

Standard Threats: How to Violate Basic Human Rights

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Abstract: The paper addresses the nature of duties grounded in human rights. I contend that rather than being protections against harm, per se, human rights largely shield against risk impositions to protected interests. “Risk imposition” is a normative idea requiring explication, but understanding dutiful action in its terms enables human rights to provide prospective policy guidance, hold institutions accountable, operate in nonideal circumstances, embody impartiality among persons, and define the moral status of agencies in international relations. Slightly differently, I indicate a general understanding of dutiful action that permits human rights to see to the tasks of an institutional morality.

Keywords: human rights; risk; standard threats; state responsibility; standard of care

How does one violate human rights? Otherwise asked, what manner of duty does a human right ground? Despite the recent philosophical interest in human rights, we do not yet have an adequate answer. Here are some kinds of human rights claims that we make:

- (1) Country X is a human rights-respecting state.
- (2) International lending agency Y has violated people Z’s human right to an adequate standard of living by requiring Z’s state to privatize water services, thereby reducing access to clean water.
- (3) P is torturing Q, and consequently, Q’s human rights are being violated.
- (4) Economic sanction/act of war/international policy S is leading to severe material deprivation, thus S constitutes a human rights violation.
- (5) Polity T only occasionally investigates allegations of sexual assault against women, and even less occasionally prosecutes suspects, and consequently violates the human rights of women.

With regard to each, what facts would we need to know in order to regard the assertion as justified? These sorts of claims frequent official and unofficial political forums,¹ and we should want philosophical theorizing

¹Most of the above could be framed in terms of rights identified in the Universal Declaration of Human Rights (UDHR). I will largely reference less controversial human

about human rights to illuminate the conditions of their justified assertability,² as well as the normative consequences of their correctness. Without such clarification, human rights discourse is threatened with the sense that it is mere diversionary talk, purely a language of political aspiration, simply another ideological instrument of politics, or meaningless and empty. Important problems have received attention and analytical clarification, but it still remains uncertain which kinds of facts are generally relevant for assessing the above-indicated types of claims. Put otherwise, it is unclear what we have to know about the world in order to discern that any human right has been violated (excusably or not, justifiably or not).

As a preface, I argue that human rights violations ought to be largely understood as, at base, risk impositions. The relevant facts for assessing human rights claims are those that pertain to the imposition of risk. “Risk imposition” requires analysis, but the view can be briefly summarized as follows. The requirements of human rights play a conceptual role analogous to that of the standard of care in negligence law. To bear a duty of care in tort is to owe a context-sensitive degree of risk mitigation to another, such that failure *wrongs the right-holder* and *modifies the normative situation* of both parties. For instance, the duty-bearer is now liable for any injuries to the wronged consequent of the risk imposed, and the right-bearer can seek recourse for any such injuries. Similarly, those bearing human rights duties normally fail by inadequate precaution, thereby wronging rights-bearers and modifying the moral situation of the parties. The analogy is not perfect, as the normative consequences at issue will differ between the cases in important respects, but as with the standard of care in tort, the risk-based requirement enables human rights to meaningfully perform as an operational normative system regulating large domains of human institutional life. Such an analysis can explain, moreover, the propriety of the language of “standard threats” found in much human rights theory.

1. Introduction: Against Simple Deprivation

The problem for human rights may not be obvious. Here is an attractively simple view: the fact of someone’s torture, for instance, is the fact we

rights, since it is not my aim to settle which human rights we have.

²A point well made by Nicole Hassoun: see “Some Reflections on *the Moral Dimensions of Human Rights*,” *Jurisprudence* 3 (2012): 253-62. Though Hassoun takes a legitimacy-based rather than human rights-based approach to protecting the autonomy of the vulnerable, her discussion of the institutional context in which we are tempted to make claims of human rights is nicely illustrated in her *Globalization and Global Justice: Shrinking Distance, Expanding Obligations* (New York: Cambridge University Press, 2012).

need to know in order to recognize the relevant human rights violation. More generally, if we know I have a human right against (or to) some sort of treatment, then being so treated (or not being so treated) constitutes a violation. We will know the relevant facts upon discernment of which human rights we have—the salient facts will be settled by an adequate formulation of the right.

The apparent simplicity is evasive rather than illuminating, and trades in on the fact that the right against torture appears to concretely explicate the corresponding duty. Leaving less specific human rights temporarily aside, even this apparently straightforward right involves unacknowledged complexity, and not because (if it is the case) torture may be justifiable in rare circumstances—that is, that there may be justifiable human rights violations. Compare two circumstances. Polity A is well-governed by the rule of law, and equitably and adequately protects personal security. Polity B inadequately or inequitably protects personal security by failing, for instance, to reliably investigate crimes in a certain region. If someone in Polity A decides, in his private capacity, to kidnap and torture a neighbor, perhaps we would impute a human rights violation to him, but probably not to his polity (if it is appropriately responsive to the crime, and so on). If a person so acts in Polity B, where there has been a spate of recent similar acts, then whatever we say about the torturer, we are much more inclined to impute a violation to the polity. The simple view cannot explain the difference in the assessment of the polities. Both circumstances involve tortures where the victim had a human right against torture against the polity. As an alternative to the simple view, we can say that Polity B ought to protect its subjects from *standard threats* to their interest(s) in not being tortured, and we have some evidence (B's institutional practice and the fact of the tortured neighbor) that it failed precisely in this respect. The idea of standard threats, here, permits us to differentiate harms that implicate institutional human rights violations from those that do not.

Consider also rights where the general formulation offers less guidance as to what is concretely required (e.g., rights to life, bodily integrity, personal liberty, an adequate standard of living, and so on). Perhaps the challenge is to make formulations more specific, and better indicative of which duties each right grounds, but this requires a principled approach—even if we have settled the underlying interests that human rights properly protect. Not all human-caused setbacks to bodily integrity will register as human rights violations, nor will all such deaths. A fatal traffic accident, in the circumstance of reasonably safe regulation and absence of personal negligence, is not a human rights violation. So, what duties regarding bodily integrity and life do the relevant human rights

ground? Again, part of the challenge here is to differentiate harms to protected interests indicative of a human rights violation from harms *to protected interests* that are not.³ These pedestrian examples show that the simple view is inadequate to the task, and so must be substantially modified or abandoned.

