rawls’ *The Law of Peoples*. His conception takes the current political practice of human rights as foundational. Beitz asks what he views as a rhetorical question: “Why should we insist that international human rights conform to a received philosophical conception rather than interpret them, as they present themselves, as a distinct normative system constructed to play a certain special role in global political life?” (Beitz, 2009: 67). His argument explicitly rejects justifying human rights through appeals to any sort of philosophical understanding of what human rights should be. Beitz wants to strengthen the international human rights project, but in doing so he risks jettisoning crucial components of a functional understanding of human rights. He is correct to argue that human rights need to perform a discursive function in global politics—they have to motivate individuals and institutions to act—but he is wrong to claim that conceptions of human rights that utilise what he terms a ‘naturalistic’ justificatory strategy distorts our understanding of “the manner in which valid claims of human right should guide action” (Beitz, 2009: 51).

Beitz critiques what he calls ‘naturalistic’ accounts of human rights, those which seek to base human rights in some form of principle or value that is external to the actual doctrine of human rights as it exists in international treaties by arguing that these accounts would “rule out substantial parts of contemporary human rights doctrine” (Beitz, 2009: 53). Beitz argues that as these conceptions of human rights “must proceed from more-or-less narrow foundations” (Beitz, 2009: 66) due to their necessarily appealing to some underlying principle or value, and so the conclusions that they reach

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will be correspondingly narrow. For Beitz this results in an undesirable narrowing of human rights, excluding some of the rights (which rights, for Beitz, depends on the foundation used – he cites James Griffin’s account potentially narrowing a right “to an adequate standard of living” (Beitz, 2009: 66)) included in some of the current international doctrine of human rights. Beitz thus views his conception of human rights as offering a solution to the restrictive nature of an understanding like Maurice Cranston’s. Cranston argued that a key “test of a human right is that it must be a universal right, one that pertains to every human being as such – and economic and social rights clearly do not” (Cranston, 1983: 13). Beitz views Cranston’s reduction of the range of rights included as human rights as detrimental to the overall human rights project. However, Beitz has constructed something of a strawman here as there are many ‘naturalistic’ accounts that do not narrow the range of human rights significantly, but which do provide a solid standard with which to measure the validity of a human rights based claim. The understanding of human rights I will propose in this chapter being one such.

Beitz also argues that naturalistic accounts do not give sufficient weight to “the discursive functions of human rights within the existing practice” (Beitz, 2009: 65). Beitz’s argument is that human rights perform an important discursive role within international politics, acting as triggers for allowing intervention in other states’ affairs, and that naturalistic conceptions of human rights do not take this role of human rights seriously. However, Beitz underestimates the ability of naturalistic conceptions to allow for a discursive role for human rights. Beitz is concerned that by justifying human rights by reference to some naturalistic principle non-political justifications will

15 Cranston was, as many have since argued, mistaken.

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shut-down discussion and debate and find it difficult to provide motivation for action. The dignity-based conception of human rights that I shall propose encourages human rights to have a strong discursive role within global politics—it will provide us with reasons to act, and we must still debate and discuss the different forms of action that they motivate.

Beitz’s final criticism of naturalistic conceptions of human rights is that they do not tackle the issue of contribution. Beitz argues that naturalistic conceptions focus on the beneficiaries of rights as opposed to the suppliers of the content of rights, and that they thus struggle to assign duties and obligations. His argument is that naturalistic theories, “by framing the central problem as one about which interests of beneficiaries human rights should protect[,]…deflect attention from what are frequently the more difficult questions” (Beitz, 2009: 65) about which agents are required to act, when they are required to act, and what it is that motivates them to act. Again, I shall argue that Beitz firstly underestimates the capacity for naturalistic theories to emphasise the contributors as well as the beneficiaries of human rights, and that he underestimates the ability of naturalistic theories to provide answers to the important questions he cites.

Beitz’s solution to these problems is to prioritise the political practice of human rights within international doctrine as opposed to developing a conception of human rights that can stand apart from the messiness of political practice and provide a basis upon which that practice can be critiqued and praised. So he seeks to define human rights by reference to the role they play in global politics. He argues in favour of a conception of human rights that is explicitly based upon current global political practice, and the role

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that human rights play in that practice, thus making his conception a political one. Beitz states that “According to a practical view…to say there is a human right to X is simply shorthand for a complex description of regularities in behaviour and belief observed among the members of some group” (Beitz, 2009: 104). As a result Beitz’s theory emphasises the status quo of international human rights practice. It would, based upon this, be conceivable for the regularities of behaviour in international politics to change in such a way as to significantly damage the human rights project, and to potentially make provision for human rights significantly more difficult.

Beitz seeks to defend himself against this criticism by arguing that “we should construe the doctrine so that appeals to human rights, under conditions that will need to be specified, can provide reasons for the world community or its agents to act in ways aimed at reducing infringements or contributing to the satisfaction of the rights in societies where they are insecure” (Beitz, 2009: 106). By this Beitz means that human rights should be conceptualised as those rights which provide reasons for global political actors to intervene in each other’s affairs in order to secure and protect human rights. However, in mounting this defence Beitz collapses his argument into the claim that a human right is any right that would justify intervention in the affairs of a sovereign state (and which, as we shall see, is very similar to Raz’s conception), which then begs the question of which rights those might be. There is nothing within Beitz’s theory that allows us to clarify which rights should count as human rights and which should not. Some individuals may believe that if a state does not provide free primary education then we would be justified in taking significant action against that state, whereas others would say that we would not be so justified. However, both individuals might agree that there is a human right to an education. In order to solve this problem

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we need a way of settling the argument about what counts as a human right (and so allows for intervention) and what does not. Beitz’s theory does not provide us with this.

Raz follows Rawls (and to an extent Beitz) in taking “human rights to be rights 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” (Raz, 2007: 9). Raz’s argument is that human rights are those rights which disable states from claiming sovereignty to protect them from external interference. Raz argues that this is the common understanding within international human rights practice and that this (the defeasibility of the international community intervening) provides human rights with their moral justification. For Raz, justifying intervention in another state’s affairs is not only the “essential feature[s] which contemporary human right practice attributes to the rights it acknowledges to be human rights” but is also “the moral standard[s] which qualify anything to be so acknowledged” (Raz, 2007: 8). So Raz argues that “human rights are those regarding which sovereignty-limiting measures are morally justified” (Raz, 2007: 10). Raz does not see the need for there to be a justifying value beyond this (as Beitz allows for) as he argues that theorists have misconstrued the relationship between values and rights. Raz argues that many theorists simply argue that something (like autonomy) is valuable and that anything that is necessary to secure this valuable thing should be considered a right. Raz, correctly, points out that this is a non sequitur. It is not a sufficient reason, although it is a necessary one, for justifying a right that the object of the right be valuable (Raz, 2007). Raz’s view of human rights as those rights which provide defeasible reasons for violating a state’s sovereignty would not necessarily preclude also utilising a metaphysical principle as part of a justificatory
strategy for human rights. However, Raz does not go down this route and does not seem to see the need for any such metaphysical principle. Raz also does not commit himself to an institutional account of human rights like Pogge. Rather he argues that human rights are rights that can be claimed from a variety of actors, including individuals, states, or international organisations, but that the defining feature of human rights is that they justify overruling a state’s sovereignty in order to intervene and protect human rights (Raz, 2007). Raz’s approach has more in common with Beitz’s that with Pogge’s. However, all three are undoubtedly political in that they appeal to political practice and reasons for justifying human rights.

Whilst there are some differences between these three approaches, they are unified by their focus on political practice and institutions. Kenneth Baynes has observed some of the threads that tie the political conception together. He observes that

According to each, human rights are primarily (though not exclusively) claims against political institutions and their officials as opposed to claims against arbitrary individuals; secondly, human rights are understood primarily in connection with the basic conditions of membership in a political society…and, finally, and most importantly, human rights are political in that the type of justification given for them is determined by their political role or function (Baynes, 2009: 375).\textsuperscript{16}

So, whilst each of these conceptions emphasises different aspects of the international human rights regime they are unified by their focus upon that regime. For Pogge human rights are those rights which perform the role of protecting us from coercive

\textsuperscript{16}Baynes examines the work of four theorists--Joshua Cohen, Michael Ignatieff, Thomas Pogge, and John Rawls. This shows the breadth of the political conception and its saliency within the current literature.

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social institutions; for Beitz human rights are defined by the actual practice of international human rights, as they are defined as those rights which we collectively believe to be important enough to justify breaching national sovereignty; and for Raz they are those rights which provide defeasible reasons for interfering in the affairs of another country. Thus, all three are unified by their attempt to justify human rights through appeals to certain aspects of the international political order, whether that be the substantive role of institutions or simply the existence of those institutions.

I will now offer four basic criticisms of the political conception. First, the political conception of human rights can be uncritical regarding the current list of rights adopted by international political practice. Secondly, the political conception is undesirably restrictive in what it characterizes as a human right. Third, the political conception has little, if anything, to say about behaviour on an individual level. Finally, the political conception can generate perverse incentives. I will work through these four criticisms in the order listed here, looking at how they apply to the three different specifications of the political conception of human rights of Pogge, Raz, and Beitz.

The first criticism is applicable primarily to more substantive conceptions of the political theory of human rights such as those of Beitz and Raz. By taking some aspect of current international political practice as foundational, their conception of human rights can be uncritical. One of the things we want our conception of human rights to do is to guide us in criticising current practice. However, by basing their conception on some aspect of the international human rights regime it is much more difficult for Raz and Beitz to hold a mirror up to current practice and identify places where it requires improvement. This means that their only recourse to criticise current political practice
regarding human rights is empirical—that is whether or not the practice is actually fulfilling its aims as prescribed by international political practice—as opposed to theoretical, which would involve being able to critique those roles and functions international political practice ascribes to human rights. Pogge’s conception can also be uncritical of current human right’s practice. However, as Pogge is seeking only to justify the existence of human rights and not provide a method for specifying a list of rights it is perhaps a bit unfair to level this particular criticism at him. Raz is less prone to this particular problem than Beitz as his conception is based upon an understanding of human rights that does set a boundary to what counts as a human right, although it is not a particularly clear one as it still leaves the question as to which rights provide defeasible reasons for interference up in the air (for example it is unlikely that we would consider a failure to provide effective primary education as grounds for coercive involvement in another state’s activities, although some people might see it as sufficient reason). However, by going down this path Raz’s conception can tack too far and become prone to the second criticism—it can be too restrictive.

Raz’s conception would potentially exclude some of the rights in the Universal Declaration from being human rights, such as the right to paid leave and the right to education. It is likely that we want to be able to say that these are genuine human rights, as on at least a \textit{prima facie} examination they appear to be of great importance for the pursuit of a genuinely dignified human life—which, as we shall see, is what human rights protect. Raz could seek to defend his conception against this criticism by arguing that he understands human rights to be those rights that justify all forms of action “against the violator in the international arena” (Raz, 2007: 9) not merely aggressive action. So whilst we might say that a failure to provide primary education is not grounds for violating the physical security of another state, we might say that it is
grounds for action of a less aggressive form such as economic sanctions with education related strings attached. However, this defence is flawed. If we accepted Raz’s conception of human rights we will still have to determine what is a “defeasibly sufficient ground for taking action” (Raz, 2007: 9). That is, we will then have to determine which rights allow us to violate state sovereignty, and in which ways different rights allow us to violate said sovereignty. Thus, Raz must either commit to a distressingly narrow conception of human rights and as a result accept that current political practice is massively overstepping its self-imposed boundaries, or he must introduce an additional concept, value, or principle into his theory in order to allow us to determine which rights are defeasible grounds for interference. Either Raz settles the argument by stripping human rights of much of their content, or his conception of human rights does not get us any closer to having a clear and accepted understanding of which rights are human rights.

Beitz is also open to the criticism that his conception might be too restrictive, but from a different angle than Raz. Beitz argues for what Ronald Dworkin might call a fox style justification for human rights. In his book Justice for Hedgehogs¹⁷ (Dworkin, 2011) Dworkin advocates for a hedgehog’s approach – that is a unity of value as opposed to a multitude of value. Dworkin would describe Beitz’s approach as a ‘foxy’ one as Beitz allows for a multitude of different values and principles to serve as foundations for human rights. This is problematic, however, for as mentioned above, the foundations we use for human rights could (arguably, should) change what we believe about human rights. If the foundations we use change what we think about human rights then having

¹⁷ Dworkin takes his inspiration for this dichotomy between foxes and hedgehogs from Isaiah Berlin’s essay The Hedgehog and the Fox: An Essay on Tolstoy’s View of History, (1953). Berlin, in turn, took inspiration from the Ancient Greek poet Archilochus who wrote “The fox knows many things, but the hedgehog knows one big thing.”

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multiple foundations could result in various competing conceptions of human rights within Beitz’s understanding. Thus Beitz’s approach is problematic as by allowing for a variety of values as foundational for human rights it makes his justification more ephemeral and open to additional contestation. This leaves at least some of those rights which we would normally consider to be basic human rights open to attack from, for example, a crude utilitarian like Peter Singer, who contends that there is nothing morally significant about humanity that should differentiate how we treat humans and animals. Singer argues that the key moral consideration is the capacity to suffer, and thus he argues that animals, such as dogs, with a significant capacity to suffer should have the same level of moral consideration as any human. (Singer, 1989: 148-162).

Following this the concept of human rights would seem to cease to be of any real significance in our moral furniture. Rather we should talk about ‘sentient being rights’ or ‘ability to suffer rights’ something which would significantly narrow the content of justifiable rights. This would result in many of what are currently considered basic human rights (like the right to free assembly, free speech, etc) ceasing to be considered in any sense basic. This is clearly contrary to what we want human rights to do. We could contrast Singer’s approach with the one I will advocate which justifies human rights through appeal to a metaphysical aspect of humans – their dignity. Beitz would allow for both of these foundations to, potentially, exist alongside each other within his conception despite the significant contestation and confusion this might cause. Whilst this argument is perhaps slightly reductionist, the criticism of Beitz is still valid. By allowing for appeals to multiple justificatory principles Beitz makes the foundations of human rights much less stable than we would desire for one of the core concepts of modern global politics.
The third critique of the political conception is primarily aimed at institutional formulations, typified by Pogge’s. By allowing for human rights only to be claimed against shared social institutions Pogge has very little (if anything) to say about how human rights should moderate behaviour between individuals and other non-state actors. Thus, it would be impossible on Pogge’s account to describe an individual acting without sanction from a social institution as a human rights violator. For example, on Pogge’s account there is no human rights violation if I, acting as an individual, torture someone. Whilst the tortured individual is unlikely to invoke human rights when seeking recourse for the torturer’s actions that does not mean that a human rights violation has not occurred. It seems clear that if you are tortured, irrespective of who the torturer is, your human rights have been violated. This critique, perhaps, represents a departure from the common understanding of human rights. Pogge articulates this common position that “through the language of human rights, one demands protection only against certain ‘official’ threats” (Pogge, 2008: 64). He goes on to argue that “official moral wrongs masquerade under the name of law and justice and they are generally committed quite openly for all to see: laid down in statutes and regulations, called for by orders and verdicts, and adorned with official seals, stamps, and signatures” (Pogge, 2008: 65). This view that human rights are only violated by official acts does not mesh perfectly with our common understanding of the basic duties associated with human rights. For example, a human right to not be tortured most basically correlates with a duty to not torture. This duty, although (as we shall see) more complex than this, seems to assume that any agent can violate the right by failing to observe this duty. Similarly for the right to not be enslaved; the duties associated with this right are often violated by non-official actors and this is still considered to be a violation of the duties associated with the right. Whilst the systematic sorts of official

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violations that Pogge highlights are likely to necessitate something more than a criminal justice response, a response that would most likely be sufficient for a lone individual, this does not mean that individual agents cannot violate a human right. A human rights violation is not mutually exclusive from a crime.

Both Beitz and Raz are also prone to this critique of not being able to effectively comment on the actions of non-state agents as they argue that a significant component of what defines a human right is that it justifies interference in a state’s internal affairs. It is extremely unlikely that this sort of interference could be justified by an individual’s actions. If, for example, an individual citizen in a developing country was consistently preventing children from his community from attending school by maliciously damaging school buses then he is, of course, committing a crime, but he is also denying those children their human right to an education. The institutional and political conceptions of human rights view this individual’s actions as nothing more than the crime of vandalism. Additionally, an individual citizen has very little say or influence over whether interference occurs, and what form such interference might take. So both Beitz and Raz also have very little to say about individual’s behaviour as regards the fulfilment of human rights. It is difficult for individuals to fulfil their potential obligations if it requires them having the influence to ensure national-level interference. Additionally, they have very little to say about human rights violations carried out by non-state actors. As a result both Beitz and Raz are subject to the third criticism I outlined above. This critique is, in part, born out of the observation that the sort of political practice to which these authors (and more broadly the political conception as a whole) are speaking is inherently an elite one. The political practice that is referenced is that of global elites – not the practice of individuals whose human rights are at stake.
on a regular basis. This could, perhaps, render the political conception somewhat impotent when applied to a political context in which the discourse is not conducted in the language of global elites.

The fourth critique is also primarily targeted at an institutional formulation such as Pogge’s. This critique is that such an account could generate perverse incentives. On Pogge’s account justice only pertains when there are shared coercive social institutions. Thus, for Pogge, human rights only kick in if there are global, shared coercive social institutions, which he argues, not uncontroversially, there are. If we do not share these institutions, then you cannot claim your rights from me. This could generate perverse incentives for some states or corporations to either disentangle from global institutions or to not enter into them in the first place. Pogge’s argument is designed to show that the currently existing global social order is unjust as it is imposed upon the worse-off by the better-off, is causing the deprivation of the worse-off, and thus violates a negative duty of justice to not actively cause harm to others. However, the implications of this argument for Pogge’s account of human rights are that they are contingent upon the imposition of a shared coercive social order. Thus, if a state pulls back from such a social order (or does not initially engage in that social order) then it could claim that its moral obligations to others are curtailed.

So, for example, a state (especially, although not exclusively, non-democratic ones) could be incentivised to not sign up to an international human rights treaty in order to avoid incurring additional duties. As an example, the United States continues to avoid becoming party to the Rome Statute and thus join the International Criminal Court in

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order to avoid incurring any obligations to submit its soldiers to the judgement of the court. This also serves to prevent the international institutional order from deepening its coercive capabilities. If human rights only exist for those within sufficiently coercive institutional structures then there could be an incentive to leave, to avoid, or to restrict such an institutional order. In the case of the US and the Rome Statute, to avoid further deepening the coercive capacity of the international institutional order. Thus Pogge’s understanding of human rights doesn’t restrict the content of human rights in the way that Beitz and Raz’s conceptions do, but rather restricts the scope of human rights.

Whilst the flaws I have highlighted in the political conception are significant they do not, on their own, necessitate a move to a more metaphysical approach. This need is grounded by the observation of O’Neill made earlier that “if obligations are the creatures of convention, so too are the rights” (O’Neill, 2005: 431-432). We need human rights to be based on more than simply convention or political practice, as otherwise they would be rights that could be avoided by undermining certain treaties or institutions. Additionally, as Waldron observes “Foundations matter: they are not just nailed on to the underside of a theory or a body of law as an after-thought.” (Waldron, 2010: 233). In order to have a coherent theory of human rights we need to have a foundation that is based not in convention or political practice but is rather based in some aspect of the right holders, in this case – humans.

By grounding human rights in some aspect of humanity we are able to set them apart from special rights generated through other methods, whilst also seeking to provide a consistent method for determining what counts as a human right and what does not.

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This aspect of humanity that I will utilise, human dignity, is one that is common both within the literature on human rights and in the founding documents of the international human rights regime. It is not immediately evident that this need for foundations requires us to develop an account of human dignity. Alan Gewirth (Gewirth, 1982: 43-44) identifies within the literature five different ways of grounding human rights--by intuition, by institution, by interests, by intrinsic worth or dignity (including religious conceptions), or via a Rawlsian original position. The institutional position can be discarded as it is essentially Pogge’s approach and is thus prone to all the problems outlined above. The Rawlsian position that Gewirth outlines--“that if persons were to choose the constitutional structure of their society from behind a veil of ignorance of all their particular qualities, they would provide that each person must have certain basic rights” (Gewirth, 1982: 44)--is specifically concerned with the rights that would be enshrined within an individual society constructed from behind the veil of ignorance and so it is not directly relevant to discussions of global universal human rights (although some other approach based on Rawls’ original position methodology might produce favourable results, it would require careful specification and would necessitate some form of global social institutions, it is not the role of this chapter to discuss the problems with a Rawlsian methodology). The intuitionist conception can be discarded as rather than providing a foundation, claims to intuition are rather denying the need for a foundation and it is “impotent in the face of conflicting intuitions” (Gewirth, 1982: 44).

This leaves us with a dignity approach and an interest approach. The dignity approach, for Gewirth, holds “that persons have moral rights because they have intrinsic worth or dignity” (Gewirth, 1982: 44). The interest approach is, for Gewirth, “that persons have rights because they have interests” (Gewirth, 1982: 44). These two approaches are for
Gewirth distinct from each other. As we will discuss at length later, the two approaches are not necessarily incompatible. The main problem with the interest approach is that it can lead to a proliferation of rights unless a concept or principle external to the theory is utilised to narrow the set of interests which can translate into a right. The concept of human dignity on its own does not provide a clear method for outlining a list of human rights and associated duties. We must first have an understanding of the appropriate conception of dignity to use, which I argue is as a lofty status, and we must then define the interests and duties that are associated with the status of human dignity. So unless we use the interest theory understanding of the function of rights as protections for specific interests we cannot translate those interests into rights. My contention will be that by combining the two--the interest theory and human dignity--we can determine a clear and coherent understanding of the justification for human rights that allows for the construction of a complete set of human rights. Before I can do this, however, I need to explain why it is human dignity that I will appeal to rather than some other value or a broad account of human nature.

Why Dignity?

My aim in this chapter is not to determine the entirety of what makes humans human; nor am I arguing that human rights are the sum total of human dignity. Dignity is simply one particular aspect of humanity that I am highlighting, a part of which is the appropriate foundation for a specific set of rights and duties that adhere to humans alone.\textsuperscript{18} Additionally, there are almost certainly other values and principles that can justify other sets of rights or duties (such as membership within a community, which

\textsuperscript{18} This is assuming the non-existence of other creatures, Martians for example, that might fulfil the necessary criteria to qualify for human rights.

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can provide the foundation for certain political rights and duties). Similarly, there are almost certainly values or principles that humans share with other creatures that justify yet another set of rights and duties (such as ability to feel pain, put forward by Peter Singer). However, these other sets of rights and duties cannot sensibly be called human rights or duties as they are not based upon any aspect of our shared humanity. Rather they are either more expansive in their scope or less expansive in their application. This would mean that either the range of creatures in possession of the rights and duties are considerably broader, or that the range of rights is considerably narrower. Additionally, the relative weight of these other sets of rights and duties in comparison with human rights and duties is not my concern here, as this would require a much more complete moral theory than I am in a position to formulate. However, dignity is one part of what it means to be human, and is a part that can justify the possession of a fairly extensive set of rights. Thus the rights derived from human dignity can be coherently called human rights as they are shared by all humans in virtue of being human.

My argument here, as will be explored in more detail below, is that by utilising an interest theory of rights in combination with human dignity we can construct a coherent foundation for human rights. The interest theory of rights, in brief, asserts that rights protect specific interests. However, this theory of the function of rights has a significant problem of overshoot--it tends to overestimate the number of rights available to us by potentially attributing a right to every single possible interest. Thus, a principle that can allow us to sensibly and coherently restrict the set of interests that are to be protected by human rights is required. This is the role that human dignity will play in the theory of human rights posited in this chapter. I will explore in more detail the interest theory of rights below. My concern now is to develop a definition of dignity, and to show how we can get from that definition to a coherent set of rights.

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Human dignity is a commonly-cited and -used concept in theorising about law and human relations. As Jeremy Waldron observes, “Dignity…is a principle of morality and a principle of law. It is certainly a principle of the highest importance, and it ought to be something we can give a good philosophic account of.” (Waldron, 2012: Kindle Locations 203-204). However, despite its apparent importance and the amount of research dedicated to the concept, there is no singularly accepted understanding of human dignity. In most of the documents that found the international human rights regime, human dignity is the value or component of humanity that is cited as being, in some sense, the foundation of human rights. However, as Charles Beitz has argued, the framers of these documents did not have a precise understanding of what they meant by human dignity when they were framing these documents. Beitz illustrates this point by citing Jacques Maritain, who was a member of the UNESCO committee on the Theoretical Bases of Human Rights, as saying “‘we agree about the rights but on condition that no one asks us why’” (emphasis in original; quoted in Beitz, 2009: 21). Similarly to the framers of the UDHR, theorists and philosophers have not, according to Beitz, constructed or defined an adequate definition of human dignity with which to ground human rights. However, Michael Rosen has developed a rigorous historical account of four separate strands of the meaning of dignity. According to Rosen’s analysis these four different strands of human dignity have been present within the discourse on dignity for significant portions of its existence as a concept within our moral theorising. It is this fact—that human dignity has meant different things to different people at different times in history—that likely causes confusion when trying to utilise human dignity as a foundation for human rights. These four strands are (Rosen, 2012):

1. Dignity as Status

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2. Dignity as Inherent Value

3. Dignity as Indicating Commendable Behaviour (acting in a *dignified* manner)

4. Dignity as Giving and Requiring Respectful Treatment (thus dignity as a specific right, rather than a foundation for rights)

In order to solve the problem with our understanding of human dignity that Beitz observes, I will examine the different conceptions of dignity and then set out a definition of human dignity that will be of use in providing a foundation for human rights. I will utilise some components of Rosen’s framework—specifically the ideas of human dignity as a status and as an inherent value (which I will argue is better understood as defining the broader concept of dignity). I will argue that the best way of understanding human dignity in the context of human rights is as a status. Rosen’s framework is of great use for explicating how our understanding human dignity has evolved over time. However, I will not rely solely on Rosen’s analysis, as my aim is not to identify what dignity has meant at different times, but rather to elucidate what it now means and how it might justify human rights. It is likely that human dignity is a synchronically universal\(^\text{19}\) concept—that is, what it means is exactly the same for all people at a given time, but it is not necessarily exactly the same for all people at all times—and so it is important that we understand how it was previously understood, but only insofar as it assists us in understanding what it means today. I will then seek to show that by understanding the function of rights in terms of the interest theory we can determine how the concept of human dignity can serve as a foundation for a coherent specification of the nature and content of human rights.

