Minimalism, Determinacy, and Human Rights

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Abstract. Many theorists understand human rights as only aiming to secure a minimally decent existence, rather than a positively good or flourishing life. Some of the theoretical considerations that support this minimalist view have been mapped out in the philosophical literature. The aim of this paper is to explain how a relatively neglected theoretical desideratum – namely, *determinacy* – can be invoked in arguing for human rights minimalism. Most of us want a theory of human rights whose demands can be realized, and which is acceptable to a range of worldviews. But we might also expect our theory to provide determinate answers to questions of scope (i.e. which putative rights are *bona fide* human rights?) and practical implementation (i.e. what concrete duties are generated by which rights?). A minimalist view of human rights makes it is easier to jointly fulfil all of these desiderata.

1. Introduction

According to a widely-shared view human rights encompass a very limited range of ethical concerns: not all human interests, only urgent interests;[1] not our preferences, only our needs;[2] not all wrongs, only severe injustices;[3] not a good life in

[1] Charles Beitz, *The Idea of Human Rights* (Oxford University Press, 2009) at 110.

[2] See David Miller, "Grounding human rights" (2012) 15:4 Critical Review of International Social and Political Philosophy 407.

[3] James W. Nickel, *Making Sense of Human Rights* (Blackwell, 2007) at 36-37; Henry Shue, *Basic Rights: Subsistence, Affluence, and U.S. Foreign Policy*, 2nd Edition (Princeton University Press, 1996) at xi.

the fullest sense, but only a minimally decent or autonomous life.[4] In short, human rights are not about realizing the best, they're about shielding us from the worst. I will call this general theoretical stance *Minimalism*.

Although Minimalism is often endorsed in philosophical debates around human rights, contemporary human rights law and human rights practice do not seem very Minimalistic. Granted, special priority is sometimes given to a small set of 'minimum core' human rights obligations, demanding provision of things like food, healthcare, housing, and education. But these minimum core obligations are only one facet of human rights practice.[5] When we look at the scope of the practice as a whole, today, what we find seems to extend well beyond a Minimalist scope. As Charles Beitz says, human rights today "are not very much more minimal than [the rights] proposed in many contemporary theories of social justice".[6] For instance, some of the human rights currently recognized by international institutions include the right to the highest attainable standard of health,[7] the right to free higher education,[8] the right to secure internet access,[9] and the right of children to grow up in a happy family environment.[10] From a Minimalist perspective this looks like a serious case of 'mission creep.'[11] We know that a person's well-being is negatively affected if she can't access the internet, or if she grows up in an unhappy family, but we don't necessarily view these hardships as *severe* injustices. And we don't think that people who have to pay for university, or who receive health services from non-state-of-the-art hospitals, *ipso facto* fail to have minimally decent lives.

The question I am interested in here is why do (many) theorists continue to nominally endorse a Minimalistic understanding of what human rights are, or should be, when the practice has so clearly extended beyond a minimalistic scope? Why

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[4] Nickel, *supra* note 3 at 36; James Griffin, *On Human Rights* (Oxford University Press, 2008) at 53; Michael Ignatieff, *Human Rights as Politics and Idolatry* (Princeton University Press, 2001) at 56-57.

[5] Committee on Economic, Social, and Cultural Rights, *General Comment No. 3: The Nature of States Parties' Obligations*, 14 December 1990.

[6] Charles Beitz, "What human rights mean" (2013) 132:1 Daedalus 132/1 36 at 39.

[7] International Covenant on Economic, Social, and Cultural Rights (ICESCR), Article 12.1.

[8] ICESCR, Article 13.2 (c).

[9] In 2016 the UN Human Rights Council issued a non-binding resolution condemning government disruption of internet access, which was reported in the media as an informal declaration of 'the right to internet access'; see General Assembly resolution 32/L.20, *The Promotion, Protection and Enjoyment of Human Rights on the Internet*, A/HRC/32/L.20 (27 June 2016), available from ap.ohchr.org/documents/alldocs.aspx?doc_id=20280.

[10] See Preamble of the UN Convention on the Rights of the Child (1989).

[11] i.e. "the gradual addition of new tasks or activities to a project so that the original purpose or idea begins to be lost"; dictionary.cambridge.org/dictionary/english/mission-creep.

not join with theorists like Beitz – and countless human rights advocates and activists – who welcome an expanded idea of what human rights are, one that encompasses various interests that are less-than-urgent, and injustices that are not quite so severe?

The recent philosophical literature offers an answer to this question that is plausible as far as it goes, but incomplete. Minimalism is an attractive way of theorizing human rights, so the argument goes, because we want the realization of human rights standards to be feasible and pluralistically adequate (i.e. acceptable to a wide range of worldviews), and these desiderata seem more realizable given a Minimalist understanding of human rights. This diagnosis leaves out an important piece of the explanatory puzzle. An ideal of *determinacy* is also part of what makes Minimalism an attractive way of theorizing human rights. It would be preferable if we had a more stable consensus about which putative rights are *bona fide* human rights, and it would be better if human rights claims could be cashed out into relatively specific and unambiguous practical requirements. In what follows I discuss some of the reasons why it is easier to realize these desiderata given Minimalism, and I thereby show how the ideal of determinacy supports a Minimalistic understanding of human rights. More subtly, I want to explain how the various desiderata that are in play here – determinacy, pluralistic adequacy, and feasibility – interact and reinforce each other. The theoretical pull towards Minimalism is about wanting to formulate a schedule of human rights that is simultaneously determinate, pluralistically adequate, and feasible.

In §2 I say more about what Minimalism is, and about how the ideals of feasibility and pluralistic adequacy lend support to it. In §3 I explain how the ideal of determinacy complements these other desiderata and bolsters the case for Minimalism. In §4 I discuss the ways in which one might resist a Minimalistic view of human rights, notwithstanding the arguments for Minimalism that appeal to determinacy and other theoretical desiderata.

2. Clarifying Minimalism

2.1 An institutional approach to human rights

Contemporary philosophical work on human rights often focuses on a methodological debate, about whether and how a theory of human rights should be informed by an understanding of human rights institutions and practices. Some authors favor a *Political Conception* of human rights. Roughly, they hold that in order to explain what human rights are, we have to start by understanding the 'work' that human rights do, e.g. in law, in international treaties and diplomacy, or in

activism.[12] Other authors favor a *Naturalistic* Conception of human rights. Roughly, they believe we can develop an account of what human rights are without affording interpretative primacy to human rights institutions and practices.[13] While I don't believe that these methodological alternatives have to be thought of as irreconcilable opponents,[14] my discussion will be broadly located within the first of these two camps. I am primarily interested in how we best theorize the present-day global political institution of human rights. For my purposes here, then, Minimalism is the view that the proper practical-cum-political role for human rights to fulfil, in the law and other social practices, is not about specifying a complete template for social justice or human flourishing, but rather, specifying some sort of basic schedule of minimal protections and provisions that all people should receive.