I argue that human rights violations largely do not require that someone suffer serious harm by another's agency. Injury to interests protected by human rights is neither necessary nor sufficient for a human rights violation. Rather, human rights violations are typically agential failures concerning risks to protected interests. Somewhat differently, I contend that the proper explication of "standard threats" largely provides the resources for understanding what human rights requires of its duty-bearers.⁴ Since Henry Shue's *Basic Rights*, the term "standard threats" has occasioned human rights theory, but it has not received sustained analysis or defense.⁵ We should fill this theoretical gap, for several reasons. First, we need a clear understanding of why a standard-threats approach is appropriate, compared to alternatives. I argue that it is capable of addressing the just identified problem for the simple view, and alone invokes the kind of considerations capable of providing prospective guidance for large arenas of social policy. Second, if one violates human rights by failing with respect to standard threats, then the idea requires determinacy. Without clarification here, we do not know what would have to be true of the world in order to warrant the types of claims stated initially—even if we have resolved which human rights we have, what interests they protect, who can bear their duties, and what normative consequences follow their violation. I provide an analysis that says, roughly, human rights violations consist in the increase of risk to dignity interests above an acceptable background level. To possess a human right, then, is to at least possess a claim against an agent to a background level of risk, as

³This example also shows us that mere appeal to standard threats, without a substantive account of the idea, is also inadequate to the task. On the face of it, a standard threat of modern systems of transport is death by the normal use of automobiles.

⁴A full account of what human rights require, from an all-things-considered point of view, would need a discussion of justifications, excuses, and consent. Here I am concerned with what counts as wrongful conduct, with respect to human rights, in the first place.

⁵Shue declines to fully explicate the idea, though it plays a basic role in his analysis of rights. See Henry Shue, *Basic Rights: Subsistence, Affluence, and U.S. Foreign Policy* (Princeton: Princeton University Press, 1980), p. 191 n. 22. Nickel too adopts the idea, emphasizing that human rights protect against experienced dangers to basic human interests. See James W. Nickel, *Making Sense of Human Rights*, 2nd ed. (Malden, Mass.: Blackwell Publishing, 2007), pp. 70-74. Donnelly and Beitz also employ the concept. See Charles R. Beitz, *The Idea of Human Rights* (New York: Oxford University Press, 2009), pp. 109-12, and Jack Donnelly, *Universal Human Rights in Theory and Practice*, 3rd ed. (Ithaca: Cornell University Press, 2013), pp. 97-99.

opposed to a claim to the satisfaction of an interest. Third, a sharper picture of the idea of standard threats contributes, I will argue, to human rights' capacity to perform important functions of a political morality. In the international sphere, for instance, many appeal to human rights to help settle the proper scope of state sovereignty and permissibility of intervention, the justness of war, the propriety of official condemnation of state policy, the legitimacy of trade and lending arrangements, whether a polity is deserving of international recognition, and so on. I show that the standard of right conduct supplied by a proper analysis of "standard threats" facilitates this role.

I should here emphasize that my primary concern with human rights is in its aspect as an institutional morality. I take no stance as to whether human rights provide standards for interpersonal conduct, or whether they perform some other important function. In any case, human rights discourse purports to set standards for permissible institutional conduct both to guide institutional policy and to hold institutions accountable. My account is consciously focused, then, on the features human rights morality must possess in order to even be potentially adequate to these tasks. Human rights claims are prominent features of political life, and much theory is dedicated to them. Moreover, if such claims can be shown to amount to something, we might have a valuable normative perspective by which to evaluate institutions. Their perceived importance and potential value should motivate us to consider what it would mean for an institution to take them seriously, that is, what must be true about the character of human rights' demands for human rights to serve as an institutional morality.

2. Human Rights Claims: A Schema

"Standard threats" concerns one element of the idea of human rights, so I should briefly schematize what a claim to a human right involves. No summary elaboration will be wholly uncontroversial, but I hope to frame things in a way that rests comfortably with much extant literature. A human right is a moral, nontransactionally grounded, moderately social context-insensitive, and difficult to alienate claim-right possessed in virtue of some aspect of the status of being human. A human right is not identical with any posited norm (e.g., a legal norm),⁶ nor is its existence

⁶Which is not to say that the *idea* of human rights ought not be sensitive to the actual political practice of human rights. See James Griffin, *On Human Rights* (New York: Oxford University Press, 2008), pp. 9-32; Beitz, *The Idea of Human Rights*, pp. 1-47; Joseph Raz, "Human Rights without Foundations," in Samantha Besson and John Tasioulas (eds.), *The Philosophy of International Law* (New York: Oxford University Press, 2010), chap. 15.

grounded in a transaction between parties (e.g., a promise or contract). Human rights may be universally held, though perhaps they can be somewhat sensitive to social conditions such that, for example, a right to advanced education is only operative in certain societal circumstances. In any case, a human right is claimable in a wide variety of social venues. Human rights may be inalienable, but if not, only a possessor can abdicate and only under stringent conditions (e.g., full information and complete voluntariness). A human right is a claim-right⁷ possessed in virtue of some aspect of the status of being human. I will offer more on this shortly, but to say it is a claim-right is to indicate that another has at least one corresponding duty, and that failure to carry out the duty wrongs the right-holder. Frequently, the capacity for or possession of human dignity (somehow interpreted) is seen as the ground for human rights.