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\(^{19}\)This is a term, and concept, borrowed from Raz – “The more plausible claim is that human rights are synchronically universal, meaning that all people alive today have them” (Raz, 201: 41).

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Four Conceptions of Human Dignity

In this section I will examine a number of different understandings of human dignity that have, at one time or another, been utilised in a conception of human rights. I will then commit myself to supporting an understanding of human dignity as a status-concept. By examining these other understandings of human dignity I want to show two things. Firstly, there is more to human dignity than simply a set of rights. Secondly, conceptions of human dignity that are not cashed out as a status will run into significant problems when trying to justify human rights. Human dignity is undoubtedly a broader concept than human rights, and so human dignity can certainly be used to do more than ground a set of rights. However, unpacking the entirety of what human dignity is and can do is beyond the scope of this chapter. Rosen’s historical analysis identifies four different conceptions of dignity that Rosen argues have been elaborated at various times throughout history. I will not spend significant time with either dignity as dignified behaviour or dignity as respect as neither of these are of use in grounding human rights. I will additionally examine James Griffin’s understanding of human dignity as ‘personhood’ cashed out as human agency as his approach is a similar status based understanding to mine. I will begin by briefly examining dignity as commendable behaviour and dignity as respect before looking at dignity as inherent value, and then Griffin’s personhood understanding of dignity. Finally, I will explicate human dignity as a status, drawing heavily on the work of Jeremy Waldron and some aspects of Griffin’s conception.

Before examining the various conceptions of dignity that Rosen (and Griffin) identifies I will briefly examine the concept/conception distinction. This distinction is important as I am arguing in favour of a specific conception of the concept of human dignity. This distinction is best set out by John Rawls who, in relation to justice, identifies the
distinction as follows – “I have distinguished the concept of justice as meaning a proper balance between competing claims from a conception of justice as a set of related principles for identifying the relevant considerations which determine this balance…the concept of justice I take to be defined, then, by the role of its principles in assigning rights and duties and in defining the appropriate division of social advantages. A conception of justice is an interpretation of this role” (Rawls, 1999: 9). In the context of dignity the concept can be defined as an understanding that there is something that morally and ethically sets humanity apart from the other creatures of this planet; a conception of human dignity is an interpretation of this inherent worth of the human race. Different conceptions of dignity can serve different ethical and moral purposes without conflicting in any way. However, when we elide different conceptions, or try to use one conception when a different one would be more appropriate we run into significant problems. This is illustrated by the, now infamous, French dwarf tossing case. In this case a dwarf, Manuel Wackenheim, took a suit against the French state for violating his right to work by outlawing dwarf tossing competitions. The legal dispute advanced through various levels (eventually being decided in favour of France by the United Nations Human Rights Committee) with a number of different arguments made. I would contend that in deciding against Mr. Wackenheim two conceptions of human dignity were elided – dignity as status and dignity as dignified behaviour. In choosing to be tossed Mr Wackenheim was not behaving in a dignified way – he was not living well – but this is an ethical question and should not be regulated by the state. In banning dwarf tossing (obviously involuntary dwarf tossing is outlawed – this refers only to those cases in which an individual with dwarfism voluntarily chooses to be tossed) the French state did deny Mr. Wackenheim the ability to pursue his chosen

20 I follow Dworkin in distinguishing between ethics and morality – “An ethical judgement makes a claim about what people should do to live well…A moral judgement makes a claim about how people must treat other people” (Dworkin, 2011: 25).

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career as an ‘entertainer’. 21 So it is important to firstly understand and, secondly, to be clear about which conception is appropriate for which task. My contention is that dignity as a status is the appropriate conception for justifying human rights.

The third strand of dignity that Rosen identifies is that of dignity as indicating commendable behaviour. This conception of dignity is based on the idea of behaving in a dignified manner, or with dignity. Rosen identifies this strand historically within aesthetics and art history. He draws heavily upon Friedrich Schiller in his discussion of this conception of dignity. Rosen states that for Schiller “Dignity is…‘tranquillity in suffering’” (Rosen, 2012: 31-32). He states that “the conception of dignity as what is dignified is part of an account of morally admirable behaviour—dignity in this sense is an expression of steadfastness of purpose and tranquillity in suffering” (Rosen, 2012: 56). Thus, this understanding of dignity involves facing difficulty and reacting to it in a stoical manner. This understanding of dignity is not particularly useful for assisting us in finding a foundation for human rights as it is primarily concerned with a very specific form of behaviour under certain circumstances. It does not provide a foundation for any rights, but rather posits an ethical standard of behaviour when presented with some form of adversity.

Rosen identifies two different forms of dignity as respect. Rosen identifies “respect-as-observance” and “respect-as-respectfulness.” Respect-as-observance Rosen derives from Joel Feinberg’s argument that “Just as I respect the speed limit by driving below a

21 I do not condone dwarf tossing. Neither do I think it is a human rights violation for a dwarf to be voluntarily tossed. Banning it outright may well be a human rights violation, albeit not a particularly weighty one.

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certain speed, I respect rights by not infringing them (if they are negative) or doing what they require if they are positive” (Rosen, 2012: 57). Thus, for Feinberg, as Rosen identifies, respecting a person’s dignity is simply equivalent to respecting their rights. In contrast to this Rosen identifies respect-as-respectfulness as treating someone with dignity. By this he means that “To respect someone’s dignity by treating them with dignity requires that one shows them respect, either positively, by acting toward them in a way that gives expression to one’s respect, or, at least, negatively, by refraining from behaviour that would show disrespect” (Rosen, 2012: 58). Rosen cites Article 3 of the Geneva Conventions from 1949 as an example of a text using dignity to mean respect-as-respectfulness. What is required of a person is not to respect a person’s rights, but to behave towards that person in a specific, namely respectful, way. From this we can see that dignity as respect cannot provide a foundation for human rights as it either assumes the existence of those rights or it specifies an ethical principle of how we should treat others in order to be living a good life. Dignity as respect is a conception of dignity that seeks to regulate our attitudes towards others – it could generate (imperfect) duties. However, it does not provide a clear pathway to outline a theory of rights beyond assuming that we have a right to be respected (in some way).

These two historic strands of dignity are not helpful for grounding human rights, although they would be of great interest in developing a larger dignity-based morality (as Rosen does). The next understanding of dignity identified by Rosen is of more interest to our understanding of human rights. The conception of dignity as an inherent value is possibly the most prima facie obvious conception to use when seeking to provide a foundation for human rights. What is meant by dignity as a value is that it is the “sense of dignity as the intrinsic value of something” (UN Document

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As such it is identifying the specific transcendental or *a priori* value of something and treating that thing in accordance with its value. Thus it is not restricted in its subject solely to humans the way that dignity as a status is. Non-human creatures can have some form of significant value associated with them. For example, creatures that are at least bordering on sentience (such as dogs or dolphins) have a significant value associated with them. We could in these cases talk of the dignity associated with near-sentience. This particular conception of dignity, as Rosen identifies, is prominent in the history of Catholic thinking on dignity. In this Catholic conception of dignity, the idea of intrinsic value derived from being a part of God’s creation is combined with being situated in the appropriate place in the hierarchy of this creation. Rosen teases out this way of viewing dignity through the work of Thomas Aquinas and Giovanni Pico della Mirandola.

We are not concerned with the dignity of non-humans as their dignity cannot justify human rights. The view that “human beings do indeed have dignity, but dignity is not essentially restricted to human beings” (UN Document E/CN.4/AC.1/SR.8 20th June 1947, p. 17) would appear to provide an easy path to identifying human rights. We would, in order to provide a foundation for human rights, have to identify the value of humans (as opposed to other, non-human entities) and then examine which rights that value would justify. However, whilst this approach, on the face of things, would be a relatively straightforward way to found human rights, it is significantly more problematic than it might seem.

The problem with this approach is that if we are to base human rights on dignity as the comparative transcendental value of humanity then we are no closer to determining what that actually looks like. We have simply said that humans have a value, which is called human dignity. This does not on its own provide us with a foundation for human
It does seem plausible to argue that humanity has a certain high value associated with it and that this value has something to do with the concept of human dignity. As discussed above the idea that dignity denotes the intrinsic value of humanity is better understood as a definition of the concept of dignity. In order to justify human rights we need an appropriate interpretation of this value — a conception of human dignity. Before examining Rosen and Waldron’s views of human dignity as a status I want to briefly examine an alternative way of cashing out human dignity that Rosen does not explore in detail — James Griffin’s personhood approach.

I examine Griffin’s conception as it is also a status based understanding of human dignity. Griffin argues that the content of the status of ‘personhood’ is normative agency by which he means the ability to choose and pursue one’s own conception of a good life. Griffin’s is an extremely sophisticated account of the grounds of human rights. He argues that there are two grounds required for compiling a complete list of human rights—“personhood and practicalities” (Griffin, 2008: 44). I will deal with the second first as it is the less controversial and more straightforward component of Griffin’s theory.

For Griffin the practicalities component of his theory is, in a sense, a modifier of the personhood grounding for human rights in order to discern the specific objects of specific rights. Griffin argues that personhood alone only produces abstract rights with some level of indeterminacy as it operates at a level of abstraction from the real world that makes it difficult to discern the specific objects of rights. For example, personhood, according to Griffin, can tell us that we have a right to free speech, but
practicalities would allow us to say that we have a right to access a reasonably free press or to freely express our views without censorship as a result of that more abstract right to free speech. Griffin’s argument, then, is that “we need to introduce features of human nature and of the nature of human societies as a second ground” (Griffin, 2008: 38). This does not seem to be particularly controversial. It is intuitively clear that in different social circumstances our more abstract rights (such as those enumerated in the UDHR) will yield different concrete rights. It would be absurd to say that an isolated Amazonian tribe have a human right to access a free press as no such thing exists for them. However, we would still say that the members of that tribe have a human right to freedom of expression. As we can see then, Griffin’s practicality criteria for determining the content of human rights is relatively uncontroversial and straightforward. However, the personhood criteria that he outlines is significantly more problematic.

Griffin argues that from personhood we can derive most, if not all, of the canonical list of human rights. However, he also claims that personhood applies a constraint to the range of rights that can be called human rights as they are not rights “to anything that promotes human good or flourishing, but merely to what is needed for human status” (Griffin, 2008: 34, emphasis in original). Griffin goes on to argue that this human status is to be equated with some form of agency, and that the “human” in human rights refers to “roughly, a functioning human agent” (Griffin, 2008: 35). As a result of this Griffin explicitly excludes certain members of the human species from possessing human rights – “Infants, the severely mentally retarded, people in an irreversible coma, are all members of the species, but are not agents” (Griffin, 2008: 34). Griffin defines the form of agency that he thinks is relevant in defining and grounding human rights as

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‘normative agency.’ By this he means “our capacity to choose and to pursue our conception of a worthwhile life” (Griffin, 2008: 45).

Griffin identifies one objection to his account of normative agency as being that an individual can be denied certain rights, such as religious freedom, and still be an agent. He defends himself against this potential criticism by arguing that his account of agency requires both autonomy and liberty. By this he means the ability to both choose our goals and to, within limits, pursue them. He uses his defence against this criticism to also argue against a capacities account of human rights. He argues that we must be able to exercise the capacities that human rights protect, as we “can trample on a good many of a person’s human rights…without in the least damaging these capacities” (Griffin, 2008: 47, emphasis in original).

Griffin’s personhood account of human rights is a compelling one. It offers a philosophically rigorous and clear account of human rights. Griffin’s is an impressive defence of and justification for the priority we give to human rights in our moral and political discourse. However, it suffers from a serious flaw. By cashing dignity out as normative agency, Griffin excludes individuals who do not fulfil his relatively expansive account of agency from possessing human rights. This would, on his own admission, exclude the profoundly mentally handicapped, children, and those in a long-term coma. As a result of this Griffin’s account excludes from the protection of human rights some of the most vulnerable of human individuals, who are arguably those who most need the protection of human rights. This would appear to be a significant flaw with Griffin’s conception of both human rights and of dignity. Within Griffin’s own account he acknowledges that not exercising a right due to it not being something you

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particularly desire does not negate the existence of the right. He draws upon the example of a shy individual and the right to free expression and argues that “if I am terribly shy and have no wish to speak, I may mind much less that I am not allowed to” (Griffin, 2008: 49). This aspect of Griffin’s argument then cannot answer the question as to why we would exclude a mentally handicapped individual from the class of person’s in possession of human rights. These individuals may be less interested in exercising certain of their human rights, but that does not mean that they should not still be afforded the protection of their rights. This flaw in Griffin’s account does not entirely undermine his account. Rather it merely necessitates a reconfiguration of what human dignity is and entails.

Whilst Griffin cashes the status of dignity out as being normative agency Jeremy Waldron presents a different picture of dignity as a status. This is the fourth strand of dignity that Rosen identified. My argument will be more in line with Waldron’s than with Griffin’s. However, I will draw upon certain elements of Griffin’s understanding of dignity and human rights. Waldron depicts human dignity as being a lofty status, stating:

This is what reactionaries always say: if we abolish distinctions of rank, we will end up treating everyone like an animal, ‘and an animal not of the highest order.’ But the ethos of human dignity reminds us that there is an alternative: we can flatten out the scale of status and rank and leave Marie Antoinette more or less where she is. Everyone can eat cake or (more to the point) everyone’s maltreatment—maltreatment of the lowliest criminal, abuse of the most despised of terror suspects —can be regarded as a sacrilege, a violation of human dignity,

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which (in the words of Edmund Burke) ten thousand swords must leap from their scabbards to avenge (Waldron, 2012: KL 1132-1137).

The status that Waldron associates with human dignity is one that was, in time gone past, associated with those at the top of the feudal hierarchy. This is human dignity as a lofty status. What Waldron has articulated is that dignity as a status is “comparable to a rank of nobility—only a rank assigned now to every human person, equally without discrimination: dignity as nobility for the common man.” (Waldron, 2012: KL 351-353). Waldron is not arguing to create a levelling up ex nihilo. Rather he has identified a form of dignity that has historically existed, that of nobility, and that some of the rights that were previously restricted to a few are extended to all (whilst some are removed from the concept of human dignity entirely).

Every man a duke, every woman a queen, everyone entitled to the sort of deference and consideration, everyone’s person and body sacrosanct, in the way that nobles were entitled to deference or in the way that an assault upon the body or the person of a king was regarded as a sacrilege (Waldron, 2012: KL 548-550).

This extension of a previously-existing dignity of status thus extends to all the rights that were previously associated with specific stations in a human hierarchy. It is important at this point to comment that the statuses of a feudal lord and human dignity are not perfectly commensurate. The status of human dignity is something which must be synchronically universal—that is it is the same for all people at a specific time, but not for all people at all times. This results in us being able to say that all individuals have a status that is equivalent to that of a feudal lord, without it being exactly the same. We are essentially saying that the value of humanity is such that we all have a
status that is akin to being a lord in feudal times. Rather than a hierarchy of humanity we have all humanity with a shared lofty status. By focusing on our equally lofty status we can define and defend a particular set of rights as “a status comprises a given set of rights rather than defining them as instrumentalities” (Waldron, 2012: KL 329-330).

The above explicates that a key component of this conception of dignity as a status is that those endowed with that status are entitled to have certain interests protected. As Waldron states “In law, a status is a particular package of rights, powers, disabilities, duties, privileges, immunities, and liabilities accruing to a person by virtue of the condition or situation they are in” (Waldron, 2015: 134). If we accept that the function of a right is to protect a specific interest, as argued by the interest theory of rights, then if a status is at least partially comprised of a set of rights then there are specific interests that need to be protected in order for the holder of a status to enjoy that status. Humans have a status and this status is comprised of their rights, based upon the interests that are required for us to enjoy that status. Just as a lord did not lose his dignity or title when he was denied the rights associated with his status, so being denied our rights does not deny our dignity--it simply prevents us from enjoying it. Human dignity is not predicated upon the fulfilment of these rights; instead, human dignity, on this understanding, defines what these rights are. Thus, our task is to determine what rights and duties might be associated with this particular status by examining the rights that are associated with the lofty status of nobility and determining which ones fit with being shared by all of humanity. This will then define the content of the status of human dignity.

22 It is important to note that Waldron lists all of the Hohfeldian incidents. A status is comprised of rights and duties.

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Waldron’s arguments regarding dignity as a status are forceful and eloquent. When combined with certain aspects of Griffin’s account they become increasingly so. “‘[T]he sort of dignity relevant to human rights,’ Griffin says, ‘is that of a highly prized status: that we are normative agents.’ He says that our human rights are derived from our dignity, understood in this way” (Waldron, 2012: KL 323-324). Griffin’s definition of normative agency leaves something to be desired, but his argument captures something that is at the core of understanding human dignity as a status – our human dignity is not something that we simply have but it is something which we can actively use. Normative agency involves choosing a path for our life – having the status of human dignity is active, not passive. Thus we all have dignity, as we all have this potential, which is a status partially defined as a particular set of interests -- one which Waldron describes as being similar to the rights and interests previously associated with lordship. Obviously Waldron is not asserting that the two sets of rights are identical. He is simply arguing that the status of human dignity is not a low one. However, the analogy with lordship is a useful one in another way. There is more to being a normative agent than the simple bearing of rights. Normative agency is also associated with duties. Feudal lordship was a reciprocal relationship; the lord had an extensive set of rights, but he also had an extensive set of duties. In a similar way human dignity as a status should also be associated with a particular set of duties.

The aim of this discussion has been to follow Waldron in attempting to “get at what dignity—the status—in general involves” (Waldron, 2012: KL 295). We are beginning to see the entirety of what this status involves--it involves a specific set of rights and a

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specific set of duties. These rights and duties are commensurate in some way with the rights and duties associated with lordship in times past--freedom of political association, freedom of speech, rights to a particular way of life, etc. Similarly, duties to assist those needing assistance in gaining subsistence, duties to treat others in particular ways--not torture, murder, arbitrarily detain, etc. are also duties that are roughly commensurate to those held by nobility. The synchronic universality of human dignity predicates that these rights will not be identical to those of lordship. They will depend significantly upon the contingencies of modern life. The nature of modern life and the expansion of this noble status to all human individuals will necessitate the specific rights being changed and modified. We can utilise something along the lines of what Griffin terms as practicalities to work out the specifics here. Simply put, the argument is that all humans share a lofty status of human dignity. A status is comprised of certain interests and duties. The interests associated with human dignity are those which would be required for a human individual in their current situation to be able to live a genuinely and recognisably dignified life. Waldron’s argument is that these will be similar, although not identical, to the interests previously protected by the status of nobility. These will need to modified by the practicalities of modern life and the removal of those rights which are clearly at odds with the extension of this status to all--such as the right to command service from some individuals.

To conclude this section, I want to turn briefly to the quote from Rene Cassin that Beitz cited. Cassin commented that “The text [of the UDHR] was trying to convey the idea that the most humble men of the most different races have among them the particular spark that distinguishes them from animals, and at the same time obligates them to more grandeur and to more duties that any other beings on earth” (UN Document

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E/CN.4/AC.1/SR.8 20th June 1947, p. 2). He was claiming that humans are, to return to the original Latin meaning of “obligate”, bound to a certain grandeur and certain duties that are in excess of any other creature on the planet. This is entirely in concert with the concept of dignity as a lofty status that we have discussed and defended here. There is a certain grandeur associated with the concept of lordship just as there are particular duties—a lord was not only a ruler but a protector. The linking of grandeur and duties by Cassin, although not direct, is intriguing as it suggests that for the framers of the UDHR the two concepts were in some way twinned. We have grandeur and we have duties, and this is what dignity is. In this case, then, the status of human dignity is to have the rights associated with our grandeur (which is roughly commensurate with those formerly afforded only to the nobility) and to fulfil the duties required of such a status.

The status of human dignity requires the protection of a set of interests that then translates into a set of rights. This chapter is arguing for an understanding of human rights that is in line with the interest theory of rights. As we shall see in the next section, a problem with the interest theory is that of overshoot—by basing human rights on interests can be difficult to specify which interest should translate into human rights and this can lead to an undesirable proliferation of rights. Obviously not every interest should translate into a right, much less a human right, but it is important that we have some way of determining where the line is to be drawn. The concept of human dignity, in this conception of human rights, provides us with a status concept with which we can restrict the list of interests that should translate into human rights, without denying the

23 “Obligate” is derived from the Latin words ob and ligare, which literally translate as “to bind to.”

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validity of other rights derived from other interests. The next section of this chapter will examine the interest theory, and its main rival, the will theory, to show how we can get from a status based upon our inherent value to a coherent conception of human rights.

The Next Step

This discussion of human dignity does not provide the necessary moral toolbox to generate a complete foundation for human rights. Rather, it provides us with a starting point. In order to get from human dignity to human rights we need a clear understanding of what rights are supposed to do. Broadly speaking there are two theories about what the function of rights are--the interest theory and the will theory. I will not here be picking a side in this debate. Rather, I will argue the interest theory is the best way of understanding human rights as it makes clear how rights are generated by human dignity. As I will explore, the interest theory of rights is a more apposite understanding of the functioning of rights in the context of human rights founded on human dignity. This does not mean that the interest theory is superior to the will theory in all circumstances; my argument is that understanding the function of human rights in line with the interest theory is a more useful way of thinking about human rights.

The interest theory of rights is clearly stated by Matthew Kramer, who describes the interest theory as

Best encapsulated in the following two propositions:

(I) Necessary though insufficient for the holding of a legal right by X is that the duty correlative to the right, when actual, normatively protects some aspect of
X’s situation that on balance is typically the interest of a human being or collectivity or nonhuman animal.

(II) Neither necessary nor sufficient for the holding of some specified legal right by X is that X is competent and authorized to demand or waive the enforcement of the duty that is correlative to the right. (Kramer, 2010: 32)

Kramer also gives a clear account of the will theory. According to this theory, “Both necessary and sufficient for the holding of some specified legal right by X is that X is competent and authorized to demand or waive the enforcement of the duty that is correlative to the right” (Kramer, 2010: 32). So the will theory of rights argues that only those individuals capable of demanding/waiving the enforcement of a duty can hold rights, and that the primary function of a right is to provide individuals with a particular power. The interest theory of rights, however, allows for individuals that do not possess that capability to also bear rights (this seems intuitively plausible as we do talk about some animal rights in a relatively uncontroversial way) and views the primary function of rights as being to protect certain specific interests. As Kramer points out, a common critique of the interest theory is that it ascribes rights too broadly. Kramer uses the example of a municipality forbidding people from walking on the grass in specific areas (Kramer, 2010). The municipality presumably does this in order to allow the grass to flourish and grow. It is an interest of the grass to not be trampled, and so interest theorists might be committed to conferring legal rights upon the lawns or the individual blades of grass. This problem does not exist in Joseph Raz’s conceptualisation of the interest theory. Raz defines a right in the following terms
x has a right’ if and only if x can have rights, and other things being equal, an aspect of x’s well-being (his interest) is a sufficient reason for holding some other person(s) to be under a duty. (Raz, 1984: 195)

So Kramer’s formulation of the interest theory has the problem that before it can be applied “the class of potential right-holders has to be demarcated; the task of demarcating that class has to be undertaken on the basis of factors outside the Interest Theory itself. Such a task is a moral endeavour” (Kramer, 2010: 35). Raz’s understanding does not require us to demarcate the class of potential right-holders in the way that Kramer’s does – only those who are capable of having rights are included for Raz (so grass, for example, is excluded). However, there are a variety of possible reasons that might justify holding another person to be under a duty. Thus whilst Raz avoids a proliferation of rights-bearers his formulation still requires some external principle to demarcate the substance of the particular class of rights. Raz’s interest theory does not face a proliferation of rights-bearers, but a proliferation of rights.

My argument is that, following from this, we can use the conception of human dignity as a status as an external moral principle or value that can allow us to delineate the boundary of human rights. So if we draw upon human dignity as a high or lofty status associated with a set of interests and duties roughly commensurate with those of the noble classes of the past, then we can say that the interests being protected are those that are necessary to allow all individuals to enjoy that particular status today.24 This

24 Of note, Justice Clarence Thomas’ recent dissent in Obergefell v. Hodges comments that “human dignity cannot be taken away by the government. Slaves did not lose their dignity (any more than they lost their humanity) because the government allowed them to be enslaved.” Whilst Justice Thomas is right in saying that they did not lose their dignity, they were denied the ability to enjoy their dignity. Slaves were not granted the rights that protect the interests that comprise one half of their dignity. Additionally, they were also largely denied the means to fulfill the other half of their dignity--their duties. Thus, Justice Thomas is only partially correct when he states that the government cannot take away an individual’s dignity. The government cannot take away dignity, but it can take away the rights that protect our enjoyment of our dignity.

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allows us to say that the bearers of human rights are all those creatures that are human, and that the rights that are to be protected are those that are necessary to ensure that the interests necessary for the enjoyment of the lofty status of their human dignity.

Implications for Duties

The final section of this chapter will examine some of the implications that follow from grounding human rights in human dignity for how we think about the duties associated with human rights. I will examine three possible implications of utilising human dignity as a foundation for human rights. Firstly, I will look at the differing rhetorical weight or position this would give duties within our moral furniture. Secondly, I will examine how some of the duties associated with human dignity may not perfectly correlate with specific human rights. Thus, the realm of duties might be expanded beyond what is normally associated directly with human rights. This might assist us in bringing greater clarity to the assignment of duties for the fulfilment of rights that do not appear to have an obvious one-to-one correlation with any specific duty. For example, if I have a right to healthcare it is unclear who is supposed to supply the object of that right. However, by allowing for some rights to not directly correlate with a single specific duty we will be able to argue that such a right should be supplied by a specific form of institutional arrangement which a number of individuals are obligated to construct. This is shown, graphically, in Figure 6: Dignity, Rights, and Duties: below. The darker arrows represent the causal relationship between human dignity and human rights and duties. The lighter arrow represents the conceptual relationship between the rights and duties – some of the rights and duties directly correlate with each other; some do not. Finally, I will show that the social nature of human dignity allows us to talk coherently about someone acting with dignity despite being materially deprived of many of the rights
necessary for them to enjoy that dignity. We are able to say that someone who is in a state of extreme deprivation is still in possession of their dignity as they have the ability to fulfil their duties and to thus act with dignity.

It is common for people to make rights claims based on the assumption that rights are, in some sense, one of the most important components of our moral furniture. By grounding human rights in human dignity we do not deny the contention that human rights are of great importance. However, we are able to sever duties from the rights, whilst maintaining their conceptual link.