Consequently, the arguments for Minimalism that I am discussing here will not necessarily have much purchase on those who favor a purely Naturalistic Conception of human rights. For example, suppose that like John Finnis you think human rights should be understood as the minimal requirements of morality which can be derived from principles of practical reason.[15] This programmatic way of conceptualizing human rights could easily lead to something Minimalist in character, because you could easily end up concluding that only a very limited schedule of moral requirements can be derived from principles of practical reason. Whatever way that inquiry plays out, my point is that this would be an entirely different type of theoretical argument for Minimalism compared to the ones that I am discussing. The arguments for Minimalism presented below are all ultimately derived from thinking about the practical functions that we want human rights to fulfil. If you see these practicalities as only coming into play *after* we have figured out what human rights essentially are, then my arguments will only seem relevant to the question of how we act to try to protect or realize human rights.

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[12] Influential theories of human rights underpinned by the Political Conception include those developed by John Rawls, *The Law of Peoples* (Harvard University Press, 1999), Joseph Raz, "Human rights without foundations" in Samantha Besson & John Tasioulas, eds, *The Philosophy of International Law* (Oxford University Press, 2010) 321, and Beitz, *The Idea of Human Rights*.

[13] For a brief overview see Section 2 of James W. Nickel, "Human rights", *Stanford Encyclopedia of Philosophy* (2019) (plato.stanford.edu/archives/sum2019/entries/rights-human/). To be clear, the Naturalistic Conception needn't promise to deliver a completely abstract, *a priori* theory of what human rights are. Some who favor this approach think that practical considerations have a secondary role to play in informing our understanding of what human rights are, e.g. Griffin's view that human rights are about protecting people's capacity for agency but in a way that is broadly practicable under existing conditions.

[14] Adam Etinson & S. Matthew Liao, "Political and naturalistic conceptions of human rights: a false polemic?" (2012) 9:1 The Journal of Moral Philosophy 327 at 334-36.

[15] See John Finnis, *Natural Law and Natural Rights*, 2d ed (Oxford University Press, 2011).

2.2 *In what sense does Minimalism 'demand less'?*

According to Samuel Moyn human rights became a popular ideal in the 1970s partly because of their modest ambitions. People were disillusioned with grand ideals and ideologies, and a human rights framework seemed like an appealing alternative because it eschewed all this, instead focusing on atrocity-prevention and "minimal constraints on reasonable politics".[16] Whether the public was right to take this view is a further question. The scope of international human rights law was already expanding by the 1970s, and it was in various ways more ambitious – a vision slightly closer to another grand ideal – than its newly enthusiastic supporters recognized. In any case, Minimalists can be thought of as those who think that human rights should stick to the sort of modest ambitions which, on Moyn's account, made them an appealing approach to thinking about justice, compared to the ideologies that they superseded.

But in what sense, exactly, does a Minimalist view of human rights impose demands that are more modest than they might otherwise be? At the very least Minimalism sees the scope of human rights as narrower than the scope of justice or morality *per se*. This isn't yet saying much, however, because one can endorse this scope-related thesis without being a Minimalist. Those who think it is appropriate for human rights treaties to extend beyond Minimalist constraints don't believe that every moral issue is about human rights. Most of us think it is wrong to say hurtful things about our friends behind their backs, but no-one believes that such behavior violates a human right. In short, seeing the scope of human rights as narrower than that of justice or morality *per se* doesn't yet make you a Minimalist. Minimalism must also be distinguished from the idea that there is only a small number of *bona fide* human rights claims, i.e. what James Nickel calls *Ultraminimalism*.[17] The notion that human rights should only pertain to urgent needs or injustices doesn't automatically entail that we will end up with a short list when we are enumerating the rights that fit this characterization.

So what is the distinctive way in which Minimalism limits the scope of human rights? It is best understood as a thesis about what human rights are not. Roughly, it is the view that they are not standards whose realization ensures rights-bearers an entirely good or flourishing life. We can rank different stand-

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[16] See Samuel Moyn, *The Last Utopia: Human Rights in History* (Harvard University Press, 2010).

[17] Nickel, *Making Sense of Human Rights* at 98-103. See Ignatieff, *Human Rights as Politics and Idolatry*, for another description of Ultraminimalism. It is unclear exactly how few rights one would have to posit in order to qualify as an Ultraminimalist. We could say that a list of human rights is Ultraminimal if – like Rawls's list, in *The Law of Peoples* at 65 – it has fewer entries than the articles of the UDHR. But this seems arbitrary, in a way that any comparative numerical criterion is bound to replicate. Nevertheless, it does seem like a noteworthy feature of some theories of human rights, including Rawls's, that instead of programmatically generating an open-ended list of rights claims, they insist upon a small (and non-open-ended) number of rights claims. In any case, my point here is simply that a Minimalistic account of human rights won't necessarily possess this feature.

ards of human life along an evaluative spectrum, from the low mark of 'barely tolerable', to a mid-level characterization like 'decent', or better yet, 'good', and then to the upper extreme of 'excellent' or 'flourishing'. One way of conceptualizing human rights is as entitlements to conditions and resources that enable people to realize a certain standard of life, up to some nominated point along this evaluative spectrum. Given this way of framing things, Minimalism can be defined as the view that human rights enable the realization of a standard that is *less than a good life*. For Minimalists, human rights have their sights set lower, and merely aim to facilitate a decent existence.[18]

Granted, these are vague terms. But there is no obvious way around that, initially. Different Minimalistic theories will cash out these ideas in different ways, and a general definition needs to accommodate this. The philosophical literature attests to this diversity. For example, some Minimalists understand human rights as not aiming to secure a good life, but rather only a decent or minimally good life,[19] or only the fundamental conditions of a good life,[20] or of any life at all.[21] Rather than a flourishing life, human rights, for some Minimalists, only aim to guarantee "the more austere life of a normative agent".[22] Others say that human rights only secure needs, rather than preferences.[23] And for theorists who favor a status-

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[18] I am glossing over some complex questions about what it means for human rights to 'realize', 'ensure', or 'facilitate' a given standard of life. I have described Minimalism as the view that the realization of human rights standards doesn't *ensure* people a good or flourishing life, but merely aims to *facilitate* a decent life. But these terms do not precisely capture the complexity of the relation in question. If we say that human rights are supposed to *facilitate* a decent life, this may suggest, misleadingly, that the general upholding of human rights in fact *is* sufficient for everyone attaining a decent life. But people can have flourishing lives while experiencing human rights violations, and people whose human rights are upheld can have an abject existence. Respect for a person's human rights is thus neither necessary nor sufficient for that person attaining whatever positive state of existence human rights are supposed to enable; see Rowan Cruft, "From a good life to human rights: some complications" in Rowan Cruft, S. Matthew Liao & Massimo Renzo, eds, *Philosophical Foundations of Human Rights* (Oxford University Press, 2015) 101. Matthew Liao tries to offer a more nuanced specification of the relation in question. Liao says human rights protect an adequate range of the fundamental conditions needed to pursue the basic activities that are essential to human beings *qua* human beings; see S. Matthew Liao, "Human rights as fundamental conditions for a good life" in Rowan Cruft, S. Matthew Liao & Massimo Renzo, eds, *Philosophical Foundations of Human Rights* (Oxford University Press, 2015) 79. According to Cruft, Liao's specification of the relation implies a controversial form of value pluralism. But my arguments ultimately do not hinge on the resolution of this issue, because what defines Minimalism is its claim about *which standard* of life human rights are supposed to enable, not a claim about the *nature of the relation* between human rights and the standard of life they're supposed to enable. Whatever the best specification of the relevant relation is – exactly how human rights *enable* a given standard of life – we can use it to differentiate Minimalism from non-Minimalist approaches.