Much theory is devoted to the last matter: the moral grounds of human rights. Prominent suggestions include an interest in normative agency,⁸ the capacity for distinctively human flourishing,⁹ basic interests protected by the core of justice,¹⁰ equal concern and respect for personal responsibility,¹¹ a more basic right to justification requiring mutual respect,¹² and a plurality of important human interests of fundamental concern to international politics.¹³ I avoid taking sides in this dispute, and, since these are frequently offered as interpretations of human dignity, will simply say that some aspect of human dignity protects certain human interests by imposing obligations on others. We can now offer a schema: to claim there is a human right is to say that there is some *interest* (or interests) that is protected by a *duty* in *another* specifying a *standard of behavior*. A human right involves at least a: (1) protected interest, (2) duty, (3) duty-bearer, and (4) standard of conduct. Each element can be investigated separately. As we saw above, we can focus on the charac-

⁷Though, as Wellman notes, human rights frequently involve other Hohfeldian powers. See Carl Wellman, *The Moral Dimensions of Human Rights* (New York: Oxford University Press, 2011), pp. 41-51. My focus will be on human rights' aspect as claim-rights.

⁸Griffin, *On Human Rights*.

⁹Martha C. Nussbaum, "Capabilities and Human Rights," *Fordham Law Review* 66 (1997): 273-300. See also Amartya Sen, *The Idea of Justice* (Cambridge, Mass.: Harvard University Press, 2009).

¹⁰Allen Buchanan, *Justice, Legitimacy, and Self-Determination: Moral Foundations for International Law*, paperback ed. (Oxford: Oxford University Press, 2004).

¹¹Ronald Dworkin, *Justice for Hedgehogs* (Cambridge, Mass.: Harvard University Press, 2011), pp. 332-39.

¹²Rainer Forst, "The Justification of Human Rights and the Basic Right to Justification: A Reflexive Approach," *Ethics* 120 (2010): 711-40.

¹³John Tasioulas, "Towards a Philosophy of Human Rights," *Current Legal Problems* 65 (2012): 1-30.

ter of the protected interests, normally in a way that would illuminate why they could be a source of duties.¹⁴ We can also ask (in general) what it is to be under a duty.¹⁵ Or, we can consider who or what can and should be a bearer of human rights duties.¹⁶ Knowing all this, we would still not know the behavior prescribed or proscribed by the duty for the bearer. I consider (4) here.¹⁷

My claim, then, is that a proper explication of the idea of standard threats helps indicate what, in large part, human rights morality requires of its duty-bearers.¹⁸ So framed, positing the relevance of standard threats is not to suggest a constraint on the extent of human rights duties (such that human rights duties could be more demanding absent the constraint).¹⁹ It is, on my view, to offer an account of what a human rights

¹⁴I use the term “interest” as nearly all recent human rights theories are articulated in terms of interests or a cognate (e.g., capabilities facilitative of human flourishing). However, I do not intend to take a stand on the will/interest debate concerning rights. I believe my formulations could be adapted to other theories.

¹⁵See, for example, Judith Jarvis Thomson, *The Realm of Rights* (Cambridge, Mass.: Harvard University Press, 1990), pp. 61-78.

¹⁶Compare Griffin, Beitz, and Pogge: James Griffin, “Human Rights and the Autonomy of International Law,” in Besson and Tasioulas (eds.), *The Philosophy of International Law*, chap. 16, pp. 343-47; Beitz, *The Idea of Human Rights*, pp. 13, 108-9; Thomas Pogge, *World Poverty and Human Rights*, 2nd ed. (Malden, Mass.: Polity Press, 2008), pp. 50-57. Importantly, answering the question of who is, in principal, a candidate for bearing human rights duties would still leave us with the pressing question of which candidate agents actually bear the duties. See Onora O’Neill, *Bounds of Justice* (New York: Cambridge University Press, 2000), pp. 97-142. For two responses to O’Neill’s concerns, see Elizabeth Ashford, “The Inadequacy of Our Traditional Conception of the Duties Imposed by Human Rights,” *Canadian Journal of Law and Jurisprudence* 19 (2006): 217-35; Adam Etinson, “Human Rights, Claimability, and the Uses of Abstraction,” *Utilitas* 25 (2013): 463-86.

¹⁷My agnosticism about the grounds of human rights and the nature of human dignity is appropriate for two reasons. First, what I say here is consistent with a variety of views about the moral grounds of human rights, i.e., with various understandings of human dignity and its capacity to generate obligations in others. Slightly differently, it addresses a problem common to many theories. Second, I focus on core rights, considering what standard of conduct would be serviceable for them. Such rights include a right to life, bodily integrity, due process, freedom of religion, liberty of person, and so on. The sorts of interests in question are likely desiderata for an account of human dignity, such that it would count against a theory if it did not have the result that they are protected. Undoubtedly there are other protected interests, and precisely which ones will depend on the best account of dignity. Yet, we need a standard for the core interests, at the very least, if human rights are to be a viable political morality. The analysis can likely be extended to other interests once a theory of dignity is adopted.

¹⁸“In large part” in that I am here excepting prohibitions on intentional harming, which plausibly are also part of the demands of human rights. I discuss this in section 3.b.3.

¹⁹An interpretation suggested by Hassoun. She says: “It is not clear, however, that [accounts of human rights] should be constrained in the absence of good practical reasons

duty amounts to in the first place. Human rights largely *do not require* that an agent avoid harming the protected interest or that an agent protect against all threats to an interest. I argue that the norm is to protect against standard threats, properly understood.

3. To Protect Against Standard Threats

3.a. Why “standard threats”?

As I have mentioned, understanding human rights as protections against standard threats is not, by itself, new. Undoubtedly, some of the attraction of the approach arises from feasibility considerations in matters of institutional governance.²⁰ Most think that states, for instance, have human rights duties, and it is simply not feasible for states to refrain from all harming or to protect against all threats. We can expect protection from the predictable threats of modern life to human dignity where the responsible agency is reasonably capable of offering protection in a way that does not violate other moral constraints.²¹ This is a reasonable point, especially for the political practice of human rights, yet straightforward appeals to feasibility are ambiguous—they may simply indicate strong justifications for not living up to what human rights require. We might speak in terms of standard threats to human dignity to partly summarize when we justifiably, given other moral political considerations, do not do what human rights strictly demand (e.g., protect against *all* threats to autonomy). People are still wronged, regrettably, in terms of their human rights, but this is often justified, all things considered. Somewhat differently, it is unclear what role feasibility is playing in grounding the propriety of standard threats discourse: is it settling the standard of right conduct with respect to human rights, or is it summarizing considerations that normally justify departures from the standard?²²

for constraining them. Suppose autonomy grounds the importance of human rights. Then, perhaps, rights should protect individuals’ ability to secure whatever they need for autonomy, unless there are equally strong considerations that justify exceptions.” Hassoun, *Globalization and Global Justice*, p. 25. Hassoun merely offers this as a passing suggestion, but this would be, in my view, to give an alternative account of what human rights require.