**Figure 6: Dignity, Rights, and Duties:**

A causal relationship between rights and duties would view the rights as in some sense prior to the duties. On this view, it is because we have rights that other people then have duties. Rather than saying that all individuals have certain rights and therefore other

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agents have certain duties we can say that all individuals have certain rights and certain duties. This allows us to re-prioritise the associated duties in our moral landscape without detracting from the importance of the rights. By providing increased priority for our duties, whilst not decreasing the priority of our rights, we increase the rhetorical force of appeals to the duties associated with human rights, and thus may be able to drive towards greater fulfilment of human rights with greater success. This is not to say that being in possession of a right does not imply the existence of a duty elsewhere—it does—it is simply arguing that by making rights causally prior to duties we run the risk of rhetorically de-emphasising the urgency of the duties. By making the initial rights and duties conceptually, rather than causally, related we are able to avoid this. However, we still maintain their conceptual link through their common basis in human dignity – thus we can still coherently talk about these duties as being associated with human rights.

The second implication is connected with the first. By severing the causal link between rights and duties we can coherently talk about duties that are associated with human rights but that are not directly correlated with any specific individual’s right. For example, it is difficult to say whose right has been violated if we do not pursue the construction and maintenance of just institutions. I do not violate any specific individual’s right if I do not contribute towards the maintenance of institutions that ensure and protect human rights. However, we can coherently say that I am not fulfilling my duty to maintain human rights protecting institutions and that this duty has some significant bearing upon fulfilling a wide array of human rights. It becomes more theoretically coherent to do this if we use human dignity as a foundation for human rights because the status of nobility was not simply associated with a set of specific

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rights, but was also associated with a set of duties. Lords had duties towards their subjects, and so if our status of human dignity is in some sense commensurate with that nobility, then it is clear that part of that status is also the possession of certain duties. One of these duties is today to promote human rights-respecting institutions as the nobility had duties to maintain the institutional structure of society. These duties are associated with human rights for two reasons. Firstly, they stem from a shared foundation in human dignity. Secondly, the fulfilment of these sorts of duties has a significant impact upon the fulfilment of a wide array of rights for a large number of people. However, this part of their relationship is not a clear correlation – there are ways imaginable in which an individual could enjoy all of their human rights without an institutional framework in place, but the practicalities of modern life make it such that the existence of certain types of institutions make the enjoyment of human rights significantly more secure.

If we apply this duty to today’s context with all individuals endowed with equal status, then we find that all of us have duties to promote a just institutional framework. This comes about as one of the duties that was most associated with nobility was maintaining a certain social and political order. As the nature of the social order associated with the status changes (human dignity is a different, though similar, status to nobility) then the duty will also change. Thus in the case of the status of human dignity it makes sense to talk about promoting a social and political institutional order that protects human dignity and thus human rights. Thus even in a scenario in which by failing to fulfil our duty we are not clearly violating a specific right, we can be said to be failing to fulfil a specific duty. This implication for how we think about our duties is particularly important as a common criticism of human rights is that it is unclear by whom certain duties are owed.

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A similar example would be the right to a basic level of health care. It is often argued that there is no clear duty bearer that correlates with this right. However, on my understanding all individuals are duty-bound to promote the dignity of others. To use the connection with lordship again, lords were obligated not to damage the prospects of their peers (other nobles). For example, Magna Carta enshrined certain of the legal rights of the nobility. Rights they could claim from each other and from the monarch. In a modern context this would translate into requiring all individuals to not damage the prospects or well-being of another individual and to promote an institutional structure that provides for, amongst other things, basic healthcare to all individuals that share the status of human dignity. There are obvious practicality constraints on this – I cannot be directly responsible for providing healthcare when I am not trained as a physician. Similarly, I cannot be directly held responsible for the healthcare provision in Bangladesh. However, I can be held responsible for my role in not promoting a fairer and just global order that would allow for better healthcare provision in Bangladesh. This does not mean that the idea of human rights is simply everything that would be associated with a just world. There is much more to a complete conception of justice than human rights, although they are almost certainly a key component of any plausible theory of justice. By loosening the causal relationship between duties and rights we are able to maintain duties that are essential for the protection and maintenance of human rights but that have no clear, specific right-bearing beneficiary and to more easily specify duty-bearers in difficult cases. A significant implication of this severance is that we cannot fulfil our duties and enjoy our rights in isolation. I, on my own, cannot fulfil every duty that I bear due to my status of human dignity. I have to co-operate with others. This shows how the human dignity approach to human rights emphasises both

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the importance of our individuality at the same time as emphasising the importance of our nature as social creatures.

Finally, by basing human rights on human dignity we can coherently talk about someone living up to, or fulfilling the expectations of, human dignity whilst they are also being materially denied the rights necessary for them to enjoy that dignity. Basing human rights on human dignity provides us with a more social role for the foundation of human rights. Human dignity decreases the atomistic nature of human rights by ensuring that it is of equal importance for us to fulfil our duties as it is for us to be in possession of our rights. Lack of one does not deny us the other. If we do not fulfil our duties we cannot be denied our human rights, and if we are denied our human rights we are still bound to fulfil those duties of which we are capable. Additionally, we cannot fulfil all of our duties without engaging in co-operation with others, which allows us to highlight the importance of our individuality as well as our sociability. For example, in Apartheid South Africa many individuals were denied a significant number of the rights they needed to enjoy their human dignity. However, many of those individuals still behaved with great dignity by fulfilling their social obligations derived from that same dignity. Nelson Mandela, by seeking to ensure that South Africa remained unified through the transition away from the Apartheid regime, fulfilled his duties, even whilst being denied his rights. He also ensured that South Africa maintained a level of social cohesion that allowed for more individuals to enjoy their human rights and fulfil their duties. There are many examples throughout modern history of individuals fulfilling their duties whilst being denied their rights. By basing human rights on human dignity we emphasise the social nature of humanity and thus we can implore all individuals, even those who are denied their rights, to work with each other to fulfil their duties.

**Conclusion**

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In this chapter, I have shown that the political conception of human rights provides a flawed basis for human rights. I then examined the concept of human dignity before positing a way of bridging the gap between human dignity and a coherent conception of human rights by using the interest theory of rights. Finally, I looked at some of the possible implications of human dignity being the foundation stone upon which we base human rights for how we think about our associated duties. By basing human rights on human dignity we shift the priorities within our moral furniture to provide greater priority and rhetorical force to the duties associated with human dignity. Additionally, we are able to construct a more social understanding of our duties, whilst also being able to coherently talk about duties that do not neatly correlate with a specific individual duty. Thus, this chapter has advanced us towards both a greater understanding of the foundations of human rights and a more complete conception of the duties that involved with those rights.
Chapter Three: Condition-Dignity and Status-Dignity: A Substantive Dignity-Based Account of Human Rights

Introduction

The aim of this chapter is to expand upon the dignitarian foundation for human rights elucidated in the previous chapter. The focus of that chapter was on the foundations of human rights – what concept provides the foundation for a theory of human rights. The status-concept of human dignity was identified as this foundational concept. However, I did not elaborate in detail upon the content of human dignity beyond a discussion of how using dignity as a foundation might change our political attitudes and approaches to the concept of duty. This chapter will elaborate upon the content of human dignity. At this point I want to introduce a distinction posited by Pablo Gilabert. Gilabert distinguishes between status-dignity and condition-dignity. Status-dignity is posessing the status of human dignity. Condition-dignity is a “Human persons’ condition in which human rights are fulfilled” (Gilabert, 2015: 199). It is in this way that we can coherently talk about all humans having the status of human dignity, whilst also talking about them being deprived of their human dignity. The status cannot be taken away, but the conditions for enjoying that status can.

The main focus of this chapter will initially be condition-dignity--what conditions are required to enjoy your status. The latter part of this chapter will return to examine the content of the status of dignity in order to determine what duties that do not correlate with a specific right are necessary for the securing of condition-dignity. At times during the chapter I will consider the question of whether the idea of standard threats to human rights might be useful in understanding their justification (particularly the right to nationality and the right to form and join trade unions). Considerations of standard
threats are often useful in helping us explain how we got the list of rights that we have and so are at times useful for helping us examine the justification of those rights. The first section of this chapter will explore the content of human dignity, unpacking the concept in order to show why it signifies a high status and to assist us in determining the substantive content required to fulfil the condition of dignity. The second section will elucidate upon this content by working through the rights enumerated in the Universal Declaration of Human Rights in order to determine a) if there are any rights there enumerated that should not be, and b) if there are any rights not enumerated there that should be. The final section of the chapter will examine the duties that comprise a part of the status of human dignity in order to determine any additions that should be made to the substance of a theory of human rights.

The human dignity-based foundation for human rights put forward in the preceding chapter went as follows. All members of the human species are in possession of a particular status called human dignity. This status is comprised of a set of interests and a set of duties. From these interests we can derive a set of rights which qualify as human rights. This justification for human rights relies on an interest theory of the function of rights and on human dignity being a status concept that involves a lofty, or high, status. As Jeremy Waldron states “In law, a status is a particular package of rights, powers, disabilities, duties, privileges, immunities, and liabilities accruing to a person by virtue of the condition or situation they are in” (Waldron, 2015: 134). The condition or situation that is relevant for human rights is the possession of human dignity. All humans are endowed with human dignity, which is the status associated with having the potential to act as a normative agent, by claiming rights and discharging duties. The first section of this chapter will be concerned with working out what is meant by 'the potential to act as a normative agent’ as a substantive concept.

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In developing my argument for the potentiality for normative agency being the key criteria that assigns the status of human dignity, and thus which will allow us to properly understand its content, I want to look briefly at two competing accounts of human dignity – James Griffin’s ‘personhood’ account and Pablo Gilabert’s ‘human capabilities’ approach. I will examine these two accounts because both capture something useful about human dignity without constituting a fully accurate substantive account of human dignity as the basis for human rights. I will argue that we can utilise Gilabert’s thinking about multiple human capabilities to make Griffin’s account of normative agency, or personhood, more complete and comprehensible. However, both accounts, by focusing on agency or capability, fail to account for the full range of humanity. My argument will be that by thinking about the potentiality for normative agency we can construct a substantive account of human rights that has the strengths of both Gilabert’s and Griffin’s accounts, without their concomitant flaws.

Griffin’s account was briefly discussed in the previous chapter. His argument is that human rights are based upon human dignity as personhood, and that personhood should be considered as the capacity for normative agency. For Griffin human rights are not rights “to anything that promotes human good or flourishing, but merely to what is needed for human status” (Griffin, 2008: 34, emphasis in original). Griffin defines the status of humanity as being “roughly, a functioning human agent” (Griffin, 2008: 35) who is in possession of “the capacity to chose and to pursue our conception of a worthwhile life” (Griffin, 2008: 45). For Griffin this is what constitutes ‘normative
agency.’ In considering different ways of cashing out this idea of normative agency – what it means to be an agent of this type – Griffin looks at the capabilities approach. He then rejects this approach by arguing that one “can trample on a good many of a person’s human rights…without in the least damaging these capacities” (Griffin, 2008: 47, emphasis in original). If we are merely protecting capacities then we are not properly protecting rights. For example, if a government were to engage in political censorship of newspapers it would be trampling upon a right of free expression. However, it would not necessarily be removing the capacity for individuals to express themselves. Thus Griffin’s personhood account of human dignity boils down to arguing that all creatures that have the realised capacity for normative agency are in possession of human dignity, and thus human rights, with normative agency meaning the ability to choose and pursue one’s own conception of a good life.

A potential flaw in Griffin’s account is the narrowness of his understanding of personhood, and thus dignity. Griffin explicitly sets out his view that we should “stipulate that only normative agents bear human rights – no exceptions: not infants, not the seriously mentally disabled, not those in a permanent vegetative state, and so on” (Griffin, 2008: 92, emphasis in original). Griffin is attempting here to “end the damaging indeterminateness of sense of the term ‘human right’” (Griffin, 2008: 93). For this, he must be commended as the indeterminateness of usage and thinking about the term ‘human right’ is extremely problematic. The issue is not with Griffin’s aims, but rather with his solution to the problem. In attempting to find a solution to this problem Griffin excludes some of the most vulnerable members of the human species from the class of rights holders. This is problematic as the term ‘human right’, on a prima facie level, should intuitively apply to all humans in virtue of being human.

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However, Griffin excludes a number of humans from the class of human rights holders. Griffin’s account not only excludes the profoundly mentally handicapped, but also children, and people in a permanent coma, from bearing any human rights. For Griffin these individuals are incapable of choosing and pursuing their own conception of a good life, and thus they do not have the pre-requisites for personhood. Griffin explicitly denies the personhood of the profoundly mentally handicapped and the permanently vegetative as any such human is incapable of being a “tolerably successful self-decider” (Griffin, 2008: 49).

In attempting to make the term ‘human right’ more determinate Griffin has narrowed its scope to the extent that he explicitly excludes a range of humans from being rights holders. Griffin is correct to argue that an overly expansive account of human rights would result in an undesirable proliferation of human rights, but he is wrong to argue that we must exclude certain members of the human species in order to do so. The correction to Griffin’s account that I will propose is to argue that personhood involves the potentiality for normative agency. By this I do not mean simply that someone must have the potential to become a self-decider in order to possess personhood. Rather my argument is that the potentiality for normative agency exists only when a creature is of such a type that when unencumbered by a specific ailment they would have the capability for normative agency--to choose and direct their own life. My aim with this is to determine what sort of creatures bear human rights not to determine which specific sub-sets of various species bear human rights. If martians arrived on earth and displayed the ability to choose and direct their own lives then we could reasonably conclude that their species is of a type that typically possesses normative agency and so should be considered as bearers of human rights. As we shall see, there is more to the

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story than simply this. However, this approach, when informed by the capability approach of Gilabert, as well as Waldron’s concept of noble status-dignity, can be effectively cashed out into a coherent set of rights and duties that bundle together in a sensible way. Next I will turn to examine Gilabert’s capabilities understanding of the substance of human dignity and explore its contribution to my own substantive account.

As Gilabert points out “An account of human dignity should point us to certain features of human beings that give rise to their status-dignity and are significant in justifying human rights” (Gilabert, 2015: 203). Gilabert then goes on to argue that “a significant basis of humans’ status-dignity is a set of very important human capabilities” (Gilabert, 2015: 204) thus setting the groundwork for him to develop a capability-based substantive account of human dignity. Gilabert’s account does not rest upon a single, or even a narrow set, of capabilities. Rather, Gilabert argues that human rights should be derived from a broad and plural set of capabilities. For Gilabert it is the possession of these capabilities that grounds status-dignity. “Some valuable basic capabilities are among the features of human beings that ground our view of them as deserving the kind of respect and concern that human rights articulate” (Gilabert, 2015: 208). For Gilabert the enjoyment or realisation of these capabilities is what ensures condition-status is enjoyed. Gilabert’s argument here is that “basic valuable capabilities that give rise to status-dignity ground a plurality of human interests…[and] seeing human rights as supporting capabilities means being concerned with whether people are really able to do and be what they have urgent reason to value” (Gilabert, 2015: 209).

Gilabert’s capabilities approach is significantly more expansive in its application than Griffin’s view of the basis of status-dignity as being found solely in normative agency.

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Gilabert argues that “it does not only include capabilities for rational…agency, but also other capabilities, such as to feel pain and pleasure” (Gilabert, 2015: 204). This allows for Gilabert’s account to potentially include categories of individuals that Griffin excludes from bearing human rights. At the same time he is also able to exclude those same individuals from possessing some of the canonical list of human rights. Gilabert does not provide a definitive list of key capabilities, but he does endorse Martha Nussbaum’s understanding of human rights and human capabilities. Nussbaum provides a comprehensive list of what she considers the ten key human capabilities (Nussbaum, 2011: 23-37 and Nussbaum, 1997: 273-300). These ten capabilities are to live a normal length human life, to maintain bodily health, to maintain bodily integrity, to utilise your senses to imagine and think in a truly human way, to have emotional attachments, to possess practical reason, to form affiliations (both friendship and self-respect), to be able to live in relation with and concern for other species, to be able to play and laugh and pursue recreational enjoyment, and finally to have control over one’s environment both politically and materially (Nussbaum, 1997: 287-288). Whilst Gilabert does not directly endorse the substance of this particular list any plausible list of central human capabilities will, at the very least, strongly resemble this one.

Gilabert’s conception is a persuasive one. A plurality of human capabilities would, undoubtedly, produce an attractive and comprehensive list of human rights. However, the capabilities approach does, albeit to a lesser degree, face some similar problems as Griffin’s ‘personhood’ account. Gilabert’s capabilities approach, by having a plurality of foundational capabilities, can grant rights to members of the human species that lack certain forms of rational agency. These would include providing basic medical care to individuals in a permanent coma based upon their ability to feel pain (although this

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might be removed if it was shown that they could not feel pain). However, it would potentially deny such individuals rights such as a right to privacy, or a right to not be arbitrarily arrested as these rights would most likely be derived from capabilities that in their present condition an individual in a coma would not possess. This is problematic in the same way as Griffin’s account as it essentially reduces human beings in a coma to the status of non-human animals. This is despite the fact that a person in a coma does not cease to be human. Both Griffin and Gilabert are seeking to render the term ‘human right’ more determinate. However, both run into very similar problems of excluding certain persons from the category of human rights bearers. Griffin’s account is, undoubtedly, more prone to this criticism than Gilabert’s conception but Gilabert cannot avoid it entirely.

A second critique of the capabilities approach is that most, if not all, of the canonical capabilities put forward by Nussbaum (and endorsed by Gilabert) could in some way be collapsed into the concept of normative agency. Gilabert is seeking to avoid the narrowness of accounts such as Griffin’s. This narrowness is both in terms of the range of individuals to whom human rights are assigned and in terms of the range of rights endorsed by such a conception. However, in seeking to avoid this narrowness Gilabert underestimates the possible extent of the breadth in an account like Griffin’s. If we look at the two capabilities that Gilabert directly flags – rational agency and the ability to feel pain and pleasure – we will be able to see a capabilities approach can be collapsed into an normative agency account more clearly. Rational agency can clearly be captured under the banner of normative agency. Normative agency is the ability to choose and direct one’s own life, rational agency is incredibly similar if not the same. It is not as immediately clear that we can include the ability to feel pain and pleasure as an

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important component of normative agency. However, if we look at the concept of normative agency as being able to choose and direct one’s own life, then feeling pain and pleasure are key components of this. Without the ability to feel pleasure it would be extremely difficult to form a positive conception of a good life, if we are unable to feel pleasure we will struggle to determine what it is we desire. Similarly, without the ability to feel pain we will struggle to determine what sorts of things we wish to avoid as we would not be pursuing a conception of a human life but rather something less. If we take Nussbaum’s ten capabilities we can see that all are crucial components in normative agency. For example, without the ability to feel affiliation we would struggle to form and pursue a conception of a good life. Without the ability to form meaningful affiliations with other people we would find it very difficult to make plans for the future as very often our life plans change and morph depending on our interpersonal relationships. Similar analyses can be performed for all of Nussbaum’s ten central human capabilities. This suggests that Gilabert’s (and Nussbaum’s) approach can be collapsed into a normative agency approach. It is not normative agency that is too narrow (as Gilabert claims) but rather it is Griffin’s conceptualisation of normative agency that is too narrow.

This leaves us in the position of having an approach espoused by Griffin that is substantively too narrow, a rival approach taken by Gilabert that seeks to solve this problem, but which does not fully succeed. I wish to propose a third approach that can solve the problems whilst maintaining the strengths of both. Griffin and Gilabert both aim to make the term ‘human right’ more determinate, to give it a more precise substantive meaning. But rather than focusing on the set of capabilities required to live a genuinely human life, or directly on the concept of normative agency, we should be

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asking what sort of creatures are humans. I will term my approach the potentiality approach.

The potentiality approach argues that humans are those creatures which without impediment have some potential for normative agency (as understood in the broad sense outlined in my critique of Gilabert above). Thus, the relevant concern is to determine whether someone is a member of a species of creatures whose members have normative agency if unaffected by some form of ailment or injury. By being a member of this species all have the potential for normative agency. Thus status-dignity is based upon the potentiality for normative agency. This avoids the problem of narrowness that confronts Griffin’s approach; all members of the human species no matter their current state of injury or disease are included as human rights bearers. Additionally, it maintains the strength of Griffin’s approach in being clear and determinate about the content of human dignity and human rights. Beyond this, it also maintains the strengths of Gilabert’s approach by adopting a broader understanding of normative agency than Griffin’s account. This will allow us to have a wider substantive account of condition-dignity. As I discussed in the previous chapter, human dignity is a high or lofty status that is in some way equivalent or analogous to the status of nobility. This is an understanding that I borrowed from Jeremy Waldron. This understanding of the grounds of status-dignity as being in the human potentiality for normative agency gives us a basis for extending this equally lofty status to all humans, and will allow us to cash out the substantive content of this noble status in a modern context. The need for this arises as whilst understanding dignity as a lofty status is beneficial for elucidating how human dignity can provide a foundation for human rights, this approach runs into some substantive problems. Primarily these problems are that the rights previously held by
nobles do not neatly match up with any contemporary understanding of human rights. Some rights of nobles do translate relatively easily such as rights to own property, or to being involved in government in some way; other noble rights do not translate in any way at all such as rights to raise levies from amongst the populace.

The next step, then, is to examine what the lofty status of human dignity – somewhat analogous with nobility – based upon the human potentiality for normative agency requires in order to ensure condition-dignity for all. This is where Gilabert and Nussbaum’s accounts become useful. By utilising a broad plurality of capabilities these two authors are able to ground a broad range of human rights. My aim, then, is to argue that the interests associated with the status of human dignity are in some way commensurate with the range of capabilities identified by Nussbaum, and that the rights derived from these interests are not trivial--they are of great value and importance to all humans, thus rendering them in some way similar to nobility. The next section of this chapter will examine the UDHR and the rights enumerated there, comparing them to the rights derivable from the interests based upon the substantive conception of dignity stipulated above.

Condition-Dignity and the UDHR

This section will perform two tasks. Firstly, it will divide the rights enumerated in the UDHR into two types, undisputed and disputed. The rights that are undisputed are those rights without which no plausible theory of human rights could do. There is a very broad consensus accepting these rights as human rights. Those rights I categorise are

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25 I examine the UDHR as it is a primary foundational document of the international human rights regime. The list of rights enumerated within it is often considered to be canonical and so is a reasonable starting point for criticism.

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disputed are those which a number of theories of human rights dispute. I will utilise this division to frame my discussion. If my theory of human rights cannot account for at least those rights which are undisputed then my theory has a major problem as a theory of human rights. If my theory can additionally account for at least some of those rights which are disputed then it can perhaps contribute to their being no longer disputed.

Secondly, this section will look at whether there are any rights which are not enumerated in the UDHR but which would qualify as human rights according to my theory.

The rights that I shall classify as undisputed are largely in the category of what are commonly called civil and political rights. That is, they are those rights which secure basic civil and political freedoms. Some theorists, notably Maurice Cranston, have termed them as negative rights, as he argues that they simply require non-interference from others to be enjoyed. This is in opposition to social and economic, or positive, rights that for Cranston require active intervention in order to be secured. The positive versus negative dichotomy is one which I do not find to be particularly useful (cf. Shue 1996). The division of rights into civil and political rights and economic and social rights is also an imperfect art- some of the rights that I suggest are undisputed might count as economic rights, whilst some of the more disputed rights would perhaps be better described as civil or political. However, when painting in broad strokes, civil and political rights are largely undisputed whilst economic and social rights are disputed. I will now list the rights that are undisputed and those that are disputed with a brief explanatory note explaining the categorisation of each right.

Undisputed rights:

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Article 3: A right to life, liberty, and security of person. This is the most fundamentally obvious right on the list. No theory of human rights disputes that the right to life, basic liberty, and bodily security are human rights.

Article 4: A right to not be enslaved. Again this is an obvious right undisputed in modern human rights discourse. It is a basic corollary of the right to basic liberty.

Article 5: A right to not be tortured. This right is a corollary of the right to security of person, and is again undisputed within human rights discourse. Even individuals who advocate for torture do so by appealing to extreme scenarios, such as the ticking time bomb scenario, that they argue would allow for the overriding of an individual’s right. They do not argue that the right is then abolished.26

Articles 6 and 7: Are both legal rights – they are the right to recognition before the law and to equality before the law. No theory of human rights denies that individuals are equal, that is they cannot be discriminated against on arbitrary grounds, and that people be recognised as persons by the law.

Article 8: Specifies that all individuals have a right to remedy for violations of their legal or constitutional rights. This is, again, considered to be a fairly basic and fundamental civil right.

Article 9: Is a right to not be arbitrarily arrested, a basic civil and political liberty that no theory of human rights denies.

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Articles 10 and 11: Specify certain rights associated with the conduct of criminal proceedings. These include the principle of legal due process, the principle of presumption of innocence until proven guilty, and the principle of not unfairly retroactively applying criminal laws. None of these rights are disputed by any serious theory of human rights.

Article 12: Articulates a basic right to personal privacy and against slander/libel. This is considered a basic civil right and is uncontested by any serious theory of human rights.

Article 13: Is freedom of movement - both within your country of origin and across international borders. Freedom of movement is considered a fundamental civil right.

Article 14: Is the right to seek asylum from persecution. Although this right is sometime contentious regarding the legitimate grounds for asylum, the existence of the right is not disputed.

Article 17: Is the right to own and not to be arbitrarily deprived of property. This is considered to be a crucial civil and economic right, and is undisputed by any serious theory of human rights.

Articles 18 and 19: Express the rights to freedom of thought and expression. These are considered to be paradigmatic examples of basic human rights.

Article 20: Is the right of freedom to peaceful assembly. This is considered to be a key and basic civil and political right that is left undisputed by any serious theory of human rights.

Article 21: Is the right to take part in the government of one’s own country. This is perhaps the most contentious of the rights that I consider to be undisputed as it implies a human right to some form of democratic government, which some consider to be a
western, liberal imposition. However, it is a direct corollary of the freedom of speech and the right to basic liberty and is, in my view, a right that is largely undisputed.

The above list comprises the rights enumerated in the UDHR which I am considering to be the basic minimum that any plausible theory of human rights would include. They are rights that even a sceptic such as Maurice Cranston would assert and not dispute. I will now show why all of these rights are compatible with my substantive theory of human dignity, and are required for condition-dignity to be enjoyed.