[19] Nickel, *Making Sense of Human Rights* at 36-37.

[20] S. Matthew Liao, *The Right to Be Loved* (Oxford University Press, 2015) at 39-73.

[21] Ignatieff, *Human Rights as Politics and Idolatry* at 56.

[22] Griffin, *On Human Rights* at 53.

[23] See Miller, "Grounding human rights".

based – as opposed to interest-based – account of rights, Minimalism will understand human rights as requiring only some *basic* form of recognition – like, say, recognition of a person's status as a rational agent,[24] or a political subject[25] – rather than a more full-blooded form of recognition, e.g. of a person's complexly-situated cultural identity.

As well as encompassing this range of Minimalist ideas about the limited scope of human rights, my characterization of Minimalism also accords with various positive theses that are espoused about the nature of human rights. In particular, consider familiar claims about the urgency of human rights. Most authors want to reserve human rights terminology for especially weighty normative concerns.[26] This seems like either another way of expressing the negative characterization of Minimalism that I have offered, or else an immediate upshot of that characterization. If human rights only provide the bare necessities needed to make human lives tolerable, then their scope will naturally be confined to urgent human interests. Relatedly, human rights are sometimes characterized as a source of high-priority obligations, in that they should ordinarily take precedence if they conflict with other kinds of norms, e.g. those related to procedural justice, or to promoting utility or economic prosperity.[27] Minimalism naturally fits with this understanding. If the aim of human rights is to give us the essentials required for a minimally decent life, it follows that they will generate high-priority demands, since their realization will be necessary to alleviate conditions that otherwise make people's lives intolerable.

2.3 The attractions of Minimalism

To summarize, Minimalism says that human rights seek to enable a merely decent or tolerable human existence. This definition is compatible with a variety of different ways of spelling out what a minimally decent or tolerable human existence consists in. And it coheres with the view that human rights are of their nature a source of particularly urgent or high priority duties.

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[24] George Kateb, *Human Dignity* (Harvard University Press, 2011) at 17; Katrin Flikschuh, "Human rights in a Kantian mode: a sketch" in Rowan Cruft, S. Matthew Liao & Massimo Renzo, eds, *Philosophical Foundations of Human Rights* (Oxford University Press, 2015) 653.

[25] Joshua Cohen, "Minimalism about human rights: the most we can hope for?" (2004) 12:2 Journal of Political Philosophy 190 at 192.

[26] For instance, Nickel favors Minimalism because it ensures that human rights are concerned only with "very severe problems"; see *Making Sense of Human Rights* at 56. Griffin focuses on the Minimalist value of personhood partly because of its "special importance"; see *On Human Rights* at 36. Miller focuses on things that are "an essential element in human life", and thus he favors a Minimalist, needs-oriented account of human rights; see "Grounding human rights" at 412.

[27] Nickel, *Making Sense of Human Rights* at 56; Beitz, *The Idea of Human Rights* at 109.

Moyn says people were attracted to the modest aspirations of human rights, compared to other political moralities. But why should this modesty be attractive? One *prima facie* advantage of a Minimalist approach is *feasibility*. Utterly infeasible human rights claims can seem like pie-in-the-sky aspirations. If we are Minimalists then human rights are less likely to face this problem. The less extensive the demands of human rights, the easier it is to fulfil them.[28] Granted, there are some complications in saying that a given demand is infeasible or unfulfillable. Demands that cannot be fulfilled under existing political conditions may be fulfilled under altered conditions, and if there is some possibility of acting to realize those new conditions, then it is misleading to insistently characterize the initial demands as infeasible.[29] But it is consistent with recognizing this complication to think that credible comparative assessments of feasibility are both possible, and relevant in assessing the merits of a normative framework. Other things being equal, it is more feasible to fulfil the demands of a framework that only purports to satisfy people's most basic needs, than it is to fulfil the demands of a more ethically ambitious framework.

One aspect of feasibility to emphasize is *political* feasibility. Human rights agreements typically call for some form of domestic implementation, and the legislative and institutional reforms that are involved in this are often a source of political conflict. We have reason to think that such reforms will be more politically achievable, though, if we have a schedule of human rights that is (i) narrower in focus, allowing for more discretion in policy implementation, (ii) non-partisan, in that it doesn't systematically recommend one major party-political platform over others, and (iii) limited in its implementation costs, such that it doesn't risk overwhelming the state's economic resources.[30] All this suggests another *prima facie* advantage for a Minimalist account of human rights. By making more modest demands, a Minimalist account seems more politically feasible in each of these ways. And there is a close connection here to the idea that human rights should be *pluralistically adequate*, i.e. acceptable to a wide variety of different worldviews. In principle, it seems that it will be easier for a wider range of values and belief-systems to generate support for human rights, to the extent that human rights are construed Minimalistically.[31]

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[28] Maurice Cranston, "Are there any human rights?" (1983) 112:4 Daedalus 1 at 13.

[29] For further discussion of these complexities see Pablo Gilabert, "The feasibility of basic socioeconomic rights: a conceptual exploration" (2009) 59:237 Philosophical Quarterly 659 at 664-68.

[30] Nickel, *Making Sense of Human Rights* at 36-37.

[31] We should distinguish the type of Minimalism that I am discussing – what Joshua Cohen calls *Substantive* Minimalism – from a related but different view, which Cohen calls *Justificatory* Minimalism. Whereas the former sets limits on the content of human rights claims, Justificatory Minimalism sets limits upon how we justify those claims. It says theories of human rights should provide us with "a conception of human rights without… connecting that conception to a particular ethical or religious outlook"; the Justificatory Minimalist "minimizes theoretical aspirations in the statement of the conception of human

These kinds of reasons to favor Minimalism have received some analysis in the recent philosophical literature.[32] It is open to debate as to whether a decisive case for Minimalism can be made on these grounds, but there is at least a *prima facie* compelling rationale for Minimalism available here. On a Minimalist approach, human rights have a more modest ambition than other comprehensive political doctrines, like Marxism, Perfectionistic versions of Liberalism, or conservative political moralities centered on religious or national identities. Comprehensive political doctrines offer a holistic picture of a good human life and a just social order. If a human rights framework can resist the urge to follow suit, and instead confine itself to identifying people's most urgent needs, and demanding their fulfilment, it will, in comparison, be subject to less moral and political contestation, and more realizable as a result.

2.4 Further complications

One complication, in trying to clarify how Minimalism relates to other theoretical positions on human rights, relates to the distinction between positive and negative rights. The idea that human rights should not include positive rights, like a right to food or housing, has sometimes been portrayed as an element or an upshot of Minimalism. For some, to be a Minimalist, is to believe that all *bona fide* human rights are negative rights.[33] But this isn't the right way or best way to construe Minimalism. Minimalism says that human rights aim to facilitate a decent or tolerable human existence, and in many contexts this necessitates the provision of subsistence goods. Consider Henry Shue's discussion of the 'basic rights' necessary for the enjoyment of other rights. A right to physical security is basic, in Shue's sense, since its violation jeopardizes the individual's ability to enjoy her

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rights with the aim of presenting a conception that is capable of winning broader public allegiance"; see "Minimalism about human rights" at 192. A number of theorists see Justificatory Minimalism as integral to the idea of human rights; besides Cohen, see also Rawls, *The Law of Peoples* at 121-22. (But for an opposing view, see Etinson and Liao, "Political and naturalistic conceptions of human rights" at 334-36.) There is also evidence that key human rights texts, like the 1948 Universal Declaration of Human Rights (UDHR), aspired to Justificatory Minimalism. Jacques Maritain famously reported that drafters of the UDHR were able to agree on the rights only "on the condition no one asks us why"; see *Human Rights: Comments and Interpretations* (Wingate, 1949) at 9. The merits of Substantive Minimalism that relate to its focus on the morally uncontroversial are separable from whatever considerations may be invoked to argue for Justificatory Minimalism.