²⁰See, e.g., Beitz, *The Idea of Human Rights*, p. 111.

²¹Ibid., pp. 111-12.

²²Does it matter? Yes, for at least three reasons. First, a theoretically accurate understanding is itself valuable, insofar as we want to simply understand this aspect of our normative discourse. Second, inaccuracy or imprecision in one region of theorizing can negatively impact other areas when our concern shifts—e.g., when we begin to consider when we may justifiably depart from the demands of human rights. Third, if we are normally justifiably violating human rights, then this could significantly affect what our

“Standard threats” should be seen as specifying the requirements of human rights, and we can see why once we attend to a general difficulty the natural rights tradition faces regarding risk. Traditionally, natural rights are understood as forbidding some determinate outcome (e.g., physical harm, death, unconsented property loss), or requiring the procurement of some determinate outcome (e.g., rescue, or nourishment of a child into adulthood). Yet, we typically decide where we can only, at best, estimate the probable outcomes of an action. Moreover, nearly everything one does creates at least a small risk of harm to others. My morning coffee could spell death by gas explosion for my neighbor.²³ What does another’s right to bodily integrity say, then, about my imposition of risk of bodily harm? To say that I cannot permissibly impose any risk of harm is implausible, as it rules out as wrongful almost any activity—especially when we begin to think at the level of social policy. What else the natural rights theorist should say is unclear.²⁴ It is worth quoting Shelly Kagan at length to illustrate the difficulty, as it sets up part of the paper’s task:

Imagine that there is a gizmo attached to my electric harpoon, with a dial marked off in gradations from 0 percent to 100 percent. As I move the dial down from 100 toward 0, I effectively decrease the likelihood that the harpoon will actually fire when I squeeze the trigger. Does the constraint [against harming] permit me to pull the trigger when there is only a 90 percent chance of killing my given victim? What about 89 percent? It seems that the defender of the constraint against doing harm can only offer two sorts of answers ... He can pick some general cutoff point, and claim that, say, the constraint only forbids a 73 percent or greater chance of doing harm ... But this first response, obviously, is hopelessly arbitrary ... If we rule out this sort of cutoff response, however, then it seems that the defender of the constraint must answer instead that *any* chance of doing harm ... would be forbidden by the constraint ... But this second response would simply lead to

attitudes towards the wronged ought to be (compared to a situation in which rights are not being violated). Frequently, wronging someone with respect to his moral rights, even justifiably, requires a reparative response (e.g., compensation, or an apology).

²³Judith Jarvis Thomson, “Imposing Risks,” in *Rights, Restitution, and Risk: Essays in Moral Theory* (Cambridge, Mass.: Harvard University Press, 1986), chap. 11.

²⁴As Nozick puts it: “Actions that risk crossing another’s boundary pose serious problems for a natural-rights position ... Imposing how slight a probability of a harm that violates someone’s right also violates his rights? ... It is difficult to imagine a principled way in which the natural-rights tradition can draw the line to fix which probabilities impose unacceptably great risks upon others.” Robert Nozick, *Anarchy, State, and Utopia* (New York: Basic Books, 1974), pp. 74-75. See especially: Peter Railton, “Locke, Stock, and Peril: Natural Property Rights, Pollution, and Risk,” in *Facts, Values, and Norms: Essays toward a Morality of Consequence* (New York: Cambridge University Press, 2003), chap. 7; Thomson, “Some Questions About Government Regulation of Behavior,” in *Rights, Restitution, and Risk*, chap. 10; David McCarthy, “Rights, Explanation, and Risks,” *Ethics* 107 (1997): 205-25; Sven Ove Hansson, “Ethical Criteria of Risk Acceptance,” *Erkenntnis* 59 (2003): 291-309; Madeleine Hayenhjelm and Jonathan Wolff, “The Moral Problem of Risk Impositions: A Survey of the Literature,” *European Journal of Philosophy* 20, suppl. S1 (2012): E26-E51.

general paralysis. For there is absolutely *nothing* that I can do which does not carry *some* risk of harming others.²⁵

Perhaps risk, endemic to human social life, is devastating to traditional natural rights thinking if it cannot supply, in a principled way, norms demanding something other than bringing about/avoiding outcomes.²⁶ In any case, we can say something of equal importance for offering the best theory of human rights.

A success condition for a theory of human rights is that it should show them to be practically meaningful for national and international policy. In particular, rights should provide guidance to practical reason about what is permissible by grounding duties. Understanding rights as requiring outcomes (e.g., preventing harm) undermines their ability to provide such guidance. Even in a deterministic universe, our epistemic relationship to the causally complex world rarely affords justified certainty in a particular outcome—and this, again, is exacerbated at the level of social policy. From the *ex ante* perspective of the agent, the relationship between a decision and outcomes is probabilistic, and almost always involves probabilities other than zero and one. Rights theory has four options. One, it could forbid any action that has a probability greater than zero of harming a protected interest. As noted above, this would paralyze the agent. Two, it could permit any action that is not guaranteed to result in harm. This would render almost all activity, including extremely risky activity, permissible from the standpoint of rights. One would be barely capable of violating rights. Three, the morality of rights could prescind from saying anything about risk impositions—it could simply be a morality of outcomes. In this case, it offers little advice to the decision-maker, as she normally decides on the basis of probabilities. Four, it offers a principled account of acceptable risking to protected interests, where acceptability can fall between zero and one. Options one through three effectively have the result that either (nearly) all actions are permissible or (nearly) all actions are impermissible in terms of rights from the *ex ante* perspective of decision. Guidance could still be sought elsewhere in morality, but in order to know whether any action or policy