The substantive conception of human dignity that I have elaborated involves the potentiality for normative agency. The potentiality component of it is such that all creatures of the type that would normally possess normative agency are considered to have the potential for normative agency and so are in possession of status-dignity. This section is explaining what is required for condition-dignity to be enjoyed. Thus I am not currently concerned with the potentiality component of my substantive account. Rather I will be focusing on normative agency. As discussed above my understanding of normative agency is a fairly broad one. In elaborating upon it I will draw upon both Nussbaum and Gilabert’s capabilities approach to provide the concept of normative agency with a more full content than Griffin’s comparatively sparse account.

From my understanding of normative agency, a set of interests can be derived. These interests can then be converted into rights. Normative agency involves being able to conceptualise one’s own understanding of the good life and then to have a reasonable opportunity to pursue and obtain it. This cannot be done without the continuation of one’s life, without the liberty to pursue one’s own life, and without security of person being reasonably guaranteed. Thus, from the status of human dignity, cashed out as normative agency, we can see that all creatures included in this status have interests,

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based upon normative agency, to life, liberty, and security of person. This means that article three of the UDHR can be defended based upon my theory of human rights.

Article 4 of the UDHR, the right to not be enslaved, is also fairly straightforwardly required for condition-dignity on my account. If you are enslaved by another you clearly are stripped of your agency. Your actions cease to be your own. Similarly, being tortured is a violation of your bodily security and thus clear violation of your normative agency.

Before discussing articles 6, 7, and 8, I want to briefly discuss article 9—the right to not be arbitrarily arrested—as it is much less problematic than the three articles preceding it. This right is easy to justify on a normative agency basis as if one was subject to arbitrary arrest or detainment then one could not effectively formulate and pursue a conception of the good life.

Articles 6, 7, and 8 are less straightforwardly connected to the idea of normative agency. It is possible to envisage a world in which you are denied recognition before the law, but are still able to formulate and pursue a conception of the good life. However, if we unpack the broad understanding of normative agency that I am proposing, utilising the list of core human capabilities that Nussbaum develops, it becomes clear that in order for an individual to be able to genuinely pursue their own conception of life then they need to be able to properly access certain legal rights. We can see this more clearly if we reintroduce Griffin’s concept of practicalities. Griffin claims that “we need to introduce features…of the nature of human societies as a second ground” (Griffin, 2008: 38) for human rights. A universal feature of functioning human societies is that they have some form of legal system. Thus, in order for an individual to be able to pursue their own conception of life they will need to have
access to, and be recognised by, that society’s legal system. Additionally, if an individual is denied access to certain aspects of their rights, both legal and moral, due to some arbitrary fact about them (such as skin colour) then they are being denied respect, which as Nussbaum describes it is “Having the social bases of self-respect and non-humiliation; being able to be treated as a dignified being whose worth is equal to that of others” (Nussbaum, 1997: 287). So if an interest of a creature with the potentiality of normative agency is respect, then we can clearly derive from that a right to be treated equally before the law and without discrimination. It would be incredibly difficult to formulate and pursue a conception of the good life if every time one was denied one of our rights we had no way of seeking remedy for this denial. Without the ability to seek remedy for wrongs committed against us we would not be able to effectively and securely pursue any of our other interests. Thus, it is a derivative interest of all of our dignity-based interests that we be able to seek and obtain effective remedy for wrongs committed against us.

Articles 10 and 11 are both also legal in nature. However, their connection to condition-dignity, and thus normative agency is different to the three rights in articles 6, 7, and 8. Articles 10 and 11 are about the rules for how to treat an individual who has been accused or convicted of a crime. Again, this is not obviously derivable from a normative agency-based interest. Additionally, we cannot easily appeal to any of Nussbaum’s ten central human capacities. The requirement that we be assumed innocent until proven guilty is derived from our normative agency-based interest in not being arbitrarily denied our liberty. In order to be denied our liberty we must have been subjected to a procedurally just process that provides a good reason for denying us our liberty as a punishment for some form of criminal behaviour. If this is not granted to us

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any denial of our liberty would be arbitrary and unjustified. Additionally it would also constitute a denial of the respect required as a component of normative agency as discussed above. Thus the presumption of innocence and procedural fairness are tightly interwoven as rights, as without one the other is unable to function correctly. If we were presumed to be guilty until proven innocent then we would be unfairly burdened in the judicial process. Finally, the right not to be prosecuted for an act that was not criminal at the time we performed it and not to have punishments imposed retroactively are derived from normative agency as in order to properly be able to pursue a conception of the good life we have to be able to formulate and pursue plans for our future. If we are not able to plan effectively due to our past actions being retroactively punished, or having more harsh punishments than expected imposed upon us, then we are unable to effectively enjoy our normative agency and we would not be able to consistently plan for the future. Thus, these three rights, enumerated in two articles in the UDHR, can be derived from our normative agency based-interests in 1) being able to plan our future, 2) not be unfairly or arbitrarily detained, and 3) to be respected as an individual human person.

Article 12 of the UDHR articulates a right to personal privacy and not to be defamed. This right can also be derived from normative agency via Nussbaum’s capability for “for having the social bases of self-respect and non humiliation” (Nussbaum, 1997: 287). Without being appropriately respected as individual persons, we cannot properly exercise our normative agency, as we would be unable to properly formulate a conception of the good due to our being denied both self-respect and the respect of our fellow men. Without this respect it is impossible to constitute a sense of oneself properly and then to formulate plans into the future. Additionally, a second of

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Nussbaum’s ten capabilities can assist us in finding a human interest that is protected by a right to privacy. This is the capability for emotion – “to love, to grieve, to experience longing, gratitude, and justified anger. Not having one's emotional development blighted by fear and anxiety” (Nussbaum, 1997: 287). If our privacy is not respected then we may not be able to fully develop some of these emotions, which can be incredibly intimate and personal in nature, without fear and anxiety. Having our emotions and emotional vulnerabilities exposed to people with whom we do not have an intimate personal relationship can be extremely psychologically painful and damaging. The connection between this and normative agency is relatively clear- when formulating our own conception of the good life and choosing how to pursue it, an incredibly important component to consider is our relationships with other individuals- our loved ones, our friends, etc- and if we are not able to properly develop our emotions and emotional connections then we would not be able to properly formulate a genuine conception of our own understanding of the good life.

The final component of this article of the UDHR is to provide protection against “attacks upon his honour and reputation” (UDHR; Article 12). This constitutes something similar to the right to not be libelled, slandered, or more generally defamed. This component of Article 12 is also derived largely from the interest in being respected- both by one’s peers and by oneself. As we have seen, without both the respect of others due to us and our own self-respect we are not able to effectively formulate a conception of the good. If we can be defamed without any recourse to compensation and the restoration of our good name then our respect is placed in serious question. Thus we must be protected from unfounded attacks upon our honour and reputation.

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Articles 13 and 14 both enumerate rights involving the free movement of individuals. Article 13 allows for free movement within a state and the right to leave and return to one’s state. Article 14 enumerates a right to seek asylum from persecution in other countries. Although both rights are ostensibly related to free movement, they are derived from quite different interests. Article 13 is directly derived from the interest to be able to pursue one’s one conception of a good life – if we are not able to move within our state and between states without security of return then we cannot effectively pursue such a conception as a key component of forming a conception of the good is found in choosing where to pursue it. Asylum, although also about the ability to move from one country to another, the underlying interest protected, is significantly different. Asylum can only be sought in legitimate cases of persecution – non-political crimes are explicitly excluded as grounds for asylum. The underlying interest being protected is our interest in being able to freely pursue our social, religious, and political aims without fear of persecution. Asylum is a right that is clearly derivable from a broad understanding of normative agency. However, asylum is also something of a secondary right. Our primary rights are to non-discrimination and to not be persecuted for any of our views or beliefs. Asylum only becomes relevant when these rights are denied to us. Thus, whilst asylum does not directly protect any interest derived from a human dignity-based interest, it does protect our interest in being able to escape situations in which our other interests are not effectively protected. Both of these rights can, then, be derived and defended from a substantive account of human dignity that is based in normative agency – both are rights that protect interests that must be protected in order to ensure condition-dignity.

Article 17 states a right to own property and to not have said property arbitrarily seized. The right to own property is often considered to be one of the most basic rights- given
perhaps its most famous articulation by John Locke who argued that “every man has a property in his own person…The work of his body, and the work of his hands, we may say, are properly his” (Locke, ed. by Michael Morgan, 2005: 692). This right to property has, then, a long history in western political thought. It can be derived from the status of human dignity defined as a lofty or noble status of normative agency, as it is a key interest in developing a conception of one’s own good that we are able to obtain and accumulate property – movable and immovable. Without property, it is difficult to pursue any readily conceivable goal in life. This right is perhaps one of the most obvious examples of a right that was previously held only by the nobility but that has been extended to all.

An extension of this right is the right to not be arbitrarily deprived of one’s property. If we can be deprived of our property at any moment without good reason and in a predictable manner (as with, for example, a well-defined form of taxation) then we cannot plan into the future- we do not know what property we have accumulated will still be in our possession at any given future moment, and so we cannot formulate predictable plans of our future goals. Thus without the rights to own and to not be arbitrarily deprived of our property we cannot fully employ our normative agency and would, thus, be denied our condition-dignity.

Articles 18 and 19 articulate rights to freedom of thought, conscience, religion, opinion, and expression. These five rights are very similar in how they are justified and in their substantive content. They complement and support each other- without freedom of expression freedom of opinion is somewhat obsolete, for example. The connection between these five rights and normative agency is reasonably straightforward. These are, arguably, five of the most prima facie important rights for securing normative agency. Without freedom of thought we cannot construct our own conception of the
good life. If we are prevented from thinking for ourselves, and simply have ideas forced upon us, then we are not able to properly formulate or pursue our own understanding of what a human life is. Similarly, freedom of expression and freedom of opinion allow us to express our own thoughts and views in a properly human way. Additionally, without freedom of expression, opinion, and thought we cannot create expressive artistic works which, as Nussbaum points out, are critical components of formulating and pursuing a genuinely human life. Freedom of conscience and religion are also critical components of being able to cultivate and pursue a conception of the good life. Religion is a central component of many people’s view of the good life. Being able to exercise and change one’s religious views is thus an important part of any understanding of a human life – whether one’s views are atheism, Christian, Muslim, Hindu or anything in between. Similarly, being able to develop a moral conscience for oneself in conjunction with the social mores of one’s own society is an important part of developing an understanding of how to behave both within society and as an individual. All five of these rights, enumerated in articles 18 and 19 of the UDHR, are central in any plausible conception of human rights. They are derived from the human dignity-based interest in being able to develop and pursue one’s own understanding of the good life, both as an individual in isolation and as a member of broader society. Without these rights being protected we would be unable to formulate or pursue such a conception.

Article 20 articulates a right to peaceful assembly and association and against being compelled to belong to any association. This right is also derivable from the status of human dignity understood as normative agency. Without the ability to freely associate we cannot properly pursue a conception of the good life. Forming associations is a key component of many individual lives. Our ability to choose which associations to join,
to form, to disband, and to ignore is an important part of how an individual can pursue their conception of the good life. Similarly, the right of peaceful assembly is an important aspect of social human life. We peacefully assemble for a whole variety of reasons that contribute to promoting our own conceptions of the good life. Without this capability we are unable to fully pursue a social understanding of the good life - if we are unable to associate with and assemble with our fellow humans then we cannot effectively pursue collective goals. The pursuit of collective goals - those goals that are shared by a number of individuals - is a crucial component in the vast majority of individual’s lives. The underlying interest is in cultivating and pursuing social and collective goals, which is a key component of normative agency. Thus, the rights to form associations and to peacefully assemble are directly derivable from my conception of human dignity. Similarly, it is clear that being forced to join a specific association, with no opportunity to opt out, is infringing upon this very same right. A key component of our right to assemble and associate is that we are able to choose which associations and assemblies to be a part of. If we are coerced into membership of either then we are no longer pursuing our own social and collective goals, but are rather having said goals imposed upon us.

The final undisputed right is perhaps the most controversial of those I have included in the list of undisputed rights. This is the right to be involved in the government of one’s own country, to vote in elections, and to have access to public service, as enshrined in article 21 of the UDHR. Inclusion of this right as undisputed is possibly controversial as many argue that democracy is not a human right, whilst the rights enshrined in article 21 clearly amount to some form of democratic government as a human right. Henry Shue strongly defends political participation rights in his book Basic Rights: Subsistence, Affluence, and U.S. Foreign Policy (1996). However, John Rawls talks
about “societies that are benevolent absolutisms: they honour human rights; but, because their members are denied a meaningful role in making political decisions, they are not well ordered” (Rawls, 1999: 4). This statement shows that Rawls envisaged states which were not democratic, but which still honoured human rights. If a state can deny its citizens a role in political decision making but still honour human rights then it suggests that having a role in political decision making, for Rawls, is not a human right. Walter Riker has defended Rawls from a purely instrumental standpoint by arguing that other human rights can be secure without participation rights. Riker does not go so far as to argue that this means there is no human right to democracy – though he acknowledges that his argument would have significant implications for that debate (Riker, 2014). The debate over whether democracy is a human right is far from settled. However, I include it on the list of undisputed rights as on my understanding of normative agency it is very clearly and directly justified and is, in my view, a central human right.

The right to participate in government is justified based on a set of central normative agency-derived interests. These interests are best described in the terms of one of Nussbaum’s ten central human capacities- the capability for control over one’s environment. Nussbaum describes this in a political context as “Being able to participate effectively in political choices that govern one's life; having the right of political participation” (Nussbaum, 1997: 288). The human capability to control one’s political environment is clearly an interest that can be derived from normative agency. Normative agency as the ability to formulate and pursue one’s own conception of the good life clearly necessitates some form of control over the political decisions that govern your life. If we are unable to participate in the decision-making processes that will largely govern and shape our life then we cannot effectively formulate and pursue a
conception of the good life. Thus, if we are denied the right to take part in the
government of our country we are denied our condition-dignity as a key status-dignity-
derived interest is not being protected. Additionally, if we are denied the right to equal
access to public service\textsuperscript{27} then we are unable to pursue a significant avenue of taking
part in the government of our country. This would close off a significant portion of
potential conceptions of the good life, as well as denying us a component of the first
part of article 21. Finally in article 21 a right to take part in periodic free and fair
elections is enshrined. This is a practical outworking of the first component of article
21. We can appeal to Griffin’s practicality foundation here. It is a practical outworking
of a right to involvement in government and the political decision making process that,
in lieu of implementing some form of direct democracy, we are entitled to vote in
regular free and fair elections.

As we can see then, all of the rights that are considered undisputed can be justified by
appealing to my broad understanding of normative agency. This is a basic desideratum
for any theory of human rights to be considered at least \textit{prima facie} plausible. I will
now examine the remaining rights enumerated in the UDHR, which I have categorised
as being generally disputed, and determine which, if any, of them can be justified based
on my human dignity approach. I will first list and briefly describe these rights, before
working through them systematically.

Disputed Rights:

Article 15: articulates a right to possess a nationality and to not be denied one’s
nationality. I include this as a disputed right as it the concept of nationality and of the

\textsuperscript{27} Public service involves working for the government in some capacity. This can take many forms
ranging from serving in the police or military through being a national bureaucrat to pursuing elected
office. Access to all these various forms of public service are important for this particular human right.

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nation is not necessarily agreed upon to be a human good. It is not easily derived from a specific human interest. Leo Tolstoy has said of patriotism that “Seas of blood have been shed in the sake of this sentiment, and more blood will be shed for its sake if men do not free themselves from this outlived bit of antiquity” (Tolstoy, 1896: accessed online). Tolstoy’s argument clearly disputes the continued existence of nations and nationalism nevermind disputing there being a human right to possess them. If the concept of nation, and nationality, is immoral then there could not be a human right to one rendering it disputed.

Article 16: establishes a right to marriage. I include this in the disputed list solely due to the issue of the marriage of LGBT individuals. Many people dispute the status of marriage as a universal human right as they argue that we can discriminate on grounds of gender/sexuality when providing this right.

Article 22: sets out a right to social security. This is included as a disputed right as a number of individuals, notably Maurice Cranston, dispute whether any socio-economic rights (or rights that require positive governmental action as opposed to merely refraining) count as human rights.

Article 23: lays out a series of work- and pay-related rights. These include the right to work, to choice of employment, to fair conditions in work, protection against unemployment, equal pay for equal work, a fair wage, and to form and join trade unions. A number of these economic rights are disputed by a variety of thinkers and practitioners (again, notably Maurice Cranston).

Article 24: Is perhaps the most famously disputed right enumerated in the UDHR. It is a right to rest and leisure with a limitation on working hours and paid holidays. This
right was excoriated by Cranston and continues to be regularly cited as an example of
the over-reach by the UDHR drafting committee.

Article 25: declares a right to healthcare and general well-being. This right is also often
contested as a genuine human right as the level of positive action required to ensure it
can be very high, and it is often considered to be unclear upon who the duties associated
with this right fall. The general well-being component of article 25 enshrines a right to
basic subsistence rights – food, shelter, and clothing. Again, this component of the
right is disputed for similar reasons, despite having some notable proponents- such as
Henry Shue and Thomas Pogge.

Article 26: articulates a right to education. It suggests that elementary (or primary)
education should be free and compulsory, that education should promote respect for
human rights, and that parents should have the right to determine the kind of education
children shall receive. Article 26 also states that “technical and professional eduction
shall be made generally available” (UDHR, 1948) and that there should be equal access
to higher education based upon merit. This right is disputed for similar reasons to the
above right to healthcare. The levels of positive governmental action required to ensure
this right are often cited to discredit this right.

Article 27: enshrines a right to participate in cultural activities within a community,
including both the arts and enjoyment of the benefits of scientific advancements. This
right is very vaguely stated in the UDHR so it is unclear how duties to ensure free
participation in cultural activities would be assigned. Additionally, a right to enjoy the
benefits of scientific advancement seems problematic in a world that places very high
importance upon intellectual property. Thus it should be considered as a disputed right.
The rest of this section will examine these eight articles of the UDHR and determine whether any of them can be supported by my understanding of normative agency. Some components of some of these rights might not be supported by an appeal to normative agency, even my relatively broad conception. Whilst being able to justify the most undisputed of rights was a desideratum for being a plausible theory of human rights, being able to justify these more disputed rights is not. However, many of these rights, as we shall see, whilst being more problematic to fulfil, are just as crucial for ensuring condition-dignity as many of those rights that are not disputed.

The right to a nationality in a world dominated by nation-states is a right that many would endorse. As mentioned before, some have criticised the entire project of nationality in the modern era as damaging to mankind. Other thinkers, Benedict Anderson for example, have been much more favourable towards nations and nationalism for their ability to bind people together. In Anderson’s understanding a nation is “an imagined community- and imagined as both inherently limited and sovereign” (Anderson, 2006: 6). There is much more to a nation than this, but the concern of this paper is not to delve into the sociology of nations and nationalism. However, we must have some understanding of what a nation is before we can properly examine whether there is a human right to a nationality (and thus to be a member of a nation). One of the central human capabilities that Nussbaum cites is that of affiliation, which she subdivides into friendship and respect. When discussing friendship, Nussbaum argues that promoting and protecting the capability to form friendships would involve “protecting institutions that constitute such forms of affiliation” (Nussbaum, 1997: 287). On my understanding of normative agency, these sorts of

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28 Benedict Anderson’s *Imagined Communities* provides an excellent analysis of both the origins and the functioning of nations in the modern world. Anderson has a reasonably positive view of the role of nations, as opposed to Tolstoy’s visceral condemnation.

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affiliative institutions are necessary to ensure that the ability to both conceive and pursue one’s own conception of the good life are fully realised. Without affiliative and social institutions we cannot form a conception of the good life that accounts for our relations to others. Similarly, if we are not able to have social relationships with other individuals then we are unable to properly pursue any goals that are social in nature. Thus, normative agency can certainly justify a right to be a part of social and cultural institutions and groups that enable us to partake of social and cultural activity.

If we introduce Griffin’s practicality foundation at this point then a right to a nationality becomes more clearly justified. Based upon normative agency alone, we have a right to be part of social and political groups that help us give meaning to our lives. In the modern world the most important and dominant of such groups is the nation. Therefore, on a practical level at this point in time we can say that a right to nationality can be derived from a normative agency-based interest in being a member of a social group that can help us in having a sense of belonging and bring meaning to our conceptions of the good. Additionally, having a right to a nationality might be considered as a guarantee against a standard threat to our dignity. Many times throughout modern history the denial of nationality has been used to discriminate against particular individuals – thus we can see that this right has been an important protection in the past and so should continue to be protected. Some might argue that this would mean that a right to nationality is not genuinely universal – it does not apply to all people at all times, but is merely instrumental. However, as mentioned in the previous chapter human rights need only be synchronically universal- that is universal at a given point in time. The needs of humans and the capacity for us to meet these needs will change over time. Human rights are rights that every person should enjoy as

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part of their status-dignity today. The specific set of rights that all humans should enjoy might be slightly different one hundred years from now, but that does not make the rights required for condition-dignity now non-universal.

The right to be able to voluntarily enter into marriage, for both men and women, is not a fully disputed human right. The dispute here is not on whether the right exists, but over whether two individuals of the same gender can avail of it. According to data from the Pew Research Centre 22 countries allow same-sex marriage, with one additional country (Mexico) that legally permits it in some of its federal jurisdictions.29 This figure is low despite rapid progress in recent years. The first country to enact same-sex marriage was the Netherlands in 2000. This suggests that whilst the right for heterosexual couples to marry is undisputed, the same right being extended to all adults irrespective of sexuality is not.

One of the ten central human capabilities that Nussbaum lists is the capability to feel emotion which she claims is to be “able to have attachments to things and people outside ourselves; to love those who love and care for us.” She further contends that “supporting this capability means supporting forms of human associations that can be shown to be crucial in their development” (Nussbaum, 1997: 287). Nussbaum’s argument in this case is that a key component of pursuing our own understanding of a good life, of living a genuinely human life, involves being able to form loving connections with other people. Thus, there is a genuine normative agency interest in

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29 This count includes Greenland which is an autonomous territory of Denmark and was not included in Denmark’s own legislation- Greenland enacted legislation of its own in May 2015. It additionally counts Scotland and England/Wales as two separate entities due to their enacting Same-Sex Marriage separately. It also counts Finland which, although having passed legislation, will not permit same-sex marriage until 2017. Thus the true number of countries currently permitting same-sex marriage is currently 19. This data is obtained from the Pew Research Centre- [http://www.pewforum.org/2015/06/26/gay-marriage-around-the-world-2013/](http://www.pewforum.org/2015/06/26/gay-marriage-around-the-world-2013/) accessed 23/10/2015.
being able to enter into a formal loving association with another individual. In practical terms in modern societies this means entering into a marriage. The primary loving association that individuals are able to enter to in modern societies is marriage and so Griffin’s practicality ground would dictate that there be a synchronically universal right for two consenting adults to enter into a marriage. Obviously, as with nationality, the specific association that enacts the right to enter into a loving association may change. However, as things currently stand there is a human right to marry with no normative agency- or practicality-based reason to deny this right to same-sex couples.

Articles 22, 23, and 24 I will tackle together as they all deal with rights around the issue of work, leisure, pay, and social security (or unemployment assistance). The right to social security is disputed due to the comparative ability of different states to provide such security. It is very difficult for some resource-poor states to provide adequate levels of social security to all citizens. However, article 22 stipulates that international co-operation should contribute to the provision for social security. A right to social security is easily derived from normative agency. If any time we lacked employment, through no fault of our own, we were unable to maintain a subsistence level of resources then we would be entirely unable to confidently plan for our future goals and aspirations. Without this ability to plan for the future on a basic level we cannot properly construct a coherent conception of the good life, nor can we effectively pursue it. The right to obtain work, to receive fair remuneration (including equal pay for equal work), and to enjoy fair working conditions are also directly derivable from normative agency-based interests. Engaging in productive activity is a central component of any coherent conception of the good life. The ability to work is based on an interest in developing and pursuing a conception of the good life, but also an interest in being able to obtain the necessary resources to maintain subsistence. Fair remuneration for work is

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derived from the second of those two interests— if we are not fairly remunerated for our work then we cannot obtain the resources we need for continued survival. Similarly, fair working conditions are derived from our normative agency-based interests in not being subjected to conditions that threaten our life or might damage our ability to pursue our conception of the good life. If work conditions are unsafe or oppressive then this strips us of our ability to enjoy our work, and thus we would no longer be pursuing our conception of the good life. From this we can then see that both our interest in maintaining subsistence and our interest in choosing and developing our own conception of the good life— including the pursuit of work.

Article 23 also states a right to form and join trade unions. This seems an overly specific right to be enumerated in a general declaration of rights. We have already seen that there is a human right to form and join associations in order to further our pursuit of our own conception of the good life. In the case of trade unions they are specific forms of association designed to protect the interests of workers in negotiations with employers. Enumerating a right to form and join trade unions is in part an offshoot of the broader right to form and join associations. There is no direct normative agency—based interest from which we can derive a specific right to form and join trade unions. However, as there is a well-justified right to form and join general associations. Trade unions are a specific type of association so there is a secondary— or derivative right— to form and join trade unions. However, enumerating a right to trade unions in a document such as the UDHR is problematic due to the UDHR being a declaration of non-specific rights. Protecting one specific form of association is inapposite in a general declaration. The reason for the inclusion of this right in the list is undoubtedly at least partially connected to the idea of standard threats against human rights. A

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standard threat, in much of modern history, has been the restriction and suppression of
workers/trade unions by the state in order to ensure

Article 24 articulates a right to rest and leisure, specifically citing reasonable limits on
working hours and periodic paid holidays. Maurice Cranston notably picked out as an
example the right to paid holidays as an example of a right that should not have been
included. Cranston argued that “The right to a holiday with pay, for example, can only
be enjoyed by people who are paid. It is a right of a certain kind…but it is not a
universal right” (Cranston, 1983: 13, emphasis in original). However, Cranston’s
argument misconstrues the meaning of universality. A right does not need to be
enjoyed by all people all the time in order to be universal. A right is universal if it can
justifiably be described as being a right that all people have, irrespective of their current
situation as regards enjoyment or need of the right. The right articulated in article 24 is
to rest and leisure, with periodic paid holidays as a practical out-working of that right.
The right to rest and leisure is directly derivable from the status of human dignity
cashed out as normative agency. Just as with the right to work, and to choose one’s line
of work, without a right to rest and leisure we cannot effectively pursue a conception of
the good life. Work is a central component of any human life. Similarly what we do
when we are not working is equally as central. Practicalities, in this case, would then
necessitate that we have realistic access to leisure time. This would require that work
hours be reasonably limited and that we be able to take periodic time off without risking
penury. In order to ensure that penury is not risked, there needs to be some holiday
with pay. Whilst this might, on a prima facie level, seem like a trivial right to be
included as a human right in the face of widespread extreme poverty and deprivation,
the protection of human dignity requires much more than protection from extreme
hardship. In this case, it requires us to be able to pursue a fulfilling life in accordance with the lofty and noble status of human dignity.