[32] For example, see Ignatieff, *Human Rights as Politics and Idolatry* at 56-57; Chapter 6 of Beitz, *The Idea of Human Rights*, Rawls, *The Law of Peoples* at 65; Chapter 5 of Martha Nussbaum, *Creating Capabilities: The Human Development Approach* (Harvard University Press, 2011); John Tasioulas, "From Utopia to Kazanistan: John Rawls and The Law of Peoples" (2002) 22:2 Oxford Journal of Legal Studies 367 at 390-95.

[33] E.g. see Cranston, "Are there any human rights?"; Ignatieff, *Human Rights as Politics and Idolatry*. Shue is one author who questions the plausibility of distinguishing liberty and welfare rights by virtue of their positive or negative character. As he says, representative cases of both types of rights generate both positive and negative duties; see Shue, *Basic Rights* at 19. Still, the distinction that is conventionally marked by these terms is helpful way of referring to two broad classes of rights we sometimes want to differentiate. My point here is that however we may try to formally distinguish those classes, it won't be the case that Minimalism is only concerned with one of the classes.

other rights. But by the same logic subsistence rights must be basic. After all, a starving person cannot enjoy her right to free speech or free assembly. Thus, for Shue, basic rights include rights to things like food and housing, alongside rights of non-interference.[34] Similar lines of reasoning appear in the theories of human rights offered by James Griffin, Martha Nussbaum, and Matthew Liao.[35] The strongest version of Minimalism will recognize both negative civil and political rights *and* various positive economic and social rights as *bona fide* human rights. A minimally decent existence requires that certain basic subsistence needs will be secured as a matter of right.

Another complication relates to the idea of human rights as a specification of the *moral minimum*. On Shue's definition, the moral minimum is "the least that each individual can demand" of other actors – people, governments, corporations, the international community – or the least that these actors must be made to do.[36] It would be easy to think of Minimalism as being committed to the idea that the scope of human rights is coextensive with a complete specification of this moral minimum. But we should tread carefully here. In conditions of extreme scarcity it may simply be impossible to ensure that everyone has what they need to enjoy a minimally decent existence. In those conditions, to insist that governments, corporations, or the international community must fulfil people's (Minimalistically-construed) human rights is to demand more of these actors than they can possibly achieve. Minimalism is defined by what people need in order to have a decent or tolerable life. There is only a contingent relation between this and what we can properly demand of others.[37]

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[34] Shue, *Basic Rights* at 19.

[35] Griffin's agency-based account says that human rights shouldn't only generate bare guarantees of non-interference in the exercise of one's agency. Rather, Griffin says, they should also guarantee basic resources like food, education, and healthcare that are necessary for the actual realization of people's agency; see *On Human Rights* at 33. Nussbaum characterizes human rights as the essential requirements for pursuing 'central human capabilities' – i.e. activities central to human life itself, like reasoning, affiliating with others, and engaging in some forms of recreation – and she says that the realization of these capabilities requires both negative rights of non-interference as well as positive forms of resource-provision; see "Human rights and capabilities" (1997) 66:1 *Fordham Law Review* 273 at 287-88. Liao's theory stresses the provision of the freedoms *and resources* necessary to pursue the basic activities which are fundamental to any good life – but not those needed in order to enjoy an excellent life; see *The Right to be Loved* at 41-46.

[36] Shue, *Basic Rights* at xi.

[37] On Michael Walzer's alternative formulation, the moral minimum is a set of demands that all or nearly all cultures accept, despite their cultural differences; see *Thick and Thin: Moral Argument at Home and Abroad* (University of Notre Dame Press, 1994) at 9-10. One may argue that Minimalism is committed to the moral minimum in this sense. It is a condition of something being a human right that it is a right whose demands are accepted by nearly all cultures. But this also seems like it would be mistaking a contingent relation for a necessary one. We are more likely to find consensus across cultures about the demands of a minimally decent life, than about the nature of a good or flourishing life. But even if there are some demands accepted by nearly all cultures, there is no *a priori* guarantee that they will include the provision of the conditions needed to facilitate a minimally decent human existence.

3. Arguments from Determinacy

Let's turn to the question of how one may appeal to the ideal of *determinacy* in order to argue for a Minimalist approach to human rights. I will begin by considering how indeterminacy can be a problem in human rights theory and practice. As I will discuss below, human rights theorists are sometimes accused of proclaiming rights in a careless fashion, without sufficient attention to the details of what these rights require of whom. They are also sometimes accused of failing to specify criteria against which the legitimacy of their human rights proclamations can be judged. These indeterminacies undermine the credibility of human rights as a practical or institutional program. The question that I will be exploring in what follows, in essence, is whether a Minimalist approach to human rights can potentially do something to mitigate these problems.

3.1 Practical indeterminacy

Let's start by more carefully pulling apart the two types of indeterminacy noted above. One of these is what I will just call *practical indeterminacy*. To illustrate, consider the right not to be tortured. There is near-universal agreement that this is a human right. But this still leaves room for debate about the right's exact contours. What counts as torture? Are there exceptions to the right not to be tortured in particular emergencies? For particular offenders? Who bears the duty to enforce and monitor compliance with this right? And how should we prioritize this task? How should we weigh it against duties relating to education or housing, given that they all involve the expenditure of resources?

At the extreme practical determinacy is a matter of answering all these questions. A human rights system would be fully practically determinate if it had answers to questions about (i) who holds which rights; (ii) what the content of those rights is; (iii) how stringent they are; (iv) what the duties associated with them are; (v) who exactly bears those duties; (vi) how those duties are to be prioritized relative to the duties generated by other rights claims, and (vii) which exceptions or extenuating conditions qualify the duties. There is enough complexity here that no human rights system could ever be fully practically determinate. But it is a standard that can be more or less realized.

Why should we regard it as a problem, then, if a human rights system is less practically determinate than it could otherwise be? One partial answer is that in today's international political order, human rights are a focal point for political agreements. Part of the purpose of any agreement is to underwrite a shared recognition of the attitudes of the parties involved, with respect to the agreement's content. If an agreement is ambiguous or otherwise indeterminate, its parties are in danger of perceiving shared intentions or commitments where there are unrecognized divergences, or where there is in fact no genuine agreement at all. One

way in which human rights theories may helpfully contribute to human rights practice, then, is by clarifying the content of past agreements, or by clarifying the terms for new ones. Figuring out the practical implications of various rights claims isn't something that a theory itself achieves, but greater theoretical precision makes the task more manageable.