²⁵Shelly Kagan, *The Limits of Morality* (Oxford: Oxford University Press, 1989), pp. 88-89. We might think that intending to impose a risk, as opposed to merely foreseeing a risk imposition, is significant (*ibid.*, p. 91). However, intention cannot fully address the problem for a rights-based theory, as can be gathered by considering high risk activities performed with innocent intentions. More generally, we do not want the force of rights to be wholly hostage to the structure of an agent's plans. See Dennis McKerlie, "Rights and Risk," *Canadian Journal of Philosophy* 16 (1986): 239-52, pp. 243-45. I discuss intention below. Even if intention is sometimes relevant, it does not resolve our basic difficulty, since we still need to know what counts as negligence with respect to the protected interest.

²⁶McKerlie, "Rights and Risk," pp. 245-51.

purportedly concerning human rights is permissible, we would have to rely almost exclusively upon heterogeneous moral concerns. Hence, we should not understand human rights' duties in outcome-centric terms.

Call the following the *practical inference test*. Any nonskeptical account of human rights must show them to regularly assist inferences about what it is *prospectively* permissible to do. Interpreting human rights requirements in terms of determinate outcomes fails this test. Perhaps, though, it might be thought that I am moving too quickly, by ignoring the difference between knowing *how to* fulfill our duties and *what*, as a moral question, our duties are. I have a duty not to kill innocents, but it is up to me (given my knowledge of human anatomy, basic facts about the world, and so on) to discern how to act pursuant to this requirement (by, for example, not firing a weapon into a crowd). A similar point might hold for human rights. Although an important distinction, it does not help the position rejected here. From the standpoint of decision, when we are discerning permissibility, requirements demanding certain outcomes cannot settle the permissible "how." Again, any policy an agent adopts to avoid/achieve an outcome will have a probabilistic relationship to the outcome. We want to know whether the policy crosses the threshold of acceptable probability. Sometimes this will be intuitively clear, as in the crowd case. Sometimes it will be less clear, as when one hunts game in lightly populated areas. The agent needs to know in advance which is acceptable, even when the former could result in no injury, and the latter in a human fatality. What the agent needs, to select a policy, is a principled way of adjudicating probabilities. Merely mandating an outcome does not do this, thus failing the practical inference test.²⁷

Return now to the torturer and the traffic accident. Almost all human

²⁷It still might be thought that I exaggerate. The right to life, construed as a right to an outcome, surely tells a gunman that it is *wrong to fire* into a crowd. However, strictly speaking, this is false. It tells him not *to kill* anyone in the crowd. Set aside (for now) intention, and imagine that he justifiably believes there is a 99% chance he will kill someone if he opens fire. He fires, and no one is harmed. He surely acted wrongly, but not with respect to an outcome right, since he did not bring about a forbidden outcome. Of course, the unlikely outcome was inaccessible to him, but that is precisely the point. From the perspective of an outcome right, the gunman knows that there is 99% chance that he will violate someone's right if he shoots, but not that shooting violates someone's right. An outcome right is a right to an outcome, simply, irrespective of the epistemic position of the agent. Consider a case in which the gunman is hunting in a designated area and does, while taking precaution, shoot someone. There he violates a purported outcome right, despite precaution. Strictly from the view of the outcome right, he acted less permissibly in this second case. Aside from being a counterintuitive moral result, it shows us how little is typically gathered *ex ante* about how to act responsibly from a strictly outcome right. Rights should permit us to straightforwardly say, *ex ante*, that the gunman would wrong the bystanders by opening fire.

rights theorists agree that we want to at least be able to hold political institutions accountable in terms of human rights. The examples illustrate the difficulty of relying on mere deprivation, treatment, or harm for identifying when institutions violate human rights. If a polity has a policy of torturing suspects, this is clear enough. Yet, the event of torture, in the presence of effective, active, and well-regulated legal institutions protecting personal security, does not implicate a violation on the part of the polity. More generally, not all setbacks to interests deserving protection register as human rights violations. Again, the fatal traffic accident (which was avoidable—the polity could forbid motor vehicles) involves basic setbacks to human interests: death. Yet, we do not regard the harm as a rights violation on the part of political institutions. No one has been wronged, and no reparative response appears in order—a mundane example, but it requires explanation, and others could be adduced: thefts, accidents, acts of God, and so on. The explanation, I suggest, is that we only treat unintentional harm as involving human rights violation when the injury is a function of an inadequate response to risk. When an agent ought to have foreseen and mitigated dangers to protected interests, but failed (in either respect) and harm is a consequence of this failure, we can then treat the injury as implicating a human rights violation. Call the demand that a theory of human rights should only hold institutions accountable for *wrongful* injury (rather than injury generally), and should have some principled basis for distinguishing between wrongful and nonwrongful injuries, the *institutional negligence test*.

The combination of the practical inference test and the institutional negligence test yields the conclusion that the duty element of human rights must largely be framed in terms of probability rather than outcomes. We should understand human rights duties in terms of a notion that is responsive to the epistemic situation of agents such that permissibility in the circumstances of decision is at least partly illuminated. “Standard threats” appears promising.

