Chapter 16

The Nature of Human Rights

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Contrast two conceptions of human rights which, following Beitz, we can call the orthodox and the practical conceptions (Beitz 2004). The orthodox conception defines human rights as those rights that each human has against every other, at all times, in all places, under all conditions, and simply in virtue of her humanity. This orthodox conception is familiar from the philosophical literature on human rights, and any philosopher will know how to construct an orthodox theory of human rights using the standard tools of a consequentialist or deontological moral theory.

The practical conception of human rights is quite different, and is more familiar from international politics than from the philosophical literature. On the practical conception, human rights define a boundary of legitimate political action. Human rights specify the ways in which state officials must and must not act toward their own citizens, where it is understood that violations of these human rights can morally permit and in some cases morally require interference by the international community. This practical conception of human rights is what one finds in the various proclamations and treaties on human rights, such as the Universal Declaration and the Convention against Torture. Here I will explore why it is worthwhile for philosophers to theorize more about human rights understood in this second, practical way, and also say a few words about how such theorizing might be done. Thomas Pogge’s account of human rights (2002a: 27–70) will provide the mileposts for the exploration of this topic.

To an orthodox theorist, the practical question about human rights will appear misguided. The practical question turns on legitimate action by the officials of modern states, and is especially concerned to find rights whose violation will permit or require outside intervention. Yet why this emphasis on legitimacy, modernity, and intervention? And why, in particular, this
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obsession with the state? After all states are not the only sort of agency that endangers individuals through violence, coercion, and neglect. Strangers, family members, and multinational corporations also endanger individuals — in fact quite often these other agencies will threaten individuals more than does their state. Why then should we take the actions of state officials as a special topic for normative theory?

The answer is that, until recently, the state was to outsiders a moral black box. Until World War II state officials violated, coerced, and neglected those within their territories with almost total impunity, appealing to the Westphalian ideal of state sovereignty to immunize themselves from external criticism and intervention. Before the Second World War there were virtually no commonly accepted standards for justifiable interference into what was called the internal affairs of a state. State officials were almost incorrigible with respect to their treatment of humans within their borders, and this is what distinguished state officials from other actors like family members and corporations.

The Second World War showed that the state could not remain a moral black box to outsiders. After the Holocaust it became clear that standards were required for official conduct toward citizens, such that violation of these standards could license or even necessitate an international response. The language that postwar political leaders used to describe these standards was the language of human rights. Human rights were meant to fill the void in the space of moral evaluation and action that was created by the concept of state sovereignty, given that this void had become morally intolerable. The human rights documents that were endorsed after the war were attempts to spell out what officials should never again do to those within their territories (cf. Donnelly 1998: 3–17).

Human rights so conceived are obviously immensely important for our politics, and so understanding which rights are such human rights should be a proportionately important topic for philosophical theory. Indeed a parallel from history may help to show how significant this kind of practical theorizing is. Before the seventeenth and eighteenth centuries, the official treatment of citizens was a moral black box not only to outsiders, but to those within the state’s borders as well. State officials in this era claimed incorrigibility regarding the treatment of those within their territory — not under the Westphalian idea of state sovereignty, but under the older theory of the divine right of kings. The divine right of kings allegedly gave officials unlimited discretion over the treatment of subjects, such that no internal resistance to the crown was legitimate. The classic social contract theorists illuminated the justificatory darkness defined by the divine right of kings. Practical rights theorists such as Locke set out accounts of natural rights that marked out the boundaries of legitimate state action, where it was