Article 25 enumerates a right to health, well-being, and subsistence. It specifically lists “food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age” (UDHR, Article 25). This right is often challenged due to the indeterminacy of how to assign the duties associated with it. The issue of how to think about duties is one that I will deal with below for now I want to simply determine whether based upon the status of human dignity as I have defined it we can justify this right. There are clear interests to having subsistence and healthcare. The question is whether protecting those interests is required in order to be able to exercise one’s normative agency. I argue that it is-without basic healthcare, food, clothing, housing, and protection from deprivation in circumstances of misfortune then we cannot construct a conception of the good life. If my time is perpetually occupied with concern for where my next meal is coming from, concern about where I am going to sleep tonight, and whether an easily treatable illness will destroy my life prospects, then I will not be able to construct a conception of the good life. Merely surviving is beneath the status of human dignity. If I lack basic health care I cannot plan for the future effectively as I cannot guarantee that in the case of injury and illness that I will be able to continue with my plans. Similarly, if upon falling ill I am unable to seek a basic level of care I am incapable of pursuing my conception of the good life. If I lack clothing and housing then, firstly, I am much more likely to fall ill and, secondly, I cannot effectively pursue my conception of the good life. I cannot make decisions about how to pursue my goals in life if I lack clothing and housing as these are basic components of life without which one would be socially

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stigmatised and excluded. Without basic healthcare, clothing, and housing one’s very life is constantly under threat - this is not a state of being in which a person is capable of exercising normative agency. Similarly, if a person lacks sufficient food to be adequately nourished then they cannot pursue their goals and so cannot enjoy condition-dignity. Irrespective of the problem of assigning and defining the associated duties, article 25 of the UDHR is justifiable based upon the status of human dignity.

A right to education, enshrined in Article 26, faces similar criticisms to those levelled against a right to subsistence and basic healthcare. It is often difficult to identify who is at fault when a right to education goes unfulfilled, just as it is difficult to identify who is obligated to supply education. Additional complexity is generated by the fact that in a case of under-fulfilment of a right to education the agent who has the initial duty to supply education, and the agent who is responsible for the under-fulfilment, are not necessarily the same person. However, education is also less directly linked to normative agency. As we have seen, if we are deprived of healthcare and subsistence then our normative agency is directly stripped from us. We are rendered unable to plan or act effectively. In the case of education, however, we can still plan and act if we lack a formal education. This is made evident by a simple glance at the fates of a wide range of under-educated individuals who are still able to construct and pursue some conception of a good life (even if their doing so is not an entirely conscious decisions). Thus it is possible to exercise normative agency without receiving an education.

However, there is a clear normative agency-based interest in receiving an education. An individual is better able to exercise their normative agency if they receive at least a basic education. If an individual is under-educated then they will be unable to properly

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construct a conception of the good life as they are far less likely to be aware of the full range of options available to them- their exercise of normative agency would be *uninformed* exercise. In the case of normative agency it is of great importance that our exercise of it be *informed*. Furthermore, without at least a basic level of education an individual will not have all of the tools required to allow them to effectively pursue their conception of the good life. There is little good in ensuring that my interest to construct a conception of the good life is protected if I am then unable to pursue that conception due to my lack of an education. I have a crucial interest, based upon my bearing the status of human dignity, in having access to the highest level of education I can attain and that I require for my pursuit of my understanding of a good life to be effective.

The final right that I will analyse in this section is enumerated in Article 27 of the UDHR. It is the right to participate in cultural activities within a community, to enjoy the arts, and to share in the benefits of scientific advancement. There are two components to this right. Firstly there is enjoyment of cultural activities including the arts. Secondly, there is enjoyment of the benefits of scientific advancement. Both of these components are inherently social in nature. Neither of these rights makes sense outside of a social setting. The vast majority of the rights considered here have some social component to them (education, legal procedure rights, work-related rights, as examples). However, the right to partake of cultural activities is as a matter of definition an entirely social right- it cannot be exercised outside of society. Enjoyment of cultural activities, including the arts as understood broadly, are central components of any construction of an understanding of the good life. These cultural activities can range from engaging in shared cultural practices such as attending a fair to partaking of so-called ‘high’ culture such as attending the opera. Again, some might contend that

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this seems something of a trivial right in the light of the extremes of hardship so often
cited in justification of continued pursuit of the human rights project. However,
engaging in these cultural activities is crucial for individuals to develop a sense of self
both as individuals and as members of society. If we are not able to engage in these
cultural activities as members of our cultural communities then we cannot constitute a
proper understanding of self, and so cannot properly construct or pursue a conception of
a good life.

Similarly, being able to enjoy the benefits of scientific advancement requires one to be
part of a society that pursues scientific advancement through research and education. It
is not possible to share in the benefits of scientific advancement if one is not part of a
society in which to share it. Whilst there is no doubt that a right to participate in
cultural life can be derived from human dignity, it is less clear that being able to share
in the benefits of scientific advancement can be similarly derived. There are obvious
interests that individuals have in being able to access modern advanced technology.
However, this is not something that we would normally say should be provided as a
matter of right. I do not necessarily have a right to benefit from advances in
nanotechnology that make smart phones possible. This is due to there being a
conflicting interest here – in many cases a scientific advancement comes about due to
the ingenuity of an individual, that individual has an interest in benefitting from the
fruits of the ingenuity and labour. This will often mean that they are entitled to charge
for access to the benefits of their technological advancement. This seems incompatible
with a sharing of the benefits of scientific advancement. There are obvious examples in
which there is a need to ensure the sharing of benefits- such as developments in medical
science. However, even in these scenarios we do think that the originator of the

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advancement deserves recompense for their undertaking. This is dealt with in paragraph 2 of Article 27 which provides protection to the author of literary, artistic, and scientific production. Thus the rights enumerated in Article 27 of the UDHR are defensible based upon the status of human dignity.

As we can see then, the vast majority of the rights enumerated in the UDHR are justifiable through appeals to human dignity understood as normative agency. The next question I will address is whether there are any rights that are not enumerated in the UDHR that should be considered as fundamental human rights. There is one right which is not included in the UDHR but which is briefly mentioned in the ICCPR which is derived directly from a normative agency-based interest. This right is the right to use one’s own language. The ICCPR, in Article 27, enumerates the rights of minorities within a territory to use their own language (along with a number of other rights). The use of language is a crucial component of normative agency. Being able to express oneself in one’s own language and to have access to official documentation in one’s native tongue is derived from an interest in being able to cultivate one’s cultural identity and in being able to effectively participate in society. If one’s native language is not recognised and supported in one’s home country then you cannot effectively cultivate your cultural identity and you cannot effectively communicate with other members of your country. There should be rights to learn other languages – part of a right to education will involve opportunities to learn languages other than your native tongue. Similarly, there should be a right to receive education in one’s native language, to be allowed without persecution to utilise one’s native tongue, and to be able to carry out official correspondence in your native language. Thus an article to this effect should be added to the UDHR (its inclusion in the ICCPR is undoubtedly a positive addition).
In conclusion to this section, I have examined in detail the rights enumerated in the UDHR and have determined that they are all defensible based upon the status of human dignity with the exception of the inclusion of direct protections for trade unions being inapposite to the purpose of a general declaration (this is more properly enumerated in the ICESCR as a specific form of economic association that does deserve some protection due to its derivation from more general human rights). All of the rights enumerated, including the heavily contested social, cultural, and economic rights that are so disparaged by sceptics such as Maurice Cranston, are defensible on my understanding of human dignity as normative agency. The final criticism of the UDHR briefly developed in this section is its neglecting of linguistic rights. The UDHR neglects to specifically enumerate any rights regarding the usage of one’s native language. This is an oversight based upon the normative agency understanding of human dignity developed here.

A significant aim of examining the content of the justifications for human rights is to critically examine the international human rights regime in order to point out its faults and failings. In this case I have examined the most basic of the foundational documents of that regime with the express purpose of critiquing its content. The result has been almost entirely positive- the UDHR is a genuine and relatively complete enumeration of those rights that can genuinely be considered as human rights. The next, and final, section of this chapter will examine the non-correlative duties that exist as a result of the status of normative agency. As mentioned in the introduction a status is comprised of a bundle of rights and duties. Some of the duties associated with human rights correlate directly to a specific right- for example a right to not be tortured clearly generates a duty to not torture. However, there are other duties associated with the status of human dignity that do not neatly correlate with a specific right. The next
section will explore these duties in order to provide a complete substantive account of the status and condition of human dignity.

**Status-Dignity and Duty**

At the outset of this section I want to introduce a concept that Jeremy Waldron has articulated but which has been left underdeveloped. This concept is of ‘successive waves of duty’. In this way we can see how complicated some of the duties associated with specific rights can be, and we can see how a duty can be generated that does not directly correlate with a single specific right. Waldron argues that “a particular duty…thought of as associated with a right, itself generates waves of duties that back it up and root it firmly in the complex, messy reality of political life” (Waldron, 1993: 212). The role for Waldron’s waves of duty concept is to allow us to better understand the complexities of fulfilling a single right. In addition to this we can then see that due to rights being, as Waldron puts it, “unlikely to stand in a simple one-to-one relation with duties” (Waldron, 1993: 212) there are likely to exist certain duties that do not correlate directly to any specific right. There are two related duties that I will discuss that fall into this category – a duty to engage in social co-operation and a duty to construct human rights-protecting institutions. These are the two primary non-correlative duties that I will identify as components of the status of human dignity. I will explore them both in order to help elucidate the concept of non-correlative duties and to also show how these specific duties assist us in combatting one of the central problems facing the human rights project- the problem of under-specified duties.
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Waldron argues that from a single right successive waves of duties can be generated. He uses the example of torture, claiming that the initial simple duty to not torture will also generate duties “to instruct people about the wrongness of torture; a duty to be vigilant about the danger of, and temptation to, torture; a duty to ameliorate situations in which torture might be thought likely to occur; and so on” (Waldron, 1993: 212). So for Waldron, from an initial single correlative duty a whole range of additional duties emerge when we examine the political realities of ensuring the fulfilment of the initial right. All of these additional duties are, according to Waldron, correlative to the initial right- “In the case of each of these duties, the argument for imposing it is traced back…to the concern for an individual interest that underpinned the right in the first place; we say that the right protects a basic human interest and that in current circumstances of human life one cannot be said to take that interest seriously if one is content to stop at the previous wave of duty” (Waldron, 1997: 213). So, for Waldron each individual right is protected by a range of correlative duties that derive in waves from the original right-duty incident. Underpinning these waves of duties are non-correlative duties. A number of the different waves of duty that Waldron names in reference to torture are not possible without some procedure for institutional protections and/or social co-operation which are the two non-correlative duties that I have identified.

A duty to social cooperation does not correlate with any specific right. We cannot say that there is a right with which a duty to socially cooperate can be linked. As discussed in the previous chapter by grounding human rights in human dignity, the relationship between rights and duties ceases to be causal and becomes conceptual. This is a minor criticism of Waldron’s conception – the initial duty from which subsequent waves...
originate is not generated causally out of the initial right. Rather, both the initial right and the initial duty are generated out of the status from which the grounding interests are derived. In the case of human rights, the status of human dignity. As a result of this conceptual relationship it is plausible that a duty might exist that does not correlate to any specific right. The opposite is not possible as any right will always correlate to a duty, thus there are more duties than rights associated with the status of human dignity.

The first of these un-correlated duties that I will consider is the duty of social co-operation. What this means is something akin to a statement made in Article 1 of the UDHR regarding how we should behave towards one another. Article 1 of the UDHR does not enumerate a specific right; rather, it states certain claims about the facts of being human. However, it finishes by claiming that all humans “should act towards one another in a spirit of brotherhood” (UDHR, Article 1). Setting aside the obvious feminist critique of utilising the term “brotherhood,” what this is stating is that humans should treat each other in a certain way. The specific form of treatment outlined in Article 1 is brotherhood. This suggests two things; firstly, that we should treat our fellow humans as if they were in some way a member of our own kin. Secondly that we should work together in co-operation with our fellow humans. Social co-operation is working together with our fellow human in a spirit of kinship. This is social co-operation as I shall define it.

The duty of social co-operation as defined above is worryingly vague. I will now flesh out the concept somewhat in order to make this duty more concrete. In a much cited quotation from the Roman playwright Terence we can find the concept of the
universality of human concern expressed by Chremes- “I am a man: what man concerns, must me concern” (Publius Terentius Afer; 1885 p. 24). If we look at the original Latin of Terence we see that he wrote “Homo sum; humani nihil a me alienum puto”- he did not say that what concerns man concerns him, but rather that everything to do with being human is not alien to him, is not foreign to him. Social co-operation, then, is the act of taking an interest in the welfare of other humans – of taking an active role in their lives. It is treating others as if they are not foreign to you. Practically this works out as not only taking an interest in ensuring that others’ rights are fulfilled, but also in working together to ensure this. We have a duty to act in unison with other humans. If we return to the idea of human dignity as a status of nobility we can see this in the idea of noblesse oblige. Those who claimed to be noble were obligated to act in accordance with their claimed nobility. In this case that means acting in ways that recognise and respect other individuals as members of society. Co-operating with them to achieve collective ends and respecting each other’s roles in achieving those ends.

An example of a potential breakdown in social co-operation and a failure to engage in social co-operation can be found currently in Northern Ireland. The Northern Irish Assembly has repeatedly debated the issue of introducing legislation to allow for same-sex marriage. However, the Democratic Unionist Party (DUP) has repeatedly used a procedural quirk of the Northern Irish Assembly to ensure that such legislation cannot be enacted into law. This is despite opinion polls consistently showing a large majority of the Northern Irish population in favour of such legislation, and flies in the face of the

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30 This quotation was cited by Karl Marx as his own personal motto for life. Marx lifted it entirely out of context- the play, *Heautontimorumenos*. is a comedy. The line is in reality an example of a nosey neighbour prying into the business of an acquaintance. However, Marx’s misuse of the line has turned it into a clarion call for those advocating for universal equality- Kwame Anthony Appiah references it in his book *Cosmopolitanism* in this context. Thus, irrespective of its comedic origins the line can help us better understand the concept of social co-operation.

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original intent of the petition of concern procedure which was designed to ensure that on issues that were potentially sectarian in nature cross-community support would have to be sought. This shows that the DUP is not socially co-operating. Rather they are utilising a procedural quirk to ensure that their view is imposed. If they were to co-operate with the other groups in Northern Irish society, to work with other legislators in the Northern Irish Assembly, rather than work against them then they would be co-operating on some level. Even if they were to vote against same-sex marriage, by not employing a procedure that is designed to protect against sectarianism and simply allowing the legislative process to function normally they would be co-operating with other members of society.

The second non-correlative dignity-based duty that I have identified is the duty to construct human rights-protecting institutions. Whereas social co-operation is more a duty to have a certain attitude towards other individuals the duty to construct human rights-protecting institutions is much more concrete. This is a duty that does not correlate with a specific right but which underpins all human rights. Without a sufficient institutional structure it is impossible for human rights to be sufficiently enjoyed. As Henry Shue has pointed out, the most important component of a right is that it be socially guaranteed. Shue argues that “A right is ordinarily a justified demand that some other people make some arrangements so that one will still be able to enjoy the substance of the right even if--actually, especially if--it is not within one’s own power to arrange on one’s own to enjoy the substance of the right” (Shue, 1996: 16). A right needs to be socially guaranteed in order to be effectively enjoyed. It is not sufficient that no-one is currently violating my right if I am constantly under threat of violation due to a lack of sufficient social guarantees. Socially guaranteeing a right will

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involve establishing an institutional order that allows for such guarantees— it is not enough to merely say ‘But I am not violating any rights’ if at the same time we are complicit in the maintenance of an institutional structure that does not socially guarantee human rights.

Thus there is a clear duty to establish an institutional structure that protects human rights. This is not simply a domestic duty it is also international in nature. We are obligated to participate in and to protect our domestic human rights-respecting institutional structures. However, we are also obligated to help build and maintain international institutions that protect human rights. Similarly, those who live in countries that lack human rights respecting institutions are obligated, as much as they can, to pursue the creation of such institutions.

So we are obligated to help develop human rights-protecting international and domestic institutions. However, it is at times difficult to conceive of this duty on an individual level as it is unclear at times what an individual can do to promote human rights-respecting institutions. Institutions cannot be built by one person alone, but an individual can do a lot to help promote human rights respecting institutions. Supporting organisations such as Amnesty International that put pressure on governments to respect human rights is one such activity. Similarly, an individual can put pressure on their elected representatives to make increasing their support for human rights institutions, such as the United Nations Human Rights Council, higher up the political agenda. In countries with poor human rights records individuals can agitate and protest in favour of institutionalising human rights institutions. Another practical example of how individuals can help to promote human rights is by educating themselves about issues such as slavery in the cocoa production industry and then only purchasing chocolate from companies that take part in the International Cocoa Initiative set up.

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specifically to scrub slavery out of cocoa production.\textsuperscript{31} If all individuals committed to a combination of fulfilling our duties of social co-operation and building human rights respecting institutions (along with our correlative duties) it would go a long way towards improving the global human rights situation.

\section*{Conclusion}

This chapter has attempted three distinct but related tasks. The first was to establish the substantive content of the status of human dignity in such a way as to determine what is required to ensure condition-dignity. I argued that this substantive content, which is also the basis for the status, is the potentiality for normative agency. Normative agency is defined as the capability to construct and pursue a conception of the good life. The potentiality for normative agency means that any creature that is of a type that under normal conditions – that is without physical or mental impediment – would be able to exercise normative agency possesses the status of human dignity. This allowed me to avoid the issue that Griffin runs into of excluding handicapped humans from the class of agents entitled to human rights, without opening the entire range of human rights up to non-human animals. Additionally, I interpreted normative agency as involving something like the central human capabilities that Gilabert and Nussbaum advocate for.

The second task was to analyse the UDHR in order to determine whether the rights enumerated there are genuine human rights. I did this as the UDHR is a helpful starting point when seeking to construct a list of human rights. I concluded that most of the rights enumerated in the UDHR were justifiable based on normative agency, but that

\textsuperscript{31} The International Cocoa Initiative is a collaborative project between anti-slavery groups and chocolate companies set up in order to eradicate slavery from cocoa production. It is one of the few examples of an industry taking clear and solid steps towards improving human rights without putting profits first. For more information see http://www.cocoainitiative.org/en/.
linguistic rights should be added to the list of genuine human rights. I finally looked at the role that duties play in the status of human dignity. I argue that there are two types of duty – correlative and non-correlative – that are associated with human dignity. Every right correlates with multiple duties. These duties emanate from an original right-duty pairing in waves, as outlined by Waldron. There are at least two duties that are derivable from human dignity that do not correlate directly with specific human rights. These two duties are the duty of social cooperation and the duty to construct and maintain human rights protecting institutions. These two duties work in tandem. Social cooperation contributes towards allowing us to build better institutions, but we can fulfil one without necessarily fulfilling the other. Social cooperation is an imperfect duty as it is a duty to have certain attitude towards how we treat our fellow human beings, to pursue a particular goal. The duty to build human rights-respecting institutions is a perfect duty as we are to perform specific actions that build and support certain types of institutions.

The next step in my thesis is to demonstrate how this human dignity approach to human rights, when combined with the Hohfeldian model of a duty developed in chapter one, would impact upon political practice. I will do this through a detailed analysis of how it would affect our understanding of a single human right- the human right to not be enslaved.
Chapter four: Human Dignity and Modern Day Slavery: What are our Duties?

“What, am I to argue that it is wrong to make men brutes, to rob them of their liberty, to work them without wages, to keep them ignorant of their relations to their fellow men, to beat them with sticks, to flay their flesh with the lash, to load their limbs with irons, to hunt them with dogs, to sell them at auction, to sunder their families, to knock out their teeth, to burn their flesh, to starve them into obedience and submission to their masters? Must I argue that a system thus marked with blood, and stained with pollution, is wrong? No! I will not. I have better employments for my time and strength than such arguments would imply.”

-Frederick Douglass, “What to the slave is the 4th of July?”, July 5th 1852

“They’d chew meat and spit it on my face. They would throw a plate full of rice on me. They would beat me up. They’d make me work from 5 a.m. to later than 1 a.m. the next day. And they didn’t pay me…I go around villages telling people not to get tricked into human trafficking…Members are given posters with illustrations to distribute. I hang them outside shops and public places.”

–Kamala, former slave in Nepal

Frederick Douglass and Kamala, though separated in time by approximately 150 years, are similar in many ways. Both are former slaves who went on, after their own

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32 My Thanks to Gaspare Tortorici and Sara Mitchell for their assistance in preparing the data and graphics used in this chapter. All data used was taken from the Walk Free Foundation’s 2014 Global Slavery Index.


emancipation, to be active and productive members of society and to help emancipate others. They are both shining examples of individuals fulfilling their duties to themselves and to others as regards work to eradicate the scourge of slavery. Both Kamala and Frederick Douglass showed a clear knowledge of the evils of slavery and both, as a result, became actively involved in combatting it.

It is common for people to assume that slavery is no longer a problem. Whilst it is hard to believe that in this day and age slavery is still a problem, the experiences of Kamala and tens of millions like her, as we shall see, prove that it is. Whilst the aim of this chapter is not to prove that slavery is a problem, it will show that utilising the human dignity-based justificatory framework for human rights laid out in chapters 2 and 3, when combined with the molecular model of a duty constructed in chapter 1, would result in significant changes to public policy on slavery prevention and amelioration at both the global and domestic level. This chapter will also make clearer the specific duties and obligations that attach to individuals – both those in affluent countries and those living in the developing world.

Before beginning a detailed exposition of the implications of my theoretical model I will first outline the scale and nature of the problem of modern day slavery and provide a sketch of current efforts to combat it. For both of these tasks I will utilise data from the Global Slavery Index (GSI). The GSI is an index of global slavery produced with funding from the Walk Free Foundation, a global anti-slavery NGO. The chapter will then proceed in four sections. The first section will elaborate upon the three waves of correlative duties that were identified in chapter three. These duties will be specified in detail – for individuals, governments, and business corporations – by identifying which duties attach to which actors and then how those duties will function by mapping them on the Hohfeldian conceptual map developed in chapter one. The second section will

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outline the nature and specific content of the non-correlative duty of social cooperation for individuals, governments, and business corporations. I will specify the various different actions required of the different global actors required to fulfil this duty in the area of combatting modern slavery. The third section will examine the second of these non-correlative duties, the duty to build human rights-protecting institutions. This section will show how our global institutions are failing to fulfil this specific duty, and will outline what they would look like were they to fulfil it.

The final section will show how the human dignity approach posited in chapters two and three respects the autonomy of individuals in comparatively deprived countries by making them also bear some level of duty. This contrasts with the common, paternalistic, view that sees the deprived as merely claimants of, and not active agents in, the securing of their own rights. This section will outline the duties of those actors who are located in countries that are more prone to high levels of enslavement. The conclusion of this paper is that we – individuals, governments, and business corporations – are all falling short of fulfilling our human dignity-derived duties associated with the area of modern slavery prevention. Thus, if implemented, the theoretical framework posited in this thesis would significantly impact global political practice.

Descriptive Data

The difficulties with estimating the prevalence of slavery within a given country are many and significant. The dark figure of slavery, the estimated percentage of the crime that is un-reported, is extremely high in most countries. As Kevin Bales and Monti Narayan Datta have estimated, the dark figure of slavery in European countries ranges from 47.9% (Norway) to 100% (Russia). Norway is the only country to come in under...
50% and the majority of countries are somewhere in the region of 90% (Datta and Bales, 2013). Datta and Bales highlight three problems with estimating slavery at the country level—stigmatization of victims of sexual crimes, stigmatization of victims of slavery, difficulties with estimating victimization due to the non-discrete nature of the crime. The first two of these problems are related to underreporting by victims. The third is a problem with estimation based on surveys. As Bales and Datta observe, “For the purpose of random-sample crime surveys, it is assumed that most crimes are discrete, time-bound events of relatively short duration…Because victim surveys do not address the question of the duration of the crime event, the crime of enslavement presents a special challenge to estimation because of its indeterminate duration” (Datta and Bales, 2013: 821).

So, when estimating slavery in a country random-sample surveys have to be combined with secondary source reporting figures in order to approximate a total figure. The GSI faces an additional problem—there is a distinct lack of random-sample national surveys that enquire about enslavement. As a result, in order to construct a global dataset the GSI has to extrapolate figures for the majority of countries. The GSI has survey data for 19 countries, ten from surveys commissioned by the Walk Free Foundation and nine from other survey sources.

From these 19 survey sources the GSI extrapolated figures for the 148 additional countries. In order to do this the GSI first assumed that every country included in the dataset had a non-zero number of slaves. A second assumption was that a country such as Haiti, with a known high level of slavery should be used to help set an estimated

35 Non-discrete refers to the fact that slavery, unlike other crimes such as theft, does not occur at a single point in time but rather over an extended period of time.

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upper limit on the prevalence of slavery. The GSI then used a statistical method called K-means clustering to group the countries into seven clusters.

This clustering technique is designed to ensure that observations in separate clusters are as different from each other as possible. The extrapolation process followed four steps – countries within each cluster were ranked according to their mean vulnerability scores from low to high. Then geography was considered within and between the clusters. The countries were then examined on a case-by-case basis to check the estimates compared to secondary source data. Finally, Small Island Developing States (including Madagascar, excluding Singapore and Haiti) were adjusted downwards.

There are a wide variety of problems with the data. The standard problems of measuring slavery are not eradicated: It is under-reported by victims; it occurs in the shadows as a crime that is often not directly observable; and survey data is scarce. Additionally, the extrapolation procedures used by the GSI are not always particularly clear. However, the GSI data provides at least a rough estimate of slavery prevalence across much of the world. Whilst the problems with the data mean that making any causal inferences utilising this data would be extremely problematic, as a descriptive tool to show the nature and extent of the problem it is invaluable.