Authors like Onora O'Neill and Eric Posner identify a different set of worries about practical indeterminacy in human rights. O'Neill argues that human rights practitioners often fail to specify who bears the correlative duties for the rights that they proclaim, especially when it comes to 'second-generation' social and economic rights. This undercuts the legitimacy of these rights claims, O'Neill says, because rights without identifiable duty-bearers are not genuine rights. This failure of specification also undermines the general utility of human rights practice, O'Neill argues, and it misleads 'victims', i.e. people whose unfulfilled needs are meant to be protected by these rights.[38]

Posner presents a related set of criticisms relating to the practical indeterminacy of international human rights law. Given how many rights are asserted in this body of law, and that securing compliance, for most of them, requires the allocation of state funds and resources, it is nearly impossible for states, especially economically under-resourced states, to comply with them all. "When many rights exist", Posner says, "a state can justify its failure to respect one right by insisting that it has exhausted financial and political resources trying to comply with other rights", and this makes it difficult to enforce human rights standards and to critique non-compliant actors.[39] Among other things, one problem that follows from this is sheer waste. Large amounts of capital, human resources, political will, and diplomatic endeavor are spent trying to address policy challenges, through a system that has a limited capacity to compel member states to comply with its own directives and injunctions. The best way forward, according to Posner, is to replace the international human rights system with something more modest in its aims – an empirically-informed set of best-practice guidelines for addressing urgent human needs and interests, which states are urged to implement but not formally bound to.

O'Neill's and Posner's complaints are cogent, but not conclusive. The fact that duty-bearers for positive human rights aren't always identified doesn't mean that they cannot be. O'Neill's point about the philosophical illegitimacy of second-generation rights can be answered, then, at least in principle.[40] As for practical

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[38] See Onora O'Neill, "The dark side of human rights" (2005) 81:2 International Affairs 427.

[39] Eric A. Posner, *The Twilight of Human Rights Law* (Oxford University Press, 2014) at 137.

[40] Even in circumstances in which no actor can plausibly be nominated as the correlative duty-bearer for a particular rights claim, it doesn't necessarily follow that the rights claim is illegitimate. Granted, it is no good postulating that there is a human right to x if we cannot specify any correlative duties for supplying or securing x. But to say that we must specify such duties doesn't mean that we must also be in a position to assign those duties right away to particular duty-bearers. Instead, as Jeremy Waldron says,

consequences, even if the costs of indeterminacy are real and significant, they may be counterbalanced by practical benefits that come with avoiding specificity in human rights treaties and institutions. For instance, in human rights declarations we may try to make things short and simple, and elide some of the complicated implementation issues, simply in order to make the documents more legible to a wide audience, including laypeople.

Eliding practical detail may also increase the probability that a given human rights proposal will become the object of a political agreement. The right not to be tortured is more likely to receive 'buy-in' if 'torture' is loosely defined. Granted, this can partly tarnish the credibility of the agreement, since it isn't wholly clear what shared commitments, if any, the parties are undertaking. But the symbolic and diplomatic benefits of entering into such agreements should not be totally discounted. Relatedly, practical indeterminacy is crucial to the formulation of rights standards that are plausibly universal in application. For example, in formulating a universal right to an adequate standard of living,[41] we leave the standard of adequacy unspecified, precisely because it requires different types and quantities of resources in different places. Restating it in terms of specific standards undermines this universalizability.[42]

Having said all this, it is still important that human rights claims have some capacity to be action-guiding and applicable to specific circumstances. The promulgation of *purely* abstract, *purely* aspirational ideals cannot, by itself, remedy the ills that human rights practice seeks to address, because it isn't sufficient to guide the work of policy-makers and legal institutions that allocate resources, coordinate people's actions, and monitor compliance. If an account of human rights cannot provide some guidance about which actions are required of which actors, it risks becoming normatively inert. This doesn't mean that a greater degree of practical determinacy overrides all other desiderata in an account of human rights. But it does mean that practical indeterminacies are a matter of legitimate concern in the formulation of such an account.

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the postulation of a human right to x can provide us with impetus to *seek out* duty-bearers to assume the responsibilities that the right to x implies, e.g. by establishing institutions aimed at securing the provision of x; see Waldron, "Duty-bearers for positive rights", October 15 2014, NYU School of Law, Public Law Research Paper No. 14-58; available at SSRN: https://ssrn.com/abstract=2510506.

[41] UDHR, Article 25.

[42] For a discussion of these uses of abstraction, see Adam Etinson, "Human rights, claimability, and the uses of abstraction" (2013) 25:4 Utilitas 463.

3.2 Scope indeterminacy

As noted above, some authors have lamented the seemingly anarchic proliferation of human rights claims.[43] The root of this complaint isn't usually the proliferation as such, but its undisciplined nature. If new human rights are being proclaimed in the absence of a decisive arbiter of their validity, without well-defined criteria against which their validity can be judged, it will be too easy for implausible human rights claims to gain superficial currency. This debases the integrity of human rights discourse, and it may also undermine the perceived legitimacy of otherwise credible human rights claims, via a kind of contaminative association. Criticisms in this vein are not merely about the failure to fully explicate all the practical ramifications of our rights claims. They are about an indeterminacy of *scope*: a failure to delineate the range of concerns to which the concept of 'a human right' can be appropriately applied.

In general, an account of a concept, C, has greater 'scope determinacy' to the extent that it can issue verdicts about a greater range of putative instances of C, with respect to the basic classificatory question of whether each of these cases is a genuine instance of C. An account of human rights suffers from scope *indeterminacy*, by this definition, to the extent that it fails to provide a clear and workable specification of what makes something a human right. To illustrate, suppose we're trying to assess the legitimacy of 20 different putative human rights claims – including some that are nearly universally accepted, e.g. the right not to be tortured, and some that are very controversial, e.g. the right to be loved. And suppose we are considering two alternative theories of human rights, A and B, which may be used as a point of reference in this assessment. Let's say that theory A issues a determinate verdict on all 20 of the claims under consideration. It tells us that in ten of the cases, the putative human rights are legitimate, while in the other ten cases they aren't. By contrast, suppose that theory B only issues a determinate verdict on some of the cases. Theory B agrees that ten of these putative human rights claims are bogus, but of the other ten putative claims, it is undecided about half of them. For five of those claims it issues a determinate verdict – that they are

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[43] For example, Griffin says "we know perfectly well what makes an act 'courageous' or 'considerate'", whereas when it comes to the application of the term *human right*, "there are unusually few criteria for determining when the term is used correctly and when incorrectly"; *On Human Rights* at 16. Griffin's point isn't merely that people disagree about the legitimacy of specific human rights claims. We may find ourselves looking at two rival accounts of human rights, offering different verdicts about the legitimacy of specific human rights claims, based on alternative sets of criteria for assessing what makes a human rights claim legitimate. That kind of disagreement about how to apply the concept of a *human right* would be perfectly fine and unremarkable. It is the kind of disagreement we have over the application of some of our most commonly-used concepts, like *justice* or *wrongness*. Griffin's point, however, is that disagreements about the legitimacy of contested human rights claims generally isn't like this. These disagreements owe largely to the fact that we often don't posit clear criteria for assessing the legitimacy of human rights claims, and indeed, haven't even properly settled the scope of the subject matter we are trying to advert to using the contested terminology. For an earlier discussion of similar concerns, see Philip Alston, "Conjuring up new human rights: a proposal for quality control" (1984) 78:3 The American Journal of International Law 607.

legitimate human rights claims – but for the others it remains undecided, and doesn't issue a verdict in either direction. By virtue of this discrepancy we can say that B has less 'scope determinacy', as an account of human rights, compared to A.