3.b. Illustrations and further defense

1. Rights to fair trial and liberty of person. I am imprisoned, for a crime I did not commit. Assume that I have a human right to liberty of person and a public and fair tribunal for criminal charges. Are my human rights violated? Consider what the answer depends on. If I am convicted by an impartial jury of my peers, after a trial with appropriate procedural guarantees concerning evidence, self-incrimination, legal representation, and the like, then this suggests that, although my imprisonment is unfortunate (perhaps tragic), it is not wrongful with respect to human rights—including the right to liberty of person. If, however, there are severe pro-

cedural failings, the jury selection is biased, the judge is corrupt, the presumption of innocence is denied, or the judiciary is generally influenced by the executive, then it appears that my rights are indeed violated. The difference in the two types of scenario is not in the result produced, but in the manner in which the institutions induced it. Notice that each of the failings in the second scenario would increase the threat of a mistaken conviction, and as the foreseeable threat increases, we are more inclined to view a conviction as involving a human rights violation.²⁸ The right to fair and public trial embodies, in this sense, a protection against standard threats to one's liberty of person.²⁹ Moreover, what counts as respecting the right to fair trial will largely be determined by what, in the social circumstances, mitigates risk of mistaken conviction. The content of the right to liberty of person is partly spelled out by the right to fair trial in view of standard threats to protected interests in liberty, and the content of the right to fair trial will be specified, in some concrete circumstance, by what can be expected to adequately reduce the danger of a mistaken outcome. For instance, if an impartial jury is unavailable here, then the trial must be moved, or jurors selected from, elsewhere. State agencies can prospectively respect the human rights to liberty of person and fair trial by adequately seeing to the salient risks. We must still indicate what "adequately seeing to the risks" fundamentally consists in, but a risk standard here exhibits the structure of a human rights-based concern with liberty.

2. *Right to free practice of religion.* I have the justified fear that to publicly manifest my religious convictions or practices would result in my harm. Is my right to freedom of religion being violated by my polity? Very likely, in view of the fact that the probable sources of such a fear are either the polity's legal treatment of my religion, or the society's intolerance of it (or both). In the former case, even if a law prohibiting my religious practice is imperfectly enforced, the fact that it leaves my welfare to the discretion of officials can be sufficient to leave my religious

²⁸The risk of acquitting the guilty is also pertinent to the protected security interests, for instance, of members of the community. What it means to respect human rights when there are multiple and potentially competing protected interests is an important matter. The appropriate standpoint for considering the issue is discussed in section 4.

²⁹Nickel views due process rights largely in these terms. See Nickel, *Making Sense of Human Rights*, pp. 108-12. I am treating the right to fair trial as derivative, then, of the right to liberty of person. This is not to say that the right to fair trial is not of instrumental concern to other protected interests, or perhaps a basic way of protecting some interest (e.g., a dignity interest in being recognized by one's political community). Here, for purposes of illustration, I simply take up the right as it concerns liberty of person, leaving open the possibility of other derivations.

liberty objectionably vulnerable. Moreover, in such an environment, the fact that I display my religious practice on an occasion, and am not punished, does not imply that my right to religious freedom is not violated. My interest(s) in free religious practice remain threatened. On the other hand, if I fear society's forceful rebuke, as discrimination, social ostracism, or violence, then it suggests that the polity is inadequately policing discrimination, supporting a culture of tolerance, or providing security of person to religious minorities. Again, no harm may come of these threats, but they are predictable and not infrequent to human social life, and I do not enjoy religious liberty in their presence. These observations, if correct, suggest that if I justifiably fear—that is, correctly perceive—substantial risk, then I have reason to doubt that my right to religious freedom is being respected. On the other hand, in a tolerant society, I may run afoul of a random zealot, and suffer a harm consequent of my express religious convictions. Perhaps the zealot violates my human right, but unless the society had reason to be sensitive to the special danger, it is not, it seems, implicated. Again, the central upshot is that the human right to free religious practice appears largely concerned with controlling risks to the relevant dignity interests, rather than avoiding setbacks per se.

3. *Respect, protect, provide.* One might accept the above and still object that human rights do more than protect against risks. Sometimes they protect against intentional outcomes, and simply forbid agencies from directly instantiating an event. For instance, human rights simply forbid the executive from imprisoning opponents for political reasons, engaging in torture, punishing innocuous religious expression, or depriving access to clean water. Imprisoning political opponents without due process is primarily wrongful, it might be thought, in its unjustified restriction of liberty, not its risk imposition. Moreover, rights to outcomes are prospectively action-guiding in the sense that they tell us that it is impermissible to *intentionally* cause a forbidden outcome. To put this in terms of the widely accepted respect/protect/provide framework for human rights duties, my analysis appears to address the “protect” and “provide” requirements, but largely neglects the “respect” requirement. To respect someone's human right against torture, I simply ought not torture the person.³⁰

Despite varying formulations of the tripartite framework in the literature, those employing it roughly agree that human rights impose duties to: (1) *respect* rights, that is, avoid harming, or introducing deprivation of concern to, protected interests, (2) *protect* rights, that is, adequately ensure

³⁰I am grateful to an anonymous reviewer for pressing these points, especially in these terms.

that others respect rights, and (3) *provide*, that is, aid those whose protected interests are experiencing remediable setbacks.³¹ It is worth noting that Shue did not intend the framework as an alternative to a standard threats approach.

If a right provides the rational basis for a justified demand that the actual enjoyment of the substance of the right be socially guaranteed against standard threats, then a right provides the rational basis for insisting upon the performance, as needed, of duties to avoid, duties to protect, and duties to aid.³²

We should agree with Shue that the framework, insofar as it is illuminating, ought largely to be treated as subsidiary to the standard threats approach to specifying human rights duties. For one, it delivers a unifying idea that potentially explains the relevance of these three types of duties to human rights. All three types of action are necessary to avoid imposing risks. Second, treating protection against risk as the underlying idea helps supply determinacy in specific contexts to each type of duty. In the illustrations above, this is perhaps clearest where protection and provision are at issue. However, consider Shue's formulation of the avoidance duty (i.e., respect) as it pertains to subsistence rights: "a duty simply not to take actions that deprive others of a means that, but for one's harmful actions, would have satisfied their subsistence rights or enabled them to satisfy their own subsistence rights."³³ For actions that have a probability other than 1 or 0 of producing an unintended but foreseeable deprivation, knowing in advance whether the actions *respect* the potentially deprived requires a standard articulating the degree of permissible risking. Afterwards, to determine whether a resulting deprivation is wrongful (rather than merely regrettable), we again will require a sense of whether the action crossed a threshold of permissible riskiness. Otherwise, if we read Shue's formulation literally, all human acts that deprive protected interests are human rights violations. This is implausible, as the car accident example shows. Otherwise said, the earlier arguments concerning the propriety of standard threats apply to the duty to avoid harming, at least in cases of noncertain, unintended, and foreseeable harming. It is also worth emphasizing that even in cases of *certain* harm or deprivation (i.e., where probability of harm is 1), we can, consistent with a model of wrongs as risk impositions, treat the action simply as dramatically falling below the threshold of permissible risking, and thus as wrong in that

³¹Shue introduced the framework. See Shue, *Basic Rights*, pp. 51-64. It is, however, very widely used. See, for instance, Donnelly, *Universal Human Rights in Theory and Practice*, pp. 36-38.