The final issue with the data is definitional. There are a range of practices which are included in the definition of slavery used by the GSI which many people might not think of as slavery. The GSI definition is “modern slavery involves one person possessing or controlling another person in such a way as to significantly deprive that person of their individual liberty, with the intention of exploiting that person through their use, management, profit, transfer or disposal” (Global Slavery Index 2014). This definition incorporates the concept of Forced Labour as defined in in the International
Labour Organisation Forced Labour Convention of 1930, Slavery and Slavery like practices as defined in the Slavery Convention (1926) and the Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery (1956), and human trafficking as defined in the Protocol To Prevent, Suppress and Punish Trafficking In Persons, Especially Women and Children, Supplementing The United Nations Convention Against Transnational Organized Crime (2000). This definition is a very broad one that includes practices such as forced marriage, non-voluntary labour, and the forced removal of organs. There are three key components to this definition- possession or control, deprivation of individual liberty, and exploitation. Thus the definition excludes simple kidnapping which does not typically involve exploitation or possession, and defines the necessary and sufficient parameters for calling something slavery. This is an important distinction to be made as kidnapping is a separate crime, with different motivations and aims, that if included in the GSI would significantly and damagingly inflate the estimates of slavery. The definition of slavery used by the GSI is a strong one; conceptually slavery is a distinct and particularly insidious violation of a human right. It is important that any definition reflects this in order to ensure reasonable measurement. Additionally slavery is different today from how it was when it was a legal practice. Chattel slavery is relatively rarer thus the definition being expanded to include practices that might not have traditionally been thought of as slavery is important. Debt bondage and forced labour often occur without ownership of a person being asserted. Thus, whilst the GSI struggles to deal with the problems of estimation and extrapolation, its definition of slavery is a strong one.
In figure 7 above, we can see a global map that shows the percentage of the population of each country included in the GSI, ranging from 0.007% in Ireland and Iceland to 4% in Mauritania. As can be seen from the above map, whilst slavery is more prevalent in certain areas of the world, it is a genuinely global problem. Africa, the Middle East, and South East Asia are the most problematic regions, but there are countries in Europe and the Americas with significant levels of slavery. Iceland and Ireland have the lowest estimated percentage of the population enslaved with 0.007%, which translates to fewer than 100 slaves in Iceland and around 300 in Ireland. Luxembourg also has fewer than 100 slaves, which translates to 0.013% of the population. These are the three best performing countries, in terms of percentage and raw number of slaves. The three worst performing countries in terms of the percentage of their population enslaved are Mauritania at 4% (155,600 slaves), Uzbekistan at 3.9729% (1,201,400 slaves), and Haiti at 2.3041% (237,700 slaves). The three worst performing countries in terms of the raw number of slaves are India with 14,285,700 slaves (or 1.1409% of its population), China with 3,241,400 slaves (or 0.2388% of its population), and Pakistan with 2,058,200 slaves (or 1.13% of its population). The estimated total number of slaves worldwide is 35,790,100 with the mean number of slaves per country sitting at 35,790,100 with the mean number of slaves per country sitting at

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216,910. We can see a breakdown of these figures by region in the box and whisker plots shown in figure 8 below.

**Figure 8: Box Plots of Regional Estimated Slavery levels**

As can be seen above every region excepting Europe has at least one country with more than 1% of its population enslaved. Europe has a very narrow distribution and the lowest mean of all the regions. The rest of the world falls far short of Europe’s performance. The Asia-Pacific region, although lacking a significant outlier, has a high average of 0.44% of the population enslaved. The Americas has a very high variance – from a maximum of 2.3% in Haiti to a minimum of 0.013% in Canada. The Middle East and North Africa region has a relatively low variance but also a high average. The Russia and Eurasia region and the Sub-Saharan Africa region perform by far the worst with an average of 0.71% and maximums of 3.97% and 4% respectively. A summary of these statistics (rounded to two decimal places) is shown below in table 3.

**Table 3: Regional Slavery Summary Statistics**

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My aim with all this descriptive data is to show that slavery is not a problem that was solved in the 19th century. Unfortunately more fine-grained data on the sectors most affected by slavery is not available beyond anecdotal stories from former slaves. These slave narratives are valuable but they cannot inform us about general trends in the pattern of enslavement. Despite this lack of more fine-grained data we can say with confidence that slavery is, to this day, a major problem. Even if the estimates of the GSI are significantly inflated, there are tens of millions of individuals still trapped in slavery. One possible line of response to this continuing problem would be to argue that whilst there are still tens of millions of slaves, slavery has been criminalised everywhere and governments are acting to eradicate it. However, the GSI also produces data based upon governmental responses to slavery.

The GSI rating of governmental response to slavery is a letter grade system. In order to compile this measurement the GSI test governments on five different areas:

1. Whether survivors of slavery are supported to exit and then remain out of slavery;
2. Whether criminal justice mechanisms adequately deal with slavery;

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3. Whether there are coordination and accountability mechanism in place for central government;

4. Whether the attitudes, social systems, and institutions that enable modern slavery are tackled;

5. Whether businesses and governments stop sourcing goods and services that use slavery.

These five areas address the main mechanisms available to governments to combat modern slavery—criminal justice (legislation outlawing slavery is present in every country bar North Korea), support for survivors, accountability of the government, social and cultural artefacts that enable slavery (such as the usage of debt bondage in India), and the sourcing of slave labour tainted goods. The GSI surveyed governments and area experts to grade each country included in the dataset. The letter grade system used is AAA, AA, A, BBB, BB, B, CCC, CC, C, D. The majority of countries received a CCC grade or lower. Only two countries did better than a BBB, and none received a grade of AAA.\(^{36}\) The full grading data for every country is available in appendix 2. As can be seen the majority of governments are falling significantly short of the exacting standards set by the GSI. It will not be my argument that we must all drop everything and give all we have to combat slavery. However, I will show that what we are duty bound to do, based on human dignity, is considerably more than is currently being done.

**Correlative Duties**

In this section I will examine those duties that correlate with the right to not be enslaved. As discussed in the previous chapter there are two types of duty that are

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\(^{36}\)This grading system is independent from prevalence rates as it measures the quality of government policy regarding slavery. A country can have a low number of slaves and still have very poor governmental policy in this area.

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associated with human rights—correlative and non-correlative duties. Correlative duties are those which could be derived directly from the existence of the right. They are those duties which we most commonly think of as being directly related to a right. The simplest examples are duties to simply refrain from performing specific acts—so if there is a right to life then there is a duty to refrain from killing, if there is a right to not be enslaved there is a duty to not enslave, if there is a right to not be tortured there is a duty to not torture and so on. These are the simplest and clearest duties we have that are associated with human rights.

However, as we have already seen, the concept of a duty is considerably more complex than this. In Chapter 3 I introduced the concept of waves of duties, borrowed from Jeremy Waldron. In Chapter 1 I explored the molecular composition of a single duty, as inspired by Wesley Newcomb Hohfeld. In this section I will apply this concept of duty to those duties that directly correlate to the right to not be enslaved. At times I will draw upon evidence from more empirical discussions of how to combat slavery especially the work of Kevin Bales. Bales has dedicated much of his career to exploring methods for combatting slavery in its modern forms and thus his work provides me with invaluable information about what is effective in combatting slavery.

My aim here is not to argue that we are all required to throw our complete support behind everything that is effective in combatting slavery but rather that by utilising the Hohfeldian understanding of what a duty is outlined in chapter 1 and the waves of duties model borrowed from Waldron for correlative duties in chapter 3 then we can come up with a coherent picture of who is required to do what in combatting this egregious, global human rights violation.

Waldron articulates the wave model as follows: “a particular duty…thought of as associated with a right, itself generates waves of duties that back it up and root it firmly
in the complex, messy reality of political life” (Waldron, 1993: 212). From an initial correlative duty there will be generated numerous additional duties that are necessary in order to make the fulfilment of the initial duty politically intelligible. Waldron draws upon the example of torture. He argues that a right not to be tortured correlates with a simple duty to not torture. More controversially, he argues that this simple duty can only be properly fulfilled by also fulfilling subsequent duties “to instruct people about the wrongness of torture; a duty to be vigilant about the danger of, and temptation to, torture; a duty to ameliorate situations in which torture might be thought likely to occur; and so on” (Waldron, 1993: 212). These subsequent waves, for Waldron, draw their justification from the same source as the initial right-duty pairing. So for Waldron we cannot be genuinely concerned with fulfilling our duty not to torture if we are not willing to concern ourselves with these subsequent duties.

Waldron does not provide a detailed explication of precisely how these waves function—what duties are contained within these subsequent waves. Thus, his concept is left undertheorised. Waldron’s primary concern in elucidating this concept was to try to find a way to resolve apparent conflicts of rights. As he observes these apparent conflicts between rights are really conflicts between duties to fulfil specific rights. As a result, rather than developing the substance of the waves in detail he attempts to determine how and whether he can utilise this waves of duty concept to make resolving conflicts between duties easier. Waldron argues that the waves of duty concept allows us both to understand better the actual content of our duties and to potentially prioritise certain duties over certain other ones. We are able to do this based on the likelihood that neglecting a specific duty would result in the negation of the original justifying interest. Waldron uses this concept to assist him in providing a systematic procedure for attempting to resolve intra-right conflicts. He does this by arguing that when rights

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conflict it is actually a case of incompossible duties but that by understanding duties in waves we are able to fulfil some of the duties associated with a particular right as not every duty associated with a single right will be incompossible with the conflicting duties. My aim here is not to try to determine a way to resolve conflicts between specific rights, although Waldron’s suggestion that we prioritise duties more likely to protect the original justifying interest over those less likely to do so seems a plausible one. My aim is, rather, to explore the way in which understanding correlative duties as being generated in waves can help us better understand who has to do what in the context of a specific duty.

In figuring out the substantive content of the waves that are generated out of an initial, simple duty it is helpful to look the specific examples that Waldron cites. He cites a number of specific examples, including a duty to instruct, a duty to be vigilant, a duty to ameliorate situations in which torture might occur, and a set of remedial duties if a violation occurs. These duties look very similar to the three types of duties that Henry Shue suggests correlate with every basic right. Shue argues that every basic right correlates with

I. Duties to avoid depriving
II. Duties to protect from deprivation
III. Duties to aid the deprived (Shue, 1996: 52, emphasis in the original).

The initial or first wave of duties that Waldron references, those duties to provide the basic content of the right, look a lot like Shue’s duties to avoid. A duty to avoid depriving someone of their right looks like a simple duty to refrain from not restricting someone in their enjoyment of the interest underlying that right. Waldron’s second wave of duties looks a lot like duties to protect on Shue’s tripartite model – to educate

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people in the dangers and evil of torture so that they know not to do it, to be vigilant against torture, to ameliorate situations in which torture seems likely – as they are all examples of preventative, or protective, measures. Additionally, the set of remedial duties that Waldron references are very similar to Shue’s duties to aid the deprived.

The picture that is emerging is that the first wave of duties is the simple, directly correlative duties. The second wave is comprised of those duties that are designed to prevent or to protect from deprivation. The third wave of duties is to remedy the situation of those who have been deprived of their right. Subsequent waves can be generated if these are not effectively fulfilled. So if duties to remedy are not fulfilled then duties to enquire and enforce will be generated, for example.

We can use this wave model to make the allocation of duties more coherent. The third (and subsequent) wave does not emerge unless there is deprivation. The first and second waves pertain irrespective of whether deprivation has occurred. In the case of the first wave these duties will, in general, be painted broadly. To use the example of slavery, the simple duty not to enslave falls upon every single individual at all times. All people are required not to enslave others. The second wave paints a much more complex picture. Using the example Waldron uses of education it is obvious that not everyone can be required to provide education to others in order to prevent slavery. This is simply not a feasible allocation of duties. The provision for education about the dangers of slavery, how to avoid being enslaved and how to spot someone who is enslaved, should come from some form of institutional source. Education should be provided by, in most cases, state institutions. The reason for this is partly internal to the theory of waves of duty and partly external. It is internal to the theory that different duties in different waves can attach to different actors, some of whom will be individual and some collective. In this case it is clear that the acts required to protect the

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underlying interest, education to protect dignity based non-enslavement, cannot be provided by individuals acting alone. This is in part a feasibility constraint and in part a story about maximising the enjoyment of the underlying interest. In the case of human rights the ultimate underlying interest is human dignity, although this breaks down into a set of contributing interests. The maximization story is thus one of maximizing the enjoyment of the substance of the interests necessary to protect the underlying interest of human dignity.

The form of collective agent that should perform this specific act is external to the theory. Whichever collective actor is best positioned to fulfil this particular duty that is derived, via the wave theory, from human dignity should fulfil it. As this duty is derived from human dignity it is ultimately one for which all of humanity is in part responsible. This responsibility is fulfilled if appropriate institutional arrangements are made. If these arrangements are not in place then whichever agents currently have the power to implement them are obligated to do so. Until this is completed individuals have third wave duties to provide aid where possible. In the case of slavery this would involve widespread governmental education programs. This would involve both programs targeted at young people to ensure that they are cognisant of their rights and duties and how to fulfil them and programs aimed at ensuring that law enforcement officials have received appropriate training for the treatment of victims of slavery and for how to spot the signs of enslavement. If a government does not have appropriate educational programs then subsequent duties to lobby for such programs fall upon both the individuals living within that jurisdiction and upon individuals and groups outside that jurisdiction. So, as we can see, whilst the first wave is relatively simple in the case of slavery, the second wave is more complex. However, the wave model allows us to make the “messy reality of political life” (Waldron, 1993: 212) more intelligible.

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In the case of individuals being deprived of their right not to be enslaved then the third wave of duties kicks in. Whilst the first and second waves emerge in conjunction with each other, the third wave only emerges when an individual is deprived of the content of their right—in this case when someone is enslaved. This simultaneous emergence is due to the systematic interdependence of the different waves of duty. As Shue observes of his tripartite structure “if either duties to avoid or duties to protect are construed too narrowly, the other duty then becomes unrealistically broad” (Shue, 1996: 61).

I will discuss the duties of individuals in countries with high levels of deprivation in the final section. Here I will discuss the duties generated by human dignity that attach to individuals in the parts of the world in which enslavement is relatively rare. Our duties in the more affluent parts of the world in the third wave of duties are to be vigilant to spotting slaves in our own countries, to ensure that there is effective legislation in place to allow for the liberation of slaves, and to allow for effective post liberation care, and to take reasonable steps to help countries with much higher levels of slavery prevalence to liberate their enslaved. I will now unpack these substantive categories of duties in more detail.

We all have a duty to be vigilant against slavery. This means that we need to educate ourselves in the signs of enslavement. This can be done relatively easily by reading a book such as Kevin Bales’ *Ending Slavery: How We Free Today’s Slaves* or conducting a simple google search which places massive amounts of information at our fingertips. *The Guardian* newspaper has an online section specifically dedicated to stories related to modern-day slavery. It is not difficult for us to educate ourselves to be able to spot when someone is enslaved. If we then come across someone in our own country (this is incredibly unlikely in Ireland, with only approximately 0.007% of the population in

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slavery) who we suspect of being a slave we must then report this to the appropriate authorities and by so doing seek to have that individual liberated.

Having discussed the way in which correlative duties function in waves as well as briefly discussing the content of these waves for individuals I want now to look at the correlative duties for governments and businesses in more detail in relation to slavery. We have seen that the story is essentially a maxi-min one with feasibility constraints. I will firstly look at governmental duties, and then businesses duties. I will also sketch these duties on to the Hohfeldian map developed in chapter one. Governments are duty-bound to ensure that appropriate legislation is passed in our country that allows for effective prosecution of slave-holders, appropriate post-liberation care for former slaves, and for any individual who was trafficked into a country illegally to not be treated as a criminal but as a victim. Post-liberation care should include medical care, housing, some level of education, and in the case of trafficking victims options to either return to their country of origin or to obtain legal permanent residency and to have their family join them. Some countries, such as The Netherlands and the United States of America (amongst a number of others), have begun to introduce such legislation. However, further steps need to be taken to ensure that such legislation is sufficient.

A concrete example of a recent piece of legislation is from the UK, the Modern Slavery Act 2015. This act does many things very well – it clearly sets out the offences of slavery and human trafficking. Additionally, it introduces some significant protections for victims of slavery- ensuring they cannot be prosecuted for crimes they committed under coercion whilst enslaved, ensuring they receive effective legal counsel, and making sure that child victims are supplied with a trained child support advocate.

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37 This duty sounds demanding and it is. However, it is a third wave duty to aid someone who was deprived of their right to not be enslaved. Duties to aid will often be quite demanding as they only appear in response to previous failure. As the common saying goes “Prevention is better than cure.”

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Further to this the act makes it a requirement for businesses of a certain size to produce and make available slavery and human trafficking reports every financial year detailing their supply chains and their policies towards combatting trafficking and slavery (The Modern Slavery Act 2015). Finally, it also introduces strong provisions allowing for the seizure of goods and capital produced by, obtained through, or involved in the transport of slaves. This is an important provision as seizing the proceeds obtained through slavery ensures that the slaveholders are not able to profit from their crimes.

However, certain components of the legislation fall short of ideal. The victim support does not go far enough. It does not ensure child victims will be appropriately housed with specially-trained court-appointed legal guardians (this was a suggestion made by the Parliament Select Committee and supported by the opposition at the time), and the provisions regarding corporate reporting about slavery put the threshold for reporting at an annual turnover of £36million (The Modern Slavery Act 2015 (Transparency in Supply Chains) Regulations 2015). This is potentially higher than would be desired as it may exclude a number of businesses that might have slavery in their supply chain.38

As we can see, then, legislative responses to slavery are difficult for governments to get right, and even when strong efforts are made it is not an easy task. The example of the UK is a good one as the legislation is praiseworthy for its attention to detail in certain areas, specifically the criminal justice provisions, but it is lacking in other areas, notably in victim support and corporate reporting. Governments thus have duties to construct legislation carefully and individual citizens have duties to pressure their representatives to enact such appropriate legislation.

38 This critique is not derived from my theory but rather from observation of what would likely be effective. The duty to effectively ensure reporting by corporations is directly derivable from my theory.

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These duties are derived from my theory as the basic interest of human dignity necessitates the protection of individuals from enslavement. The status of human dignity, thus, also contains duties that directly correlate with the right of non-enslavement that emerge in waves being assigned to different actors based on feasibility constraints and the need to maximise the basic minimum of the enjoyment of human dignity. The governmental duties discussed above, using the example of recent UK legislation, are correlated with the right of non-enslavement. All three primary waves are present in the legislation – provisions to prevent slavery from happening; provisions to protect former victims of slavery; provisions to punish former slave-holders; and provisions to assist people to ensure that we do not purchase slave-made goods. Preventing slavery provisions fulfil first wave duties to avoid depriving as well as fulfilling second wave duties to protect from deprivation. Provisions to protect former victims contributes to fulfilling second and third wave duties to protect and aid. Finally, provisions to ensure that we do not purchase slave made goods fulfil first wave duties to avoid depriving, or in this case to avoid contributing to deprivation.

The third part of the third wave of duties associated with the right to not be enslaved involves taking certain steps to push for the liberation of slaves outside our own country’s borders. It is practically implausible to try to assign a direct duty of liberation to all individuals. Whilst this duty is a human dignity-derived one, and so attaches in some way to all individuals, everywhere, it would be completely implausible to ask an individual in Dublin to kick in doors in India. However, there are certain steps that those of us in countries with low slavery prevalence can take to seek to reduce the demand for slaves. As mentioned in the previous paragraph, the UK’s Modern Slavery Act 2015 introduces a legal requirement that all companies providing goods or services with a turnover above £36million produce a report every financial year detailing their

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supply chains and their policies to eradicate slavery from those supply chains. This provision makes it much easier for individuals to fulfil their own duties and codifies the duties of businesses. We, in the more affluent world, are duty bound to investigate the sources of the goods we buy and to seek to buy only goods that are produced without the input of slavery. Requiring businesses to be more transparent about their supply chains makes it much easier to determine which products are likely to be tainted by slavery. It is important that we seek to buy only goods made free from the taint of slavery. It becomes much easier to do so if we are easily able to obtain reliable information on the supply chains used by businesses.

Another way of fulfilling this part of our duty is through the use of accreditation. The most famous of these accreditation systems is probably the Rugmark (now known as GoodWeave) which is an accreditation system established in the mid-1990’s for use on carpets produced in India. It has since expanded to operate in a number of other countries (including Nepal and Pakistan- which along with India are significant problem cases as regards slavery). The Rugmark system provides a label to carpets made without the use of child or slave labour. This allows consumers to purchase carpets with confidence that they are not tainted by the use of slave labour. So we are, then, duty-bound to only purchase carpets with the Rugmark accreditation and carpet producers are duty-bound to sign up to and abide by the Rugmark standards. Industries that are potentially tainted with slavery have duties to address this (charcoal and fishing are two examples of such industries).³⁹

Another industry in which significant efforts have been taken to scrub slavery out of the supply chain is chocolate. The International Cocoa Initiative is a collaborative effort

³⁹ More information about Goodweave, or Rugmark, can be found at http://www.goodweave.org/home.php

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between NGO’s, chocolate companies, and national governments that is working to eradicate slavery from the supply chain in chocolate production. Much of the world’s cocoa is produced in West Africa which is one of the most problematic regions of the world. The Cocoa Initiative has, since its foundation in 2002, worked to try to improve the conditions for workers in these West African farms and to eradicate slavery from its supply chains. Whilst its progress has been slow, it has worked hard to eradicate slavery from the chocolate supply chain. Additionally, it allows us, as consumers, to only buy chocolate from companies associated with the initiative and so to contribute towards the eradication of slavery from cocoa production thus allowing us to better fulfil our individual duties.\(^40\)

It should be noted at this point that a general boycott of an industry known to have problems with slavery in its supply chains is not helpful. No economic activity is currently entirely powered by slave labour, and thus engaging in a general boycott would punish those producers who are not using slave labour along with those who are. This would have the perverse result of bolstering those using slave labour as their costs are less, but their returns would be the same as the honest producers. As a result those using slaves would be able to survive a boycott more effectively than those that are not. So we can see that whilst individuals have duties to not use or profit from slave made products we cannot simply boycott certain products. Rather we have to pay attention to the products we purchase and take all possible measure to avoid slave made products. The duty to remove slavery from supply chains falls on businesses and governments-businesses to eradicate slavery from their supply chains and governments to regulate and assist in those efforts. These duties are largely initial first wave duties to avoid but

\(^{40}\) More information about the International Cocoa Initiative can be found at http://www.cocoainitiative.org/en/

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are also second wave duties to educate individuals about the presence of slavery within certain industries.

I will now examine how these different activities involve different components of the Hohfeldian model of a duty explored in chapter 1, and how this more nuanced understanding of a duty can help us understand better what sorts of actions we have to perform. I reproduce the table of definitions of the Hohfeldian concepts used in chapter 1 below Table 4.

**Table 4: Hohfeldian Concepts**

<table>
<thead>
<tr>
<th>Rights</th>
<th>Definition</th>
<th>Duties</th>
<th>Definition</th>
</tr>
</thead>
<tbody>
<tr>
<td>Right (Claim)</td>
<td>Affirmative claim against another</td>
<td>Duty (Requirement)</td>
<td>Requirement that you fulfil the claim of another</td>
</tr>
<tr>
<td></td>
<td>One's freedom from the right or claim of another</td>
<td>No-right</td>
<td>The lack of an ability to require another person to act in a particular way</td>
</tr>
<tr>
<td>Privilege</td>
<td>One's affirmative &quot;control&quot; over a given legal relation as against another</td>
<td>Liability</td>
<td>Being restricted by the legal control of another as regards a particular relation</td>
</tr>
<tr>
<td>Power</td>
<td>One's freedom from the legal power or &quot;control&quot; of another as regards some legal relation</td>
<td>Disability</td>
<td>The inability to exert control over a given legal relation</td>
</tr>
<tr>
<td>Immunity</td>
<td></td>
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The four duty-side concepts are Requirement, No-right, Liability, and Disability. Hohfeld developed these concepts as legal ones and so certain aspects of his application have to be modified. The first of the four, and only necessary, components of a duty is a requirement, or in Hohfeld’s terms a duty, which entails you being required, or obligated, to fulfil the claim of another. This can be both positive and negative in...
nature. The second, a no-right, is your lack of an affirmative claim - you are unable to require someone else to act (either positively or negatively). A liability and a disability are both duties that subject you to the control of another in some way. A liability requires you to act as instructed by the right-holder in the given area. A disability is the lack of such control or an inability to issue a legitimate command. All duties must have a requirement as one of the occurring components in order to be properly considered a duty. There are a number of duties associated with slavery, however, that also involve some of the other three components – in fact most duties involve more than one of these incidents. For example the simple duty to not enslave someone is a requirement that you fulfil all individuals’ claims to not be enslaved.

An example of a duty that is not a simple requirement is the duty of a business to provide information regarding its supply chains to consumers which places those businesses under a liability to said consumers. They are subject to the control of consumers to provide this information when it is requested of them. Other than this example the majority of correlative duties associated with the right of non-enslavement are simple requirements. The aim of this brief re-introduction of the Hohfeldian model is to show how by understanding the internal workings of a duty better we can understand the specific actions we are required to perform (or refrain from) better. Whilst the mapping of the duties correlated with slavery onto the Hohfeldian model is not particularly difficult in this case it is always useful to have conceptual clarity – even in relatively simple cases. This better understanding of the specific type of action required allows us to better understand what is to be done in specific circumstances.

41 A possible exception is the inability of a government to deport a trafficked individual – the government is under a no-right as they cannot require a specific action from a former victim of slavery.

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This section has focused on duties that correlate directly with the specific right of non-enslavement. I will now move on to examine the first of the two non-correlative duties identified in chapter 3 – the duty of social co-operation.

Non-Correlative Duty: Social Co-operation

In chapter 3 I identified two duties that are derived from human dignity but that do not correlate with any specific rights that are derived from human dignity. The first of these is a duty of social co-operation. In this section I will explore in detail precisely what this duty looks like, as regards combatting modern slavery, for both individual and collective agents. As in the last section I will focus on the duties of those of us in countries with comparatively low levels of slavery, as I will address the duties of those in countries with high prevalence in the final section. The aim of this section is to show what this duty of social co-operation looks like in the particular case of modern day slavery.