This sort of scope indeterminacy is a problem given the influence of human rights in contemporary policy-making. It is bad enough being unable to specify the practical requirements generated by recognized human rights. It is even worse if there is deep and persistent uncertainty about what qualifies as a *bona fide* human rights claim in the first place. Philosophical theorizing about human rights cannot fix this by itself. However clear and well-argued it may be, a token theory of human rights cannot miraculously prevent the uptake of ill-conceived or spurious human rights claims. If there is going to be 'quality control' in the proclamation and recognition of novel human rights claims, relevant institutional authorities must be involved.[44] But at the same time, unless we are prepared to accept human rights proclamations based on nothing more than institutional fiat, theory cannot but be involved. In trying to decide which rights should be formally recognized as human rights, we need some sort of principled criteria for identifying *bona fide* human rights, independently of their ratification. In principle, then, philosophical theories of human rights have work to do in addressing scope indeterminacy. They offer conceptual resources that can guide institutional vetting processes, by explaining how to conceive of the nature of human rights, how they are normatively grounded, and how legitimate human rights claims can be identified.[45]

In one sense 'scope indeterminacy' is a matter of theoretical concern, although it has practical implications as well. For one thing, as I say above, a haphazard, unaccountable increase in novel human rights claims may affect the perceived credibility and hence the legitimacy of human rights discourse and institutions. For another thing, addressing *practical* indeterminacy in human rights partly involves making judgements about the relative priority of the duties associated with various rights claims, and this is harder to carry out in the midst of uncertainty about exactly which rights claims figure in the schedule of human rights whose associated duties stand in need of specification.

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[44] For arguments along these lines see Alston, "Conjuring up new human rights" at 618-21.

[45] For further discussion see Griffin, *On Human Rights* at 14; Allen Buchanan, "Human rights and the legitimacy of the international order" (2008) 14:1 Legal Theory 39; Jürgen Habermas, "Remarks on legitimation through human rights" in M. Pensky, ed., *The Postnational Constellation: Political Essays* (MIT Press, 2001) 113. Obviously there are some complications lurking beneath the surface here. A philosophical account of human rights that resolves issues of scope determinacy is no good unless it also achieves a reasonable level of 'fit' with commonly-held understandings about what human rights are. If an account of human rights fails in this regard, it will strike us as being a theory of *something else* – some philosophical construct that only nominally relates to ordinary discourse about human rights; see Adam Etinson, "On being faithful to the 'practice': a response to Nickel" in A. Etinson, ed., *Human Rights: Moral or Political?* (Oxford University Press, 2018) 160.

3.3 Minimalism and practical determinacy

How do these problems of indeterminacy, and the corrective ideal of determinacy, generate an argument for Minimalism? In answering this it is useful to have a shorthand way of referring to human rights theories that demand more than Minimalism. I will use the term *Supraminimalist* for this purpose. Whereas a Minimalist says human rights merely aim to facilitate a minimally decent life, a Supraminimalist says that human rights aim to facilitate something better than this, e.g. a life that partakes of certain important human goods.[46]

In reference to practical determinacy the most plausible way to argue for Minimalism is to appeal to simple logistics. A Minimalist human rights framework will have fewer practical indeterminacy problems to contend with overall, compared to a Supraminimalist framework, because it recognizes fewer rights whose practical implications need to be specified. All else being equal, the less that human rights entitle their bearers to receive, the fewer resources they will demand, and the less logistically complex the task of providing these will be. Securing the conditions for a *better-than*-minimally-decent life will mean securing access to a wider range of goods, in health, education, employment, recreation, political participation, etc. The more and better the resources people are entitled to in these areas, as a matter of right, the more logistically onerous the practical challenges of fulfilling those entitlements will become. On each frontier there will be a wider range of problems to be addressed, including what the duties associated with the specified rights are, who exactly bears those duties, the priority of those duties relative to other duties implied by other legitimate rights claims, and which extenuating conditions qualify those duties.

With painstaking work, these questions can be answered, one by one, for each rights claim in its specific context of application. But this doesn't negate the point. The practical implementation of a Minimalist human rights framework is still less logistically onerous than a Supraminimalist framework, due to constantly evolving background conditions. As new technologies, crises, and socioeconomic conditions arise, fresh issues around the practical implications of established human rights claims emerge with them. For example, with the growth of online communication technologies we are forced to reexamine the require-

[46] To be clear, Supraminimalism thus defined is not a straw person. With respect to human rights practice and human rights law, it is a position that is reflected in the widespread acceptance of human rights claims that manifestly purport to facilitate something better than a minimally decent existence, including several of the examples mentioned in §1, e.g. the ICESCR's professed human right to the highest attainable standard of health (Article 12.1). Supraminimalism is further recommended by philosophical theories of human rights that take the contemporary Supraminimalist human rights practice as a guiding template for a theoretical specification of the scope of human rights, in particular Beitz, *The Idea of Human Rights*. And Supraminimalism is defended on independent theoretical grounds in a number of philosophical theories of human rights, including Greg Dinsmore, "When less really is less: what's wrong with minimalist approaches to human rights" (2007) 15:4 The Journal of Political Philosophy 473, and Etinson, "Human rights, claimability, and the uses of abstraction".

ments of privacy in a digital context, e.g. whether the right to freedom of expression entails a corollary right to internet access, and how to secure this access if so. No matter how fully-fleshed-out our theory of human rights is, the indeterminacies in practical implementation that are created by changing conditions cannot be pre-emptively settled. This is true for Minimalism and Supraminimalism alike. New indeterminacies are always arising, irrespective of how minimal the scope of human rights is. But because Minimalism guarantees fewer goods than Supraminimalism, it makes the recurring problem of resolving these indeterminacies less arduous. As an illustration, consider two specifications of the right to education, one Minimalist, one Supraminimalist.

> Article 42.3.2 of the Constitution of Ireland (1937): The State shall… as guardian of the common good, require in view of actual conditions that the children receive a certain minimum education, moral, intellectual, and social.

> Article 13.1 of the ICESCR (1966): The States Parties… agree that education shall be directed to the full development of the human personality and the sense of its dignity, and shall strengthen the respect for human rights and fundamental freedoms.