³²Shue, *Basic Rights*, pp. 54-55.

³³*Ibid.*, p.55.

respect.³⁴ If respect for human dignity requires that I not impose moderate risk of deprivation, for instance, then it is abundantly disrespectful to generate a probability of 1 of that deprivation.

Intentional harms might be different. If an official tortures a prisoner, it is not only the high probability of inducing suffering that seems to concern us. In fact, torture by its very nature seems to be an intentional act, and it is plausibly as bad as or worse than merely producing qualitatively similar suffering as a side effect of one's activity. Similar points hold for express prohibitions on religious practice and the imprisonment of political opponents. I do not deny that intention can be a wrong-making feature of an action, independent of negligence, and that it can be so in the morality of human rights. Indeed, intention is capable of performing the two tasks just mentioned. An act can prospectively be deemed wrongful by the character of its operative intention, and consequences can be held to be a feature of the act by examining the scope of the intention. If a harm is intended (as a means or end), then it can be sorted out as wrongful from the total array of injuries. Hence, I agree, rights to outcomes can meaningfully prohibit intentional activity. Nonetheless, granting that there is a separate species of human rights wronging does not undermine the thesis here that human rights violations largely consist in agential failures regarding standard threats. Much of what human rights are thought to require, as we can see in the illustrations above, is only sensible in view of a risk-based standard of conduct. Moreover, in some cases where we may be inclined to impute part of the wrongfulness to intention, there remains a role for risk imposition. A legislature targets certain religious practices, and its overbroad prohibition endangers others by giving wide scope to the effective discretion of officials. Further, it signals a willingness on the part of the governing body to restrict religion when expedient or popular. Here we need a risk standard to capture the full extent of the wrong. Finally, in an important sense, protecting against standard threats is the primary, if not always immediate, mandate for political institutions. When an executive agency intends to torture and successfully does so, members have failed in their immediate capacity as state officials to avoid forming and acting on the intention. Yet, a prior question concerns the institutional context that enabled the agency to successfully carry out the act. If institutional mechanisms are not in place to incapacitate such intentions, then we have evidence that dignity interests were objectionably vulnerable prior to the torture. The executive agency ought not to have been in a position to deliver on its objectives, and the broader institutions failed to enact appropriate safeguards (including an institutional culture discour-

³⁴This point is along the lines of McCarthy's defense of the "Risk Thesis": McCarthy, "Rights, Explanation, and Risks," p. 224.

aging serious consideration of such objectives). The human right against torture primarily tasks a body of political institutions with ensuring that those who fall within its jurisdiction do not face the threat of torture.

3.c. Agential failure regarding standard threats as risk imposition

What is the character of agential failure identified by a norm requiring protection of an interest against standard threats? Agencies fail when they do not properly mitigate foreseeable and common threats posed by the world and social life to human dignity. What counts, though, as adequate mitigation? What counts as foreseeable? A lending agency and/or national government perceives that a significant increase in water prices could be a function of its policy. How much of a danger to basic human interests must this pose for it to constitute a human rights violation? Privatization results in inaccessibly priced clean water (though perhaps prices would have risen anyway). Is the result foreseeable in a way that invites a reparative response in virtue of a rights violation?

These are pressing questions here, and the inability to provide a principled response would leave the standard threats approach no better off, in terms of the just defended criteria, than an outcome-centric approach. Given that we have a social practice that addresses these sorts of issues in a reasonably systematic way, the law of torts, I have some confidence that a principled approach is available. However, we should first note some preliminary consequences of the standard threats interpretation, and make clear the proper way to analyze “standard threats.”

If human rights protect against standard threats, then the fact of a protected interest’s setback (hereafter “injury”) is only evidence of a human rights violation, it does not constitute one. A death (e.g.) could be the result of a nonstandard threat, or a properly mitigated standard one, and even if it ought to have been averted, the rights violation consists in the inadequate response to the danger (or its creation), not the death. (The injury is still morally important, from the standpoint of human rights, but largely from the point of view of corrective justice.) Moreover, failing to protect against a threat may not result in an injury. In a region prone to earthquakes, a government fails to establish an effective regulatory agency to ensure safe building construction. An earthquake strikes, but miraculously, no one is injured. The good fortune of all does not imply that the government acted responsibly. Rather, in adopting the discourse of standard threats, we should say that it did violate its people’s human rights—though it is not (given the lucky circumstance) in a position to repair *injuries* that are a function of its failure (as there are none).³⁵ My human

³⁵Though risk imposition, by itself, can invite liability for repair. See David McCarthy,

rights are violated when an agency inadequately responds to danger to my protected interests.

Intuitively, to say “protect against standard threats” would appear to indicate that: we should protect against events that are foreseeably frequent, and significantly injurious to human dignity. Moreover, it would surely be granted that as the potential impact to protected interests increases, then the threshold of probability for the threat to count as “standard” decreases (as in the earthquake case). On the other end, high probability for relatively low impact threats may permit them to qualify (e.g., regular low-level corruption in bureaucratic agencies). This is just to think in terms of risk, understood as probability of an injury multiplied by its seriousness (though, to capture the various prospects of any policy, we would express risk as a schedule or profile of possible outcomes). On this view, human rights normally protect against significant risks to our dignity. This is different from saying that there is a separate human right against risk imposition *in addition* to human rights against harms.³⁶ It is not that there are a set of human rights against harming, and others against risking. Again, human rights protect against risks in the first place, rather than harm per se.