As defined in chapter 3, social co-operation involves treating fellow humans with respect, as equal members of society, working with them to improve society. We can see it in the terms of Article 1 of the UDHR, which implores us to “act towards one another in a spirit of brotherhood.” Whilst the use of the term “brotherhood” is open to feminist critique, the sentiment of the article is clear- that we treat all of our fellow humans with the respect that is owed to bearers of human dignity. In chapter 3 I used a quotation from the Roman playwright Terence- “I am human; nothing that is human is foreign to me.” (Publius Terentius Afer, 1885: 24) This quotation encapsulates much of what is meant by social co-operation. It is being concerned for and working with our fellow humans to ensure the content of our human dignity is protected. Kevin Bales, in
his book *Ending Slavery: How We Free Today’s Slaves*, quotes the American civil rights activist Fannie Lou Hamer as saying, “We’re never going to get there, unless we all go together” (Bales, 2007: Kindle Locations 891-892). Bales goes on, in a subsequent chapter, to discuss the ways in which enslaved communities can work together to free themselves. In this section, however, I am discussing what we as members of society in more affluent parts of the world are obligated to do.

In the case of modern slavery, the duty of social co-operation cashes out in a number of different ways. I will look at four ways in which this duty constrains and dictates the behaviour of individuals before looking at how it impacts the obligations of governments and of businesses. Firstly, we have to take an active interest in our direct physical neighbours- if we observe slavery in our geographic locale we have to report it. This duty is derived from the conception of human dignity developed in chapters two and three. This conception is explicitly defined as having a social aspect to it, hence the broad duty of social co-operation. We have a duty to take an interest in the lives of those around us as dignity, when cashed out as normative agency, requires us to be able to construct and pursue a conception of the good life- we have to take an interest in the lives of others so that we can, when necessary and compatible with our other obligations and commitments, take action to assist them in their pursuit of a good life. Thus we shouldn’t be nosy – rooting around in our neighbours lives is not necessary – but seeking to actively participate in the life of our community allows us to be vigilant without being intrusive or nosy.

Secondly, we have to work with others in our local communities to make said communities places in which slavery continues to be unable to take root. The conditions that can lead individuals into slavery are many and varied – Kevin Bales and Zoe Trodd have gathered narratives from former victims of slavery that represent eight

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distinct ways of being enslaved. They are chattel slavery, debt bondage slavery, contract slavery, war slavery, child soldier slavery, prison camp slavery, the Haitian restavec system, and the trokosi slavery of West Africa (Bales and Trodd, 2008: 10). However, whilst there are various different methods of falling into slavery there is a common thread running through them all – those enslaved were almost always in situations of extreme deprivation and desperation prior to their enslavement. A free individual who does not continually worry about her continued survival due to extreme deprivation is highly unlikely to end up being enslaved. Most slaves in the modern world end up in their situation due to economic desperation. The most common forms of slavery from the eight mentioned above are chattel slavery, debt bondage slavery, and contract slavery. All three of these are most likely to affect individuals in a dire economic situation. Debt bondage slavery comes about due to an individual pledging themselves as collateral for a loan and then finding that their labour does not reduce the loan. Contract slavery is when an individual signs a contract of employment but upon being brought to their place of work they find themselves enslaved. Chattel slavery is most like the old form of slavery- a person is captured, born, or sold into slavery and ownership is often asserted (these definitions are taken from Bales and Trodd, 2008: 10). Therefore we have to maintain our social safety nets and ensure that individuals in our societies do not fall into the sort of destitution that can lead into slavery.42

Thirdly, we have to seek to promote more global forms of social co-operation. We need to promote NGO’s and supranational organisations that seek to ameliorate the situation whilst also promoting more cross-national communication. As technology develops and the world becomes a smaller place our geographic locale becomes physically larger- we are able to observe and to help a much larger number of people.

42 This is only one of many possible reasons to seek to prevent extreme deprivation. This does not change the fact that it is a good reason to seek to prevent extreme deprivation.

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We should donate some of our excess wealth to NGO’s working to combat slavery. Finally, we should promote the formation and maintenance of corporate organisations that seek to remove slavery from their supply chains. So we should support those chocolate companies that are part of the International Cocoa Initiative, we should promote knowledge of the GoodWeave mark, and we should encourage other problem industries to form similar organisations through lobbying and consumer activities. So, for individuals, social co-operation means, in practical terms, working with each other to be vigilant against slavery and to contribute to those organisations, both charitable and corporate, that are seeking to end it.

Social co-operation is not simply a duty that falls upon individuals. For individuals it means working together and treating each other with the respect due to a bearer of dignity. For collective agents it looks different. For government it means promoting a particular sort of society. As Aristotle argues in *The Politics* “A city can be excellent only when the citizens who have a share in the government are excellent” (Aristotle, *The Politics* 7.13.30-35), and so in order to promote social co-operation the government needs to encourage its citizens to behave in specific, human rights -protecting ways. The government should encourage individual citizens to be active and engaged citizens, whilst also maintaining their differences.

The duty of governments in this area involves walking a very narrow line – it needs to promote and encourage citizens to be active, engaged, and cognizant of both their rights and duties whilst not having an overly homogenising effect. It may sound obvious that

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43 There is significant debate about the amount of charity we are ethically required to give. For more on this particular debate see Paul Gomberg, ‘The Fallacy of Philanthropy’ in *Canadian Journal of Philosophy*, Vol. 32, No. 1 (March, 2002), Peter Singer, ‘Famine, Affluence, and Morality’ in *Philosophy & Public Affairs*, Vol. 1, No. 3 (Spring, 1972), Garrett Cullity, ‘International Aid and the Scope of Kindness’ in *Ethics*, Vol. 105, No. 1 (October, 1994), and Andrew Kuper and Peter Singer, “Debate: Global Poverty Relief.” *Ethics & International Affairs* 16, no. 1 (Spring, 2002). For my purposes it need only be accepted that we should give something to charity- and that some of what we give should go towards charities combatting slavery.

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the government should be just and encourage citizens to fulfil their obligations. However, the duty of social co-operation for governments is both more and less extensive than the requirement to build a just society. It is more extensive as it requires government to actively encourage citizens to be a certain type of person—one who wants to take an interest in the affairs of their fellow citizens. It is less extensive as it does not require the basic structure of society to change—the duty of social co-operation is essentially imperfect—as the government should pursue a particular goal but how it achieves that goal is fairly open. The government can achieve this through education programs directed at ensuring all individuals are educated in the rights and duties they have both as part of society and as regards their human rights. Additionally, governments can encourage individuals to behave in a spirit of co-operation by providing incentives to be charitable through taxation. So the central contribution here is to show that in order to combat slavery governments have imperfect duties to inculcate certain values in their citizens.

Thirdly, governments can use framing and changes in choice architecture to ‘nudge’ citizens towards making choices and decisions that are more in line with social co-operation and fulfilling their human dignity derived duties. Aspects of this might be criticised for being excessively paternalistic or even manipulative. In certain circumstances this might be a fair criticism—it would be very easy for governments to take this too far and to inappropriately manipulate citizens into certain actions. However, if we believe that there is a role for government in the promotion of a fairer society then actions like these are fairly uncontroversial.


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Finally, governments are required to work with each other to combat the crimes of slavery, which often cross national boundaries. Human trafficking is one of the most common forms of slavery (outside bonded labour in India) and is a genuinely international problem. Governments must work with each other in order to ensure effective combatting of this crime. For businesses this duty of social co-operation requires corporate co-operation such as that exhibited by the International Cocoa Initiative. Businesses are dutybound to be transparent about and investigate their own supply chains.\(^{45}\) Beyond this they must work with other business in their industry, NGOs, and national governments to eradicate slave labour from their supply chains. The model of the International Cocoa Initiative is an excellent one. These proposals are inspired by suggestions that are common in the anti-slavery literature and practice of NGO’s. Part of my contribution is to frame these as specific duties. The greater part of my contribution is to specify what our duties are – we are not necessarily required to do anything and everything that might combat slavery – but we are required to do what is enumerated here.

If we apply the Hohfeldian model to these duties then we can see that they are, as with correlative duties, mostly simple requirements (that is, they lack any of the other three incidents). In the case of individuals the duty is to maintain a relationship of dignity and respect with all other individuals. This broad duty works itself out into a number of requirements – to give to charities, to be vigilant, to develop a particular sort of community. In the case of governments the situation is very similar – the government is required to promote a particular form of society, which works itself out into a range

\(^{45}\) An example of such self-policing that is in line with this component of the duty of social co-operation is the recent publication of a report by Nestle outlining the problem of slave labour in its seafood supply chain, specifically sourced from South-East Asia. For more information see http://www.theguardian.com/global-development/2015/nov/24/nestle-admits-forced-labour-in-seafood-supply-chain

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of more specific requirements. Businesses bear the same requirement, but they also have a liability – they are subject to the authority of governments and individuals to ensure that they properly investigate and tackle the slavery that exists within their supply chains.

So, to conclude this section individuals have a duty of social co-operation that is derived from human dignity. This duty involves treating our fellow humans with respect, being interested in the course of their lives, and working together with them in a spirit of co-operation. In practical terms regarding modern slavery this means being collectively vigilant against slavery, co-operating within our local communities to ensure that they remain infertile ground for slavery to grow in, and supporting the work of organisations that are seeking to eradicate slavery elsewhere. For governments it means promoting a certain type of society- one that produces citizens that are inclined towards engaging in social co-operation (without overly homogenising the population). For businesses it means working with national governments, NGO’s, and each other to discover and remove slavery from their supply chains. Furthermore, application of the Hohfeldian model of duty from chapter 1 allows us to see how this very broad and vague duty, to maintain a certain sort of relationship, maps onto the conceptual model of a duty.

Non-Correlative Duty: Building Human Rights-Respecting Institutions

The second of the two non-correlative dignity-derived duties identified in chapter 3 is the duty to build human rights-protecting institutions. This duty is more straightforward than the duty of social co-operation as it involves minimal amounts of individual action and limited amounts of business action. For reasons of practicality
this is a duty that falls largely upon national governments. Additionally, this duty requires less explication than the duty of social co-operation as it is less vague in its parameters. In this section I will first state the small duty owed by individuals before going into detail looking at the nature of governmental duties. Finally, I will examine one possible critique of this duty—that it simply collapses into a duty to build a more just world and is not really about human rights. I will argue that this critique is flawed as it misconstrues the role of human rights within a larger theory of global justice by conflating the two.

Before discussing the duties associated with building human rights-protecting institutions I will first discuss what I mean by an institution. On a *prima facie* level it might be obvious what is meant by an institution— an organised body with rules that govern certain areas of behaviour. However, I want to move beyond this narrow definition as this would limit the scope of this particular duty to building strictly formal institutions which would render it less applicable to much of contemporary global political practice. I will, thus, define institutions here in the same way as Stephen Krasner defines a regime in the context of international political economy. Krasner defines regimes as:

Sets of implicit or explicit principles, norms, rules, and decision-making procedures around which actors’ expectations converge in a given area of international relations. Principles are beliefs of fact, causation and rectitude. Norms are standards of behaviour defined in terms of rights and obligations. Rules are specific prescriptions or proscriptions for action. Decision-making
procedures are prevailing practices for making and implementing collective choice. (Krasner, 1982: 186).\textsuperscript{46}

This definition is long and full- it covers a wide range of artefacts in the political realm. Krasner’s definition is aimed specifically at international regimes; however, the concept is applicable to the domestic realm as well. Certain components of this definition are quite difficult to design, specifically principles and norms. However, individuals and governments that are acting within the political sphere can help to shape both of these through both their words and deeds. When designing decision-making procedures and rules framers have a duty to ensure that nothing about any institution would actively damage human rights- the design of these components of a regime, or institution, is much easier to consciously direct than norms and principles.

I will now examine the specific obligations generated by the duty to build human rights-protecting institutions. Individual duties in this area are limited due to the small amount of influence that most individuals have over the institutional design of large-scale institutions. The average individual should pressure their elected representatives to shape these institutions in ways that will contribute to the protection of human rights. Additionally, individuals have duties to help build domestic institutions that protect human rights. In the area of domestic institutions the duty that adheres to individuals is considerably larger than in the realm of global regimes. Individuals can help to shape and transform the norms of their society through their actions and the fulfilment of their duty of social co-operation.

\textsuperscript{46}There are various other similar definitions. Krasner’s serves my purposes reasonably well and is not particularly contentious. The specifics of the definition are not particularly important for my argument beyond it being a fairly broad definition.
In the specific context of modern slavery, individuals have duties to inculcate norms and principles that make the taking of slaves repulsive to all. This duty is derivable from the status of human dignity as normative agency. Normative agency necessitates being able to choose and pursue a conception of the good life. The duties associated with this status are those duties that help ensure all others enjoy the condition of this status and are compatible with all (including the duty bearer themself) being able to enjoy their condition-dignity. For slavery, this involves ensuring that, at a minimum, the proposition of being enslaved is minimized. Additionally, they have duties to pressure those in decision-making positions within their society, most likely their elected representatives, to design the rules and decision-making procedures with this in mind. This is largely a second-order duty, as it is a duty to apply pressure to someone else to fulfil their duty.

In all, individuals’ duties are limited by the ought-implies-can proviso. It is very difficult for private individuals to significantly influence the design of large-scale institutions of the sort I am discussing, and so it would be nonsensical to suggest that they have a significant duty to do so. Some of this might seem somewhat banal for the majority of developed countries as anti-slavery norms are, by and large, thoroughly entrenched in our culture. However, this is not a result of my theory having nothing to contribute but rather the fact that slavery is thoroughly rejected across most of the world. Thus there is little resistance to seeking to combat it. This is much less obvious in the case of some other rights enumerated in chapter three.

The duties of national governments in this area are much more significant. In the design of the rules and decision-making procedures used at the international level the
most important, if not only, players are national governments. This is a present reality of
global politics, and one which cannot be ignored. Governments, when designing
international institutions, must incorporate provisions that, at the least, do not damage
human rights. It is a truism that different institutions have different purposes. The
World Health Organisation and the International Monetary Fund, for example, do very
different things. However, both have significant impact upon the behaviour of both
collective and individual actors all across the world. Whilst neither of them are directly
concerned with the issue of modern-day slavery, which in international institutional
terms normally falls under the purview of either the International Labour Organisation
or the United Nations Human Rights Committee/The Office of the United Nations High
Commissioner for Human Rights, their rules, decision-making procedures, norms, and
principles should ensure that they do not, at the least, promote conditions amenable to
the maintenance of slavery. The IMF, for example, should provide economic incentives
and assistance to countries that enact and implement effective anti-slavery programs.
Similarly, the WHO in its role of coordinating and directing international health within
the UN should provide assistance to all countries with the appropriate healthcare
responses to individuals who have been victims of slavery. Liberated slaves will often
have specific healthcare needs--especially psychological ones—that will need appropriate
attention. National governments should ensure that such activities are written into the
rules of these institutions.

In addition to this, national governments should construct stronger international
decision-making procedures and rules for tackling slavery. As it stands the United
Nations has two institutional responses to the issue of slavery. The United Nations
Voluntary Trust Fund on Contemporary Forms of Slavery is a fund that provides money

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to NGOs working on combatting modern-day slavery. The Special Rapporteur on Contemporary Forms of Slavery, Including its Causes and Consequences was established in 2014 and is currently Ms. Urmila Bhoola. The special rapporteur inspects and reports on the activities of individual countries. Both of these are crucial components of a broader anti-slavery regime. Both of these show that global institutions are fulfilling some of their duties – in these cases funding anti-slavery activity (which is probably best done transnationally via NGOs) and studying and reporting on slavery – we can’t combat it if we don’t know where it is. However, global institutions are failing significantly in the area of providing assistance to governments that are struggling to combat slavery.

An example of a country struggling to combat slavery in this way might be Brazil which established an anti-slavery task force within its national police service. However, this task force is woefully underfunded due to the inability of the national Brazilian government to provide it with adequate support and the geographically large distances it must cover (most Brazilian slavery is extremely difficult to police as it is in the charcoal industry which is concentrated in rural areas on the edge of dense forestation).47 There should be an international body established whose sole purpose is to provide training and funding to national government officials in combatting slavery. This additional institution would allow for the pooling of knowledge and expertise and would make combatting slavery much easier. As slavery is a global problem it will require transnational co-operation. Establishing this institution is a duty as we are bound to build institutions to effectively combat slavery as part of our dignity based

47 For more information on slavery in the Brazilian charcoal industry see Kevin Bales, Disposable People: New Slavery in the Global Economy, (London: 2012).

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duty to construct human rights protecting institutions. This institution would fulfil this
duty as it would empower national governments to find solutions that work in their
country – combatting slavery in the Brazilian charcoal industry is very different from
combatting slavery amongst domestic workers in the USA – whilst also ensuring that
there are effective and appropriate institutional responses to the problem of slavery in
the modern world. The funding for such a body would not need to be large in the grand
scheme of things, but could make a significant difference to the lives of the
approximately 35 million individuals currently enslaved.

The duty to build human rights-promoting institutions in the area of norms and
principles is one that is, largely, well-fulfilled. Barring North Korea, every country on
the planet has legislation outlawing the practice of slavery. There are multiple
international treaties that have near-universal support opposing and defining slavery.
Very few people, if any, will admit to being in favour of slavery. However, this is
clearly not enough as slavery is still widespread. Beyond the norms and principles
opposing slavery governments must seek to develop norms of vigilance and education.
These are both in part linked to their correlative duties to provide education about
slavery. However, developing norms is an institutional issue, not a direct correlative of
a right not to be enslaved. This is much more difficult than amending the rules of
already-existing institutions and establishing new ones. It is difficult to disseminate
norms as it is difficult to change what people think and believe. Governments can,
however, have a significant impact upon the beliefs of their citizens through education
and public programs. An example of this might be the widespread problem of
corruption in the Indian police. Often raids on premises housing slaves are slowed or
delayed by police due to the bribes they receive from slave-holders, and these same

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police often tip off the slave-holders so that they can move their slaves. The Indian government could do much more to stamp out this culture or norm of corruption within its police service which would assist greatly in the eradication of slavery from India.

It is possible to criticise the duty to create human rights protecting institutions for simply being a duty to promote a more just world. However, this misconstrues the relationship between global justice and human rights by conflating the two. Thomas Pogge argues that “A complex and internationally acceptable core criterion of basic justice might best be formulated…in the language of human rights” (Pogge, 2008: 50, emphasis mine). Pogge is not arguing that the sum total of basic justice is comprised of human rights. Designing social institutions to protect human rights is necessary to ensure a more just world but it is not sufficient to ensure a more just world. Thus, the critique that this duty simply collapses into a vague duty to build a more just global order misconstrues the nature of modern conceptions of justice and their relationship with human rights. Human rights are almost certainly a necessary component of any plausible conception of justice; they are not a sufficient component. There is not necessarily a need to discuss the distribution of resources within a theory of human rights. Human rights-respecting institutions are more just than institutions that do not respect human rights. However, respecting human rights does not necessarily make an institution just. For example the IMF might offer incentives to countries that combat slavery whilst still insisting on unfair loan repayment plans. By promoting respect for human rights it is more just than if it did not but could not be described as just.

Individuals have duties to act in line with norms and principles of opposition to and vigilance against slavery. They additionally have duties to pressure their elected

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representatives to build domestic and global anti-slavery institutions. National governments have duties to amend the rules and decision-making procedures that are already in place, such as the IMF or WHO, to ensure that they assist in the fight against slavery. They secondly have duties to establish a stronger institution than the two currently extant institutions directly and solely concerned with slavery. Finally, they have duties to inculcate and strengthen norms that are inimical to the practices of slavery.

Agency Promoting

There is a common strand within much of the global justice and human rights literature that is oddly agency denying. Much of the time there is an assumption that human rights are about what we, the relatively affluent, do for/to the less well off. We can see this in the formulation of Shue’s three types of duty – to avoid, protect, and aid. The third of Shue’s three duties, and the overall tenor of his book, are directed almost exclusively at the relatively affluent (Shue, 1996). We can see a similar agency denying tendency in Thomas Pogge’s Global Resource Dividend (GRD) which is focused on the wealthy making transfers to the less wealthy. Pogge’s GRD is a scheme to tax raw resources and use the money obtained to eradicate global poverty. Pogge argues that his GRD is the scheme most likely to succeed at reducing extreme poverty, although he does accept that something like a Tobin tax could perform the same function (Pogge, 2008). There is nothing inherently wrong with Pogge’s scheme, or with Shue’s desire to see the affluent world more effectively assist the relatively deprived. However, this trend within the literature to focus upon what we, the affluent, can do for/to the relatively deprived ignores, if not denies, the agency of the relatively deprived. Onora O’Neill identifies this trend when she observes that “It is true that the human rights movement sees human beings more as agents than did feudal and

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utilitarian theories. But it still does not see them as fully autonomous: Claimants basically agitate for others to act” (O’Neill, 2008: 149, emphasis in original). So in this section I will examine how the human dignity approach that I have put forward generates duties for the less affluent, just as it generates duties for those of us that live in relative affluence, and thus my theory does not deny agency to the deprived, but rather places them at the heart of their own human rights fulfilment.

The human dignity justificatory model that I have proposed for human rights holds that human dignity should be best understood as a status; that a status is comprised of a bundle of interests and duties; that from interests we can derive certain basic rights; and that the content of human dignity should be understood as the capabilities necessary to ensure the potentiality for normative agency, with potentiality understood as meaning that any creature that is of a type that without mental or physical impediment would be able to exercise normative agency is in possession of this status. One of the implications of this position that I highlighted earlier was that it renders the relationship between rights and duties conceptual as opposed to causal. The common understanding of rights and duties is that if we have a right, then that right generates or causes a duty. On this story the relationship between the two is causal – the existence of the rights causes the duty to come into existence. On my human dignity understanding of the grounding of human rights this relationship ceases to be causal and becomes conceptual. This means that rather than there being an interest, which justifies a right, which causes a duty there is human dignity which comprises of both a set of interests (which create rights) and a set of duties. Thus, the duties are not caused by the rights but are generated from the same conceptual source – both the duties and the rights are simultaneously derived from human dignity. This is important when it comes to considering the problem of this agency denying streak in the human rights and global

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justice literatures. By making this relationship conceptual, as opposed to causal, the same set of duties adheres to every single bearer of human dignity. The only divergences are based upon practicalities. The basic set of abstract duties are the exact same, they just work themselves out in the real world in different ways. This means that even those individuals that live in countries characterised by serious deprivation have duties derived from their human dignity. It is appropriate to treat them separately here for two reasons. Firstly, aspects of the substance of the duties will differ due to the different situations of the two groups. Secondly, by treating them separately I am more easily able to highlight the strength of my theory in counteracting this trend. I will now explore these duties in the context of modern-day slavery.

I will discuss the duties of the relatively deprived in the same order as the three sections above – correlative duties, duties of social co-operation, and duties to build human rights respecting institutions. The correlative duties of the relatively deprived are very similar to those of the relatively affluent, with a greater restriction imposed by the ought-implies-can proviso. The relative deprivation of many individuals limits what they are capable of doing. The individual duties to not enslave, to be vigilant against slavery, and to report it when it is found attach as strongly to individuals in a state of relative deprivation as they do to those in a state of relative affluence. Vigilance, non-enslavement, and reporting of suspected enslavement are resource-neutral as they do not cost an individual any material wealth to perform and so the ought-implies-can proviso is not relevant here. The duty to provide education is as strong in the developing world as it is in the developed world. Obviously, however, the governments of developing countries will struggle to adequately fund appropriate educational programs, but this simply means that an additional duty to aid attaches to developed

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governments to assist the less developed with obtaining the requisite resources. This duty is derived like a correlative duty via the wave model – where the right is under-fulfilled because one actor is incapable of fulfilling it then if it is possible for another actor to assist without damaging their ability to fulfil their other obligations they should do so. In this case affluent governments should assist less affluent governments through aid programs.

Similarly the duty to apply pressure to elected representatives is as strong in democratic developing countries as in the developed world. Obviously, individuals living in a non-democratic government are unable to apply pressure to elected representatives; however, they will have duties to agitate in some way for their own empowerment. If we were to apply this model to a right to democracy then we would likely conclude that individuals in non-democratic countries are duty-bound to seek to transform their political structures. (I would also argue that such a duty must be discharged peacefully in order to be in genuine accordance with my theory of human dignity, but there is not space here to fully elaborate upon this argument.) Individuals in developing countries still have some duties to assist in the provision of post-liberation care for former slaves. This duty will work out differently in a developing country than a developed one, but this does not mean it is not present. In a developed country this duty will normally mean something like ensuring adequate healthcare, housing, and choice in future location in the case of a trafficked individual. In a developing country it is more likely to involve not ostracising an individual who has returned from being trafficked (this is particularly likely to happen in the case of young women who were trafficked for the sex trade) and to support a freed slave in not falling back into slavery through individual vigilance and (as we shall see shortly) social co-operation. This can take a

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variety of forms – from ensuring that an individual is not deemed a social outcast to instituting programs that can help disadvantaged individuals find some sort of gainful work.

Finally, when it comes to freeing those currently enslaved, individuals in developing countries, arguably, have more direct duties to aid than those of us elsewhere. The distance and relative rarity of slavery in much of the developed world means that the ought-implies-can proviso is stronger for the relatively affluent than the deprived. An individual in, for example, Mauritania (with 4% of the population enslaved) is much more likely to actively encounter an enslaved individual than we are here in Ireland (with 0.007% of the population enslaved). Individuals in Mauritania are thus more likely to be duty-bound to report slavery as they are more likely to encounter a slave. Similarly, a police officer is more likely to be duty-bound to kick in a door to liberate slaves in Mauritania than in Ireland. So whilst the correlative duties of the affluent and relatively deprived are similar, for the affluent there is more emphasis on the later waves to educate, aid, and assist. For the relatively deprived there is a greater emphasis on the first wave to liberate and prevent. There are limited duties falling on businesses in the developing world due to the relatively smaller corporate ecosystem. However, any businesses that operate solely within the developing world have duties to ensure that their supply chains are slave-free, although their duties to publicise their supply chains are weaker due to limitations derived from a lack of internet access and low levels of literacy.
Duties of social cooperation will look quite differently in the developing world than in the developed world due to differences in circumstances. In the developed world, as we have seen, the duty of social co-operation falls upon governments to encourage a particular type of society and upon individuals to treat each other with interest and respect. In the developing world this duty is in some ways much stronger and in others much weaker. The duties of governments to encourage social cooperation is weaker due to the much more limited resources at their disposal. It would violate the ought-implies-can proviso to demand that governments with insufficient resources should engage in widespread civic education and engagement programs. However, the duty falls much more strongly upon individuals. In the developing world, with more agrarian and under-developed economies, this duty involves forming institutions such as agricultural co-operatives to ensure fair prices and adequate labour standards for all.