Both articles raise issues of practical determinacy. For instance, what types of moral and social education are encompassed in the Irish Constitution's notion of minimum education? And what are the implications of this given changing socio-economic and technological conditions, which affect equality of access, among other things? These problems have to be worked out in practice. Nonetheless, the point is that if the scope of the right to education is formulated in Supraminimalist terms, as we see in the ICESCR – aiming at something like the "full development of the human personality" – then the horizon of practical indeterminacy will expand. Our education system will have to supply a wider variety of goods – not just knowledge, but goods relating to all aspects of human life and development – and therefore many additional logistical judgment calls will have to be made about how these things are provided.[47]

It doesn't follow from this that any particular human rights institution, policy proposal, or treaty that adopts a Minimalist approach will have greater practical

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[47] Human rights express underlying values that are themselves subject to ongoing investigation. For example, if the right to privacy is underwritten by the value of dignity, then the requirements of the right depends on the nature of dignity. And the articulation of these connections is open-ended, because the nature of our underlying values is always open to philosophical debate, which leaves room for 'judgment calls' about the demands of the right – e.g. in the case of the right to privacy, whether it is compatible with various forms of 'deep state' surveillance. Although I have been emphasizing practical issues, we should also recognize that the practical indeterminacies facing a Supraminimalist approach aren't just about the means that we use to pursue our ends, they are also about the content of the ends themselves: the nature of the values or goods that are secured by human rights, and the extent of people's entitlement to them. For a discussion of how underlying values affect the practical specification of human rights claims, see Saladin Meckled-Garcia, "Specifying human rights" in Rowan Cruft, S. Matthew Liao, and Massimo Renzo (eds.), *Philosophical Foundations of Human Rights* (Oxford University Press, 2015) 300.

determinacy compared to any specific institution or treaty that takes a Supraminimalist approach. It is possible to propose a Minimalistic schedule of human rights while failing to address questions about the practical implications of rights thus asserted. It is also possible to propose a Supraminimalistic schedule of human rights, while taking care to specify all the practical requirements of the rights that one asserts. The comparative assessments that I am advancing here are better understood at the level of *types* of human rights theories, rather than token instances of those types. An argument for Minimalism from practical determinacy is, in essence, about the reduced logistical burdens and related difficulties that a broadly Minimalist approach to human rights has to contend with. It is less burdensome for Minimalists to aspire to practical determinacy, because there is less that they are purporting to determine.

Note that the argument for Minimalism I am developing here, based on the desideratum of practical determinacy, partly works in tandem with arguments for Minimalism based on ideals of feasibility and political viability, as discussed in §2.3. A human rights system that takes on a Supraminimalist approach becomes more economically costly to support, more politically fraught to implement (partly due to its costliness), and more complicated to manage (partly due to its being politically fraught). The challenge of spelling out the practical implications of a state's human rights commitments is connected with all these downsides. It adds to them in that it requires the expenditure of additional economic and human resources, e.g. to operate human rights commissions and other advisory bodies that oversee the translation of abstract human rights commitments into legislation and policy. It overlaps with them, in that the political challenges of implementing and sustaining human rights reforms will be greater the more costly and bureaucratically intrusive they end up being.[48] Again, a Minimalist approach is neither necessary nor sufficient for having a practically determinate human rights system. But it tends to reduce the burdens of achieving a practically determinate human rights system, in a way that mirrors, and partly reinforces, other kinds of pressures that will already tend to make a Minimalist approach more feasible and politically viable.

3.4 Minimalism and scope determinacy

Setting aside practical determinacy, does Minimalism have further advantages over a Supraminimalist approach in trying to achieve *scope* determinacy? First, consider how the Supraminimalist might take a defensive stance. Suppose I am defending a Supraminimalist theory on which the demands of human rights include the provision of some goods beyond those that are necessary for a minimally decent life. If I am confronted with worries about scope indeterminacy, I might

[48] See Chapters 2 and 3 of Posner, *The Twilight of Human Rights Law*, for further discussion of these burdens.

say something like: "look, the legitimate human rights claims are the ones that are explicated in my theory; so I *have* offered a complete specification of the scope of human rights". Having determinacy of scope in this particularized sense counts for something, but it doesn't dispel the worry. In order to bolster the credibility of human rights discourse, and practically prioritize the duties that are derived from human rights claims, we need something more like *generally-accepted* determinacy of scope. Again, as discussed in §3.2, it is primarily the job of human rights institutions to achieve this. But to reiterate my earlier point, formal procedures for resolving scope-related controversies must be informed by a theory of what human rights are, or else they will be relying on institutional fiat. And this theory will have to underwrite generally-acceptable verdicts about new and contested human rights claims. The main disadvantage of a Supraminimalist approach to human rights, with respect to problems of scope determinacy, is that it less well-placed to underwrite generally-acceptable verdicts about new and controversial human rights claims.

Here is a simple thought experiment that indicates why this is the case. Imagine we have two Supraminimalists, who both conceive of human rights as the rights whose correlative duties call for the realisation of the conditions necessary for a somewhat-better-than-minimally-decent life – call this an *okay* life. And suppose we ask each of them to independently produce a complete list of *bona fide* human rights claims – no practical specification of duties, just the rights claims such as they are. Imagine we also have two Minimalists – who believe human rights merely aim to facilitate a minimally decent life – and we also ask them to produce a full list of human rights. We would expect a higher proportion of overlap and 'matching' in the second pair of lists than in the first. There is some room for reasonable disagreement about the requirements of a minimally decent life. But there is even more room for reasonable disagreement about the requirements of an *okay* life.[49] Once we move beyond two hypothetical individuals, and consider the real-life stakeholders in human rights institutions – representatives of different worldviews, divided by language, culture, geography, religion, and history – the disparities will increase. These parties may disagree about what's needed to enjoy a minimally decent life, but they will have more disagreements about what's needed to enjoy an okay life. The fewer disagreements our theoretical approach

[49] There are ways of cashing out this claim that would amount to an assertion of value pluralism, i.e. the view that there is "an irreducible plurality of values or principles that are relevant to moral judgment"; see Susan Wolf "Two levels of pluralism" (1992) 102:4 Ethics 785 at 785. To be clear, I am not meaning to commit myself to this view in the argument I'm making here. Consider the non-pluralist – the monist – who believes that there is a singular value that is relevant to moral judgement, which, if clearly apprehended, could settle all debates about the requirements of an okay life. Even the most resolute monist should recognize that in disagreements about questions of value in the actual world, where foundational ethical issues are a matter of perennial debate, we are nearly always unable to identify considerations that rationally compel the assent of all sincere and well-informed parties on these questions. When I say that there is room for reasonable disagreement about the requirements of an okay life, all I mean to be committing myself to are these kinds of relatively uncontroversial points, about the inescapability of real-world moral disagreement between apparently reasonable people.

forces us to contend with, the more hope we have of establishing generally-acceptable verdicts about contested human rights claims. Minimalism limits the range of normative issues under consideration, and thereby creates the possibility of greater pluralistic convergence.

To echo my point about practical logistics in §3.3, it is true that careful consultation and dialogue may sometimes foster a consensus where none was thought possible.[50] But as in the logistics case, this task is never finished. Shifting social and technological conditions mean that there are constantly-evolving parameters around our attempts to understand and define human interests. Granted, this continual change has some destabilizing effect on judgements about the requirements of a minimally decent life. But it has a greater destabilizing effect on judgements about the requirements for a life that exceeds this threshold. Trying to get adherents of different worldviews to agree about this, in an ever-evolving world, is a monumental challenge. Minimalism restricts our focus to a more limited range of basic human needs, around which cross-cultural judgements remain comparatively stable even in the midst of social changes.[51]

To summarize: an individual Supraminimalist can propose determinate answers to questions about the scope of human rights. But Minimalism, as a general approach to theorizing human rights, is better-placed to offer generally-acceptable verdicts about contested human rights claims, and thus to prevent the problems that come with a proliferation of spurious human rights claims. This is because it confines the scope of human rights discourse to areas where followers of different worldviews are more likely to find agreement.

Similar to the previous section, this argument for Minimalism works in tandem with an argument sketched in §2.3, based on *pluralistic adequacy*. In order to gain the support of a diverse public – and to avoid charges of imposing a parochial, Western ethical agenda – human rights must be acceptable to a wide range of

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[50] To express cautious optimism in this direction isn't to accept any strong thesis about the universality of human rights standards. As my discussion indicates, I think adherents of different worldviews have genuine disagreements about the normative issues that human rights standards seek to address. Where consensus is achievable, it is to be achieved not by effacing these differences, but by finding compromises and adaptable normative standards that are acceptable to all parties. As Sen puts it, parochiality and partisanship in human rights standards can be avoided "not so much by taking either a conjunction, or an intersection, of the views respectively held by dominant voices in different societies across the world… but through an interactive process… examining what would survive in public discussion, given a reasonably free flow of information and uncurbed opportunity to discuss differing points of view"; Amartya Sen, "Elements of a theory of human rights" (2004) 32:4 Philosophy & Public Affairs 315 at 320.

[51] There is a somewhat flat-footed reply available here. One might simply say: "it cannot be *that* hard to achieve agreement about these matters; after all, look at all these international human rights treaties that have been signed by most or all UN member states". But this line of reasoning moves far too quickly. It is hard to tell what degree of common understanding about the nature of an okay human life is indicated by countries entering into human rights treaties. One complicating factor is that states often register formal reservations that limit their treaty obligations. Another complicating factor is that states often enter these treaties under various forms of external duress. (On both of points, see Chapter 2 of Posner *The Twilight of Human Rights Law*.) There too many complicating factors in the vicinity to suppose that the point I'm making in the main text can be easily undermined by this kind of flat-footed objection.

worldviews. Minimalism makes this easier, since there is more intercultural agreement on what makes for a minimally decent existence, than on what makes for a flourishing (or otherwise better-than-minimally-decent) life. A different way to try to achieve pluralistic adequacy, if you are committed to Supraminimalism, is to downplay worries about indeterminacy of scope. As long as we have something close to a pluralistic consensus about a wide range of established human rights claims, so one might argue, we can live with uncertainties and disputes about controversial new human rights claims. This is a defensible position, in principle. But the more we reckon with the actual costs that indeterminacy of scope brings with it, the more pressure this position comes under. By foregrounding those costs, we reinforce our explanation of why the turn to Minimalism seems like the right way of dealing with the demand for a pluralistically adequate account human rights. Given its more limited aspirations, Minimalism leaves a narrower window for disagreement, and thus offers the best hope for articulating human rights standards that are at once both pluralistically adequate *and* determinate in scope.

4. Conclusion

Our question was why are many human rights theorists reluctant to embrace the Supraminimalist aims of contemporary human rights practice? Why do they hold onto the idea that human rights should merely be aiming to shield us from the worst? The arguments above don't show that Supraminimalism is utterly untenable, but they offer a sharper sense of the challenges that come with it.[52] If you want human rights standards to be feasible, politically viable, and pluralistically adequate, you are more likely to get what you want on a Minimalist view. The ideal of determinacy reinforces this. If you think the practical implications of human rights claims need to be explicated, this widens the 'feasibility gap' between Minimalism and Supraminimalism. And if you think we should be seeking a determinate, general consensus about the scope of human rights, this will make it even harder for Supraminimalists to offer a pluralistically adequate account of human rights, compared to Minimalists.

International human rights law and contemporary policies aiming to realize human rights are evidently Supraminimalist, and many human rights theorists think we must theorize human rights in a way that answers to this fact.[53] And yet there

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[52] There are arguments against Minimalism that I haven't discussed, including the argument that Minimalism is in a certain sense self-defeating. The argument, roughly, is that if human rights standards are only activated in the most urgent circumstances – in attempts to remedy atrocities, severe injustices, and moments of total political chaos – then they will seldom be realizable or enforceable. As one author says, then, "the minimalist conception of rights stakes its claims in precisely the situations where they are most likely to fail, further undermining the human rights project"; see Dinsmore, "When less really is less" at 473.

[53] See Etinson, "On being faithful to the 'practice'".

continues to be a gravitational pull towards Minimalism in human rights theory. This pull exists because we expect human rights to be practically translated into effective law and policy, and because there are certain regulative ideals, including determinacy, which it seems like we must aspire to in order for this to have any decent chance of success. The more ambitious the agenda that we adopt under the banner of human rights, the harder it is to have human rights law and policy that is practically spelled-out, determinate in scope, acceptable to an ideologically diverse set of peoples, and politically realizable among those peoples.

But just how timid should our ambitions be? We could contrast Minimalism with an approach that demands even less, on which human rights aim to facilitate not even a decent life, but merely a life that's very slightly preferable to abject suffering. Let's call this view *Sub-Minimalism*. It would seem bizarre to criticize Minimalism for being less feasible than Sub-Minimalism, or to praise Sub-Minimalism because it has an easier time offering a pluralistically adequate account of the conditions required for the slightly-better-than-abject standard of life that it sees human rights as aiming to facilitate. The fact that it is more difficult to offer a human rights framework that is determinate, politically feasible, pluralistically adequate, *and* which goes beyond modest, Minimalistic aims, doesn't yet mean that the attempt is pointless. If the ease of the task were the only priority, then the solution would be to set our sights as low as possible. If the arguments for Sub-Minimalism seem absurd, this is because the ease of the task isn't the only thing that matters. Human rights are, in some sense, about trying to significantly improve humanity's lot.[54] This overarching purpose needs to be factored in, somehow or other, in any account of the character and limits of human rights.

When we observe Minimalist theorizing in human rights discourse, including from authors who raise concerns about practical indeterminacy, like O'Neill and Posner, we don't get a sense of people who are simply indifferent to this overarching purpose. What we see, rather, is a sincere and almost solemn pessimism. We see worries about how things go awry if we set our sights too high, which encourage erring on the side of caution in trying to improve humanity's lot. However one feels about that sort of pessimism, the difficulties of developing a credible Supra-minimalist account of human rights will have to be properly reckoned with. As I explained in §3.4, it is a major challenge trying to get representatives of different value systems to agree about the requirements for an okay or good life, and all the more so when social changes are complicating our understanding of human needs

[54] To quote Amartya Sen, echoing Marx, the appeal to human rights comes "mostly from those who are concerned with changing the world, rather than interpreting it"; see "Elements of a theory of human rights" at 317.

and interests. Even nebulous agreements about these matters are difficult to achieve, let alone determinate and precise agreements.[55]

[55] For comments and feedback on earlier versions of this article I am grateful to an anonymous referee and the editors of this journal, as well as audiences at the Durham University Law School in 2019, the Australian Association of Philosophy Conference at Monash University in 2016, and the American Philosophical Association Pacific Division meeting in 2016. This paper started life as a co-authored piece of writing with Adam Etinson. Eventually he and I realised that our views were a bit too out of sync to make the co-authoring feasible. But I am immensely grateful to Adam for the many fertile discussions we had about these issues, and for the work he contributed to earlier versions of this paper. Of course I take full responsibility for the views in the paper and any problems with them.