The duty of social co-operation in developing countries can be illustrated in regards to slavery by examining an example. Kevin Bales tells the story of a village in India called Sonebarsa. This was an entire village that worked in a quarry as slaves held under debt bondage. Through assistance from a local community group call Sankalp these villagers managed to free themselves by obtaining a quarry lease in their own name. Their path to doing this was a difficult one – Bales tells of how when the villagers tried to meet publically the slaveholders physically assaulted them, only held back when 3,500 individuals from neighbouring villages came to support them. When these supporters left Sonebarsa was attacked by the slaveholders who destroyed everything the villagers owned. It took over a year for the villagers of Sonebarsa to obtain their freedom. When they did so it was both through their own efforts and with the support of Sankalp and villagers from elsewhere in their region. This is an example

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of individuals fulfilling their duty of social cooperation. Both those villagers from outside Sonebarsa (which was renamed Azad Nagar which means “Land of Freedom” after the villagers obtained their freedom) who helped those held in slavery there, the villagers of Sonebarsa itself, and the workers from Sankalp all worked together, cooperated, and successfully freed an entire village (Bales, 2007). These individuals all fulfilled their duties of social cooperation, even when it was incredibly difficult and dangerous to do so. So we can see then how the duty of social cooperation in relation to the issue of slavery falls much more heavily upon individuals rather than governments in countries where slavery is a major problem. The reverse is true in countries without a major slavery problem. We in the relatively affluent parts of the world cannot cooperate on behalf of those in the relatively deprived parts of the world—they are duty-bound to do that for themselves.

Finally I want to look at the duty of building human rights-protecting institutions that individuals in relatively deprived parts of the world possess. Again, the ought-implies-can proviso has a significant influence here. Whilst individuals and governments in all parts of the world have duties to assist in the building of such institutions, the ability to do so of those in relatively deprived parts of the world is much more limited than in more affluent countries. However, using the broad definition of institutions drawn from Krasner earlier we can see that the development of norms and principles is much more plausible for such deprived individuals than the creation of rules or decision-making procedures. Using the example of Sonebarsa from above, workers from Sankalp helped disseminate norms of self-help and social co-operation. The method used to free the village of Sonebarsa was one that was pioneered in a different village in the same region of India which was then spread by workers from Sankalp. This developing of

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and then spreading of a norm of self-help is an example of individuals in a relatively deprived country fulfilling a duty to build human rights-respecting institutions.

A second form of this duty that is held by the governments of developing countries is to develop certain norms of practice within their security and police forces. Many developing countries, India again being a prime example, have significant problems of corruption within their police forces. The governments of these countries, if they took a hard line on corruption and acted forcefully to stamp it out, could and should make a significant contribution towards eradicating slavery within their borders.

**Conclusion**

The first section of this chapter established, through the usage of data from the Global Slavery Index, that slavery is still a global problem and that efforts to eradicate it are still distressingly limited. The second applied the wave model of duty generation developed in chapter 3 along with the Hohfeldian model of a duty outlined in chapter 1 to determine the content and nature of the different correlative duties associated with a right to not be enslaved. The third section examined the nature and content of the first of the two non-correlative duties identified in chapter 3 – the duty of social cooperation. The fourth section described the nature and content of the second of the non-correlative duties, the duty to build human rights-respecting institutions. The final section explored how the human dignity justificatory approach to human rights that I have outlined and defended in chapters 2 and 3 runs counter to the agency denying streak that runs within much of the human rights and global justice literature. This allows me to identify duties that adhere to individuals who are relatively affluent as well as those who are relatively

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deprived. By rendering the relationship between rights and duties conceptual rather than causal my theory maintains the strengths of other theories of human rights, whilst also gaining the ability to allow deprived individuals a greater level of agency in their own liberation.

The aim of this chapter has been to show how the theory detailed in chapter 1, 2, and 3 would impact upon global political practice in the area of combatting slavery. I have, through the theory developed in the rest of the thesis, been able to make clearer who the bearers of specific duties are, what the content of their duties in specific circumstances are, and what the nature of the actions required by those duties are. This allows us to have a much better understanding of where and how we are failing to fulfil our duties, and hopefully goes at least some of the way towards ensuring the fulfilment of human rights for all.
In concluding this thesis I have two aims – to firstly summarise and tie together the ideas posited in the four substantive chapters; and secondly to address any lingering concerns generated by those chapters. The aim of the thesis, as a whole, has been to tackle a pair of problems within the human rights literature. This problem was first identified, as Samuel Moyn recently observed in the *Boston Review*, by Onora O’Neill thirty years ago (Moyn, 2016). O’Neill held that “We do not know what a right amounts to until we know who has what obligation do what for whom under which circumstances” (O’Neill, 2008: 150). Today, in spite of the pioneering work of Wesley Newcomb Hohfeld, we are still extremely imprecise in how we use the term “duty” thus rendering it unclear what, precisely, a duty is. Additionally we are somewhat lackadaisical in how we assign duties to different actors. We ultimately are not sure, in the area of human rights, “who has what obligation to do what for whom” (O’Neill, 2008: 150). This thesis has addressed both of these problems. Moyn laments the abandonment of the language of duties in contemporary political philosophy, particularly in liberal thought. He cites Samuel Pufendorf, Giuseppe Mazzini, and Mohandas Ghandi as examples of individuals in history who placed emphasis not upon individual rights but upon the duties and obligations that are owed by individuals in their political thought. Part of my aim in this thesis has been to contribute to the revival of discussion of duties that Moyn calls for- to restore the centrality of duty as a concept in political theory.

Much of the recent research on duty and obligation has either focused on them merely as correlatives of rights or in the context of political obligation (that is the obligation to

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obey the state) (For the former see Pogge, 2008; Griffin, 2008; for the latter see Pennock and Chapman, 2009; Plamenatz, 1968; and Flathman, 1973). My thesis has not sought to supplant the concept of human rights with that of human duties- as Moyn observes it “would be a grievous mistake to insist, as both Mazzini and Gandhi apparently did, that enjoyment of rights ought to *depend* on assumption of duties first” (Moyn, 2016). Rather my aim has been to bring duty back to the forefront alongside human rights- to have the two concepts recognised as co-equal and central components of our theoretical political discourse. I have sought to do this in three ways- firstly by analysing the concept of a duty in isolation (chapter 1); secondly by examining the foundations of human rights, in human dignity, and showing how this foundation renders the relationship conceptual, not causal (chapters two and three); and finally, by examining how this re-prioritising and analysis of duty would influence actual political practice in the area of modern slavery (chapter 4). I will now walk through the conclusions and implications of these three components of the thesis and seek to tie them together in pursuit of the above stated aims.

**What is a Duty?**

Chapter one conducted a detailed conceptual analysis of the concept of a duty. In doing so I used an adapted Hohfeldian model of a duty. Hohfeld argued that the ordinary language of “rights” and “duties” was not sufficient to describe the different ways in which the legal concepts functioned. He argued that there are eight separate concepts that encapsulate what were normally referred to as “rights” and “duties”. These eight concepts were a right, a privilege, a power, and immunity, a duty, a no-right, a liability, and a disability. Four of them, right, privilege, power, and immunity, are terms that are, for Hohfeld, more correctly used to represent the different ways in which the term

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“right” has been used. Duty, no-right, liability, and disability are terms that are more correctly used to represent different ways in which the term “duty” has been used. I diverge in a relatively minor way from Hohfeld as I argue that rather than needing to think of these as four separate paired concepts (Hohfeld defines all eight in terms of their correlative and opposite on the other side of the right/duty divide) that we should think of the four right side concepts as the components of the singular concept of a right, and the four duty side concepts as the components of the singular concept of a duty.

In doing this I follow Leif Wenar who constructs a model of a right along similar lines to the way in which I construct a model of a duty. Wenar argues that by utilising this adapted Hohfeldian model “Ordinary rights-talk can be entirely rigorous and error-free, provided that speakers understand how assertions of rights map onto the Hohfeldian incidents” (Wenar, 2005: 237). He also argues that the “Hohfeldian framework shows that the unity of rights is not a simple Thalesian monism; it is the unity of molecules composed of the atoms of the periodic table” (Wenar, 2005: 237) and so argues that the four concepts Hohfeld identified are better understood as the molecules that make up the unified concept of a right. My aim is to show the same with duties - to show that a duty is a unified concept with various molecular components and to bring rigour to duty-talk. The argument is that all duties can be mapped onto the Hohfeldian incidents and that doing so makes it easier for us to determine what sort of action is required in a given situation. Thus chapter one is aiming to answer the “what obligation” (and what sort of obligation) part of the problem posed by O’Neill by helping us to better systematise our language about what sort of obligations there are. The four components of a duty that are identified- a duty (or as I re-termed it a requirement), a no-right, a disability, and a liability cover all of the different forms in which a duty can present,
either in isolation or in combination with each other. All duties can be mapped on to these four concepts in some way, and by doing so we can better understand the nature of the actions or inactions required in different circumstances.

The Foundations of Human Rights and their Implications

Chapters two and three are in many ways twins. They represent a combined effort to address the problem of “what obligation” by looking at the foundations of human rights and to determine the substantive content of duties attached to human rights. Not what sort of actions we intend when we use the term “duty”, but what specific duties are associated with human rights. They also aim to make ‘everyone’ an intelligible answer to the question of who bears the duties. It can seem like vapid idealism, and somewhat trite, to respond ‘everyone’ when asked who the duty bearers are. Chapters two and three seek to make this answer more concrete. These two chapters do this by examining the theoretical foundations of human rights. The first section of chapter two examines and critiques what is known as the political conception of human rights. This is a conception that is advocated in range of different ways by a disparate group of political theorists (calling them a group is potentially an over-reach). However, in their theorising about human rights these theorists all make appeals to some aspect of political practice – how we go about putting human rights into practice globally – in order to provide a foundation for human rights. This is opposed to a more metaphysical approach which seeks to ground human rights in some aspect of the right bearer – humans. In setting out and critiquing the political conception I focus on three particular theorists as typical of this trend in the literature. The three theorists I look at are Charles Beitz, Joseph Raz, and Thomas Pogge. Beitz argues that human rights are

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those rights which we collectively believe to be important enough to over-ride national sovereignty in the case of their breach; Raz argues that human rights are those rights which provide defeasible reasons for coercively interfering in the affairs of another country; and Pogge argues that human rights are rights that protect us from coercive social institutions (and so are only salient when we have shared coercive social institutions). All three are examples of a political conception of human rights as all three justify human rights not be appealing to some aspect of the right holders, but by appealing to global political practice- whether that be the act of interfering in another states’ affairs or it is the extension of coercive social institutions across the globe. I posit four criticisms of the political conception-

1. The political conception of human rights is, generally, uncritical regarding the current list of rights adopted by international political practice- as it operates from within that practice;

2. The political conception is, at times, undesirably restrictive in what it characterizes as a human right- education, for example, is often hard to justify as a human rights on a political conception;

3. The political conception has little, if anything, to say about behaviour on an individual level- only behaviour by collective institutions of some sort.

4. The political conception can generate perverse incentives- primarily to avoid entangling one’s country in sufficiently coercive social institutions.

These four criticisms apply to different formulations of a political conception of human rights to different degrees. My aim with these four criticisms is not to attack a single form of a political conception, but to show that irrespective of what type of political conception is adopted that there are fundamental problems with the approach.

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I then posit an alternative approach- a metaphysical conception of human rights grounded in human dignity. I argue that the concept/conception distinction is not adequately understood when discussing human dignity. I argue that the concept of human dignity is defined as a status that sets humanity apart from other creatures on this planet. Various conceptions of human dignity seek to interpret this role of defining the nature of humanity. I also argue that these different conceptions need not be mutually exclusive -- one can interpret the concept of human dignity as something that requires a certain type of behaviour as well as interpreting it as conferring certain rights and duties upon bearers of it without being contradictory. Michael Rosen posits that there are four broad conceptions of human dignity- dignity as status, dignity as inherent value, dignity as commendable behaviour (being dignified), and dignity as respect. I argue, following Jeremy Waldron, that when considering the foundations of human rights the appropriate conception is dignity as a status. I argue that a status is comprised of a bundle of interests and duties and that we can thus derive a coherent list of human rights from the status of human dignity via the interest theory of rights (as defined by Matthew Kramer) by determining what the substance of the status is. I then conclude chapter two by highlighting three implications of this foundation for human rights in the conception of human dignity as a status. These three implications are firstly, that due to rights and duties being conceptually rather than causally linked we can increase the rhetorical force of our duty-talk and can increase the importance of duty as a component of our moral conceptual furniture; secondly that as human dignity as a status potentially generates duties that do not perfectly correlate

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48 This distinction is one which is best articulated by John Rawls in *A Theory of Justice* when he discusses the difference between the concept of justice vs a conception of justice- “I have distinguished the concept of justice as meaning a proper balance between competing claims from a conception of justice as a set of related principles for identifying the relevant considerations which determine this balance…the concept of justice I take to be defined, then, by the role of its principles in assigning rights and duties and in defining the appropriate division of social advantages. A conception of justice is an interpretation of this role” (Rawls, 1999: 9).
with a specific, single right that the range of duties associated with human rights is potentially broader than normally thought; and finally that by conceptualising the foundation of human rights this way we are able to coherently talk of an individual being denied their human dignity whilst also being able to exercise their human dignity (this has a lot in common with Pablo Gilabert’s idea of status-dignity and condition-dignity distinction).

Chapter three tackles three tasks that build upon chapter two. The first of these tasks is to establish the substantive content of the status of human dignity – what is it about humans that provides this status and what rights are derivable from this. I argue, following James Griffin, that the central component of humanity that is relevant for a status of dignity is the concept of normative agency – the capability to construct and pursue a conception of the good life. I diverge from Griffin as he argues that the important facet is actual possession of this capability whereas I argue that what I term the potentiality for normative agency is what is important. I do this as Griffin explicitly excludes the profoundly handicapped from bearing human rights, an implication I want to avoid. I also, however, want to avoid the problem of opening up the range of creatures that are bearers of human rights to non-human animals. I argue that the most effective way of cashing out this idea is to draw upon the capabilities approach typified by Martha Nussbaum and Amartya Sen, and recently elaborated upon by Pablo Gilabert. I draw mostly on Gilabert and Nussbaum, rather than Sen, because Nussbaum provides a clear articulation of what she views as the central human capabilities and

49 Although I see no reason to necessarily exclude non-human extra-terrestrials were they to arrive on our planet or be discovered in the course of space exploration provided that their species was one that clearly possessed the potentiality for normative agency. There are no non-human animals currently on earth in possession of this potentiality.

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Gilabert provides a very recent linking between human rights and capabilities. I argue that the capability to develop a conception of a good life results in there being a set of derivative capabilities required for us to exercise this central capability that can then be cashed out as rights via the interest theory of the function of rights.

The second task that chapter three deals with is born out of my critique of the political conception of human rights for being worryingly vague about precisely which rights count as human rights. Therefore I critically examine the Universal Declaration of Human rights utilising the approach articulated in the latter half of chapter two and the first section of chapter three. I ultimately conclude that all of the rights in the UDHR are justifiable based upon the conception of human dignity as a status cashed out in terms of normative agency except for the right to form trade unions. This examination of the UDHR shows that the approach that I advocate allows for critical analysis of current global political practice surrounding human rights whilst also providing a solid justification for the vast majority of those rights which are normally considered to be human rights. One aspect of my argument is that these rights need only be synchronically universal. This means that they are universal for all people living at a given time- the necessary interests/capabilities to protect human dignity might change over time. We can see this by looking at history- a right to a nationality (enshrined in article 15 of the UDHR) does not make sense before nations existed (which is roughly dated by sociologists of nations and nationality to sometime in the eighteenth century). However a world in which the nation-state is not only the dominant political structure but also the dominant cultural artefact renders being a member of a nation and having a national identity central to the human experience. Similarly, looking to the future, it is not difficult to envisage some of the rights currently enshrined becoming of less
importance and new rights emerging. The changing nature of the global economy could render such rights as holiday pay redundant. This aspect of my conception of human rights allows us to be flexible – human rights are those rights that all current humans share – whilst also being definitive.

The final section of chapter three examines the role of duties in the status of human dignity. I have argued, following Waldron, that a status is comprised of both rights (or interests that translate into rights) and duties. As I have discussed above, a major motivator behind this thesis is to re-emphasise duties in political philosophy. Thus a significant portion of chapter three is dedicated to examining the duties that come from human dignity. I argue that there are two types of duty associated with human dignity – correlative duties and non-correlative duties. Correlative duties are those duties that directly relate to a specific human right with the most basic example being that a right to life correlates with a duty to not kill. I argue that these duties function in waves, an argument initially made by Jeremy Waldron but which he does not fully elaborate upon. These waves mean that multiple duties will, and do, correlate with a single right. So from an initial starting point of a right to not be tortured and a duty to not torture there are also additional duties generated to be vigilant against torture, to educate people about the wrongs and dangers of torture, to punish torturers where they are discovered, to provide reparation to victims of torture and so on and so forth. This shows how the protection of a single right is never a simple thing- there are always multiple duties that will attach to multiple different actors. I then examine the nature of the non-correlative duties that are derived from human dignity. I argue that there are two non-correlative duties that derive from human dignity. The first is a duty of social co-operation; the second is a duty to build human rights-protecting institutions (along with ensuring that
existing institutions respect human rights). These two duties are interconnected: a duty to build human rights-protecting institutions is at least partly facilitated through social co-operation. I argue that the duty of social cooperation is, to borrow Kantian terminology, an imperfect duty to pursue certain goals in society. It is a duty to have a certain kind of attitude, to behave in a specific way, towards our fellow humans. Social cooperation involves respecting each other and seeking to ensure that our society’s public realm is characterised by respect for human rights. A duty to build human rights-protecting institutions is more straightforward: any social institutions we establish (for whatever purpose) must respect human rights and we must ensure that there are adequate institutions which are expressly designed to ensure protection of human rights. These two duties do not correlate with a specific right: if they are not fulfilled there is no single individual or even, necessarily, specific group of individuals that can seek redress—nor is there a specific group that redress can be sought from. Yet in many ways the ability to fulfil one’s correlative duties hinges upon successful fulfilment of these non-correlative duties.

Applications to Modern Slavery

The fourth, and final, chapter of this thesis applies the theoretical insights developed in the first three chapters to a specific human rights area—namely modern slavery. My reasoning for selecting the issue of slavery is two-fold. Firstly, it is an incredibly important and salient issue in the world right now. Estimates of the number of individuals currently enslaved ranging from 20–40 million. As slavery has been officially outlawed in all countries in the world (with the exception of North Korea where the state is the primary slave-holder) it is largely an unseen problem. There are very few places left where you can go to a market and purchase an individual like a

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chattel. This often makes it difficult to figure out what our duties are – it seems obvious that I am not required to personally liberate an individual enslaved in India, but it also seems obvious that I have some sort of duty to do something (especially if I benefit from slave labour – as nearly all of us probably do). Additionally, as slavery often crosses national borders and is far from a simple issue it is not always clear who is required to act. So by applying my theoretical insights to this area I hope to have made a significant contribution towards solving these problems. The second aspect of my motivation for selecting slavery as an issue area is that it is relatively uncontroversial – no reasonable people dispute that slavery is wrong. Unlike during the nineteenth century there are no mainstream advocates for slavery – it is outlawed and condemned everywhere. This lack of controversy makes it a useful example as if my theory does not function when applied to the least disputed of human rights then it *prima facie* is not successful.

The first section of chapter four utilises data from the 2014 Global Slavery Index (the most up-to-date data available at the time of writing) to show that slavery is not a problem of the past but is, rather, one that continues to this day. The second section of chapter four examines the duties that correlate with the right to not be enslaved. This section examines the different waves of duties that emanate from the initial right-duty pairing of a right to not be enslaved and a duty to not enslave. In developing Waldron’s wave model I borrow Henry Shue’s tripartite construction of duties to avoid, duties to protect, and duties to aid. I argue that we can see three clear waves of duties. Firstly there are simple duties to avoid depriving- so to not enslave someone and to not participate in a system that permits slavery. The second wave is comprised of duties to protect or to avoid- so duties to ensure that enslavement does not occur. These would
include duties like ensuring there is adequate education about the danger of being trapped in slavery and ensuring that there are effective labour standards that ensure that individuals cannot be taken into slavery. The third wave only emerges when the first two waves have failed and an individual has been enslaved. These duties are duties to liberate slaves and to assist former slaves to effectively transition back to being effective contributors to society. These different correlative duties attach to different actors depending on the context of the duty. So in the case of the relatively simple first wave duties they fall on all individuals at all times – do not enslave. Second wave duties are considerably more complex - it is clear that a single individual cannot feasibly be personally responsible for educating an entire population. This duty falls upon all individuals – it is derived from human dignity and so all humans share in it – but it practically can only be fulfilled via collective action. The most obvious collective agent to fulfil this duty is the state. Other collective actors can have duties in various different circumstances (for example chocolate manufacturers have duties to participate in programs such as the Cocoa Initiative to help scrub slavery out of the cocoa and chocolate supply chain). By using the wave model of duties it becomes much easier to understand the complexities of actual political life. I conclude this section on correlative duties by utilising the Hohfeldian model developed in chapter one to make it clear what sort of actions or inactions are required by the various different duties that appear. The Hohfeldian model allows us to better understand what sort of actions are required in the various different circumstances that occur.

The third section of chapter four examines the first of the two non-correlative duties - the duty of social co-operation. This duty was the more vague of the two non-correlative duties identified in chapter three. Thus being definitive about the

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implications of this duty for political practice and individual behaviour is extremely important. In doing this I identify a number of ways in which this duty of social co-operation materialises for different types of actors – individuals, governments, and businesses. For the second of the two non-correlative duties, the duty to build human rights respecting institutions, I conduct a similar analysis as the one I carried out for the duty of social co-operation. A potential criticism of this non-correlative duty is that is simply collapses into a duty to develop a just world. However, this critique is misdirected. As I argue, whilst most plausible theories of justice have human rights (or some similar concept) as a centrepiece, these rights are not the sum total of any conception of justice. Thus this critique is not effective as it misconstrues the relationship between justice and human rights by conflating the two.

The final section of chapter four examines the way in which my conception allows us to avoid an agency denying streak in the global justice and human rights literature. Onora O’Neill also identified this problem that many, otherwise appealing, theories of global justice and human rights (in particular) do not see claimants of human rights as fully autonomous agents acting on their own behalf. Whilst there is nothing necessarily wrong with a theory that largely focuses on what the relatively affluent should do it is desirable that we also view the relatively deprived as agents – as being able to be architects of their own human rights enjoyment. It is important that the agency of those who have had their human rights denied them is recognised. Part of this has to be recognising that those in countries with a high number of relatively deprived individuals have duties to improve their own situation and the situation of those around them. The human dignity approach that I propose allows for this to be acknowledged thus avoiding the mild agency rejection of other approaches.

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Where Next?

In this thesis I have tackled two inter-connected problems – imprecision in our use of the term “duty” and a lack of clarity about the content and assignment of the duties associated with human rights. There are, however, a number of significant issues surrounding duties and human rights that I have been unable to explore in this thesis. Before concluding I want to highlight some of these issues and indicated some areas for future research.

Firstly, I have not examined any scenarios in which duties might conflict. There are a number of examples of such scenarios. An oft cited one is that a right to privacy and a right to free speech can clash. However, when someone claims that two rights are incompatible the truth is almost invariably that our duties are in conflict. In the case of privacy and free speech our duty to respect privacy and our duty to respect free speech are in conflict. A journalist seeking to report on the private life of a politician has a duty to respect said politician’s right to a private life whilst also having an obligation to report on issues of public interest. Similarly the politician has a duty to not restrict the journalist’s right to free speech and so should not inhibit his ability to report news. Clearly there are conflicts between these various duties. A future avenue for research would be to explore ways to resolve this conflict.

A second scenario in which duties conflict is linked to a second area for future research. This scenario is one in which the only way to discharge one duty is to use force against an individual or individuals, thus violating a separate duty. In this case the conflict is between our duty to protect the human rights of threatened and vulnerable individuals.
and our duty to not use violence or force against others. This conflict also poses questions in the area of the use of force and humanitarian intervention. There are, in this case, two possible solutions to the conflict – first, that our obligation to the threatened outweighs our obligation to not use violence; second, that our obligation to not use violence is absolute. If the first option is correct then determining a consistent procedure for how to establish when our duty to not use violence can be over-ridden is incredibly important. If the second option is correct then a commitment to human rights commits us to a very strong pacifistic principle and our ability to effectively protect and enforce human rights might be curtailed.

Another additional area for significant additional work is to interrogate how the theory of rights and duties developed in this thesis would affect political practice in the protection and enforcement of different rights. I have examined the issue of slavery in this thesis, which is a relatively uncontroversial right as far as human rights go. A particularly useful area of investigation would be to look at less paradigmatically uncontroversial rights than non-enslavement such as rights to healthcare or to education. These rights are often contested due to their supposedly positive nature. This supposedly positive nature, it is often claimed, renders it especially difficult to identify duty bearers and to assign duties effectively for the enforcement and protection of these rights. Having shown that my theory functions for uncontroversial rights, and so meets a *prima facie* criterion for plausibility, it would be both important and interesting to explore whether it can make the protection of more controversial rights

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50 Although I follow Henry Shue in rejecting the positive/negative dichotomy due to it not accurately portraying the nature of any actual rights this dichotomy is still often appealed to when seeking to define human rights.

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more intelligible. Thus additional work applying this theory to different rights would, undoubtedly, be fruitful.

Final Remarks

It has been thirty years since Onora O’Neill first began discussing what she has since referred to as the “dark side of human rights” – the lack of a coherent understanding about the duties associated with human rights. The aim of this thesis has been to contribute towards solving this problem. This is not the final word on the matter- there is much more work to be done before the problem is solved. However, this is undoubtedly a step towards a solution to the problem. Working towards the realising of human rights at times invokes the image that closes F. Scott Fitzgerald’s classic novel *The Great Gatsby* – “So we beat on, boats against the current, borne back ceaselessly into the past” (Fitzgerald, 1993: 115). It is an image of futility- fighting against the current- but also of determination- we will continue to beat on towards the goal. Often the fight to see human rights more fully realised seems futile- we are still a long way from even partially fulfilling the ideal. However, if we continue to refine our thought, if we continue to battle against the tide, then we can make improvements. Rather than the bittersweet image the closes Fitzgerald’s novel we can, and have, seen huge leaps forward in our ability to ensure that human rights are protected. Hopefully this thesis can contribute to our continued progress and can help us beat on until we reach that goal.

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