The idea of risk is not itself unproblematic, and we need to say more about the relevant sense—particularly the element of probability—to forestall certain misunderstandings and objections, and to set the stage for a proper formulation of the risk standard. At minimum, human rights are in the business of assigning obligations to institutional agents to respect and protect human dignity, and these obligations ought to be such that the agent can be held accountable in view of them. Consequently, if risk mitigation is basic to the duties of human rights, a theory of human rights needs an understanding of probability that: (1) is responsive to agential capacity, (2) renders risk intersubjectively cognizable, and (3) can implicate moral concern. To partly follow Stephen Perry’s treatment of risk for the purposes of tort theory,³⁷ I suggest that we understand probability in frequentist and moderately epistemic terms, that is, as involving judgments of objective relative frequency based upon evidence available to the subject, but properly assessed according to intersubjec-

“Liability and Risk,” *Philosophy & Public Affairs* 25 (1996): 238-62.

³⁶Hansson and Oberdiek, e.g., appear to treat the right against risking they defend in this way. See Hansson, “Ethical Criteria of Risk Acceptance,” and John Oberdiek, “Towards a Right against Risking,” *Law and Philosophy* 28 (2009): 367-92.

³⁷See Stephen R. Perry, “Risk, Harm, and Responsibility,” in David G. Owen (ed.), *Philosophical Foundations of Tort Law* (New York: Oxford University Press, 1995), chap. 14, and “Responsibility for Outcomes, Risk, and the Law of Torts,” in Gerald J. Postema (ed.), *Philosophy and the Law of Torts* (New York: Cambridge University Press, 2001), chap. 3.

tively valid standards of reasoning.

On this understanding, probability judgments concern the frequency of an attribute relative to a class, where estimating the probability of a particular event involves treating it as a member of a class. I judge that there is a .167 chance that the die will show “2,” which is to say that I judge that 1 in 6 “rolled, six-sided fair dice” has the property of coming up 2, and that the die is a member of that class. *Objective probability* is the actual relative frequency of an attribute to a class. *Subjective probability* is the proper estimation of objective relative frequency given a subject’s available evidence and the proper deployment of applicable standards of inference. Perry explains:

The most satisfactory account of epistemic probability maintains that such probabilities involve estimations of relative frequency that have been made, relative to a given body of evidence, in accordance with accepted standards of inductive reasoning and rational belief. If such standards can properly be regarded as intersubjectively valid, then there is a sense in which epistemic probability judgments can be said to be objective.³⁸

Proper estimations of probability, then, will reflect the degree of well-conducted inquiry we can expect. My judgment that there is a .25 chance of rain in the next hour is assessed on the basis of the evidence available to me, and how well I used the evidence inferentially. Information gathering and reasoning require effort, thus we must also index our standards of correct estimation against some level of (normatively determined) well-conducted investigation. Appropriate estimation depends not only on what counts as treating the evidence with epistemic propriety, but also on the degree to which we can expect the agent to deploy information-gathering techniques and inferential tools.

Risk, on this approach, amounts to epistemic probability of injury multiplied by the degree of injury. We should treat epistemic, as opposed to objective, risk as the relevant sense for human rights protection, since we want human rights to partially illuminate the realm of permissible policies for agencies. If an agent’s duty were to protect against objective risk, the permissibility of nearly any policy would be (almost in principle) inaccessible. Our knowledge of relative frequencies is standardly imperfect. Yet, we have not given up on objective duties or accountability either—assessment of risk is still based in intersubjectively valid epistemic and logical standards. We can expect a certain estimation of risk given an agent’s capacities, available evidence, and reasonable degree of inquiry. Irrespective of whether the agent in fact foresees a threat, we can determine whether a kind of threat is reasonably foreseeable.³⁹ Finally,

³⁸Perry, “Responsibility for Outcomes, Risk, and the Law of Torts,” pp. 97-98.

³⁹Thus, a firm or official agency, e.g., is not relieved of responsibility for proper risk

the moderate epistemic conception of probability maintains a basic tie to the way the world is and how things turn out—ultimately, we are trying to discern factual relative frequencies.⁴⁰ Risk properly engenders our moral concern when it speaks to how our action will actually affect others' interests. We cannot explicate human rights duties simply in terms of outcomes. Nonetheless, our motivation to spell out the content of such duties in terms of risk is still grounded in a moral concern with how our action will impact the availability of human dignity.

To risk, then, is to make it epistemically correct to re-classify at least one (protected) interest as a member of a class of such interests with a higher relative frequency of injury. Though helpful, an important ambiguity arises as soon as we begin to employ risk normatively—one typically ignored by ethicists in their treatment of risk.⁴¹ What is the initial class, with its accompanying rate of injury, with which it is appropriate to understand the interest? What is the baseline to which we rightly compare the risk creation? There are two issues. One concerns the joint-ness of social risk, the other how to characterize the degree of background risk that appropriately accompanies human existence. I bike in a bike lane, and a texting driver speeds by. We are tempted to say that the driver imposed a risk, but this presupposes that we properly single out the driver as the risk imposer, and that the risk creation is significant enough to warrant our concern. Why not say that I imposed the risk by bike-riding, or that the risk involved in our interaction is of the same innocuous character as my interaction with the pedestrian, tree, or tricycle-riding toddler to my right? Risks are standardly a function of multiple parties,⁴² and

responsiveness by ignorance. Its ignorance would have to be consistent with what it ought to have believed given the appropriate degree of well-conducted inquiry in the circumstances.

⁴⁰In contrast to more radical subjectivist conceptions of probability where the connection between the world and a subject's justified confidence in a proposition (i.e., confidence that does not violate the probability calculus or other constraints) is attenuated. See: Roy Weatherford, *Philosophical Foundations of Probability Theory* (London: Routledge & Kegan Paul, 1982), pp. 219-42; and Perry, "Risk, Harm, and Responsibility," pp. 325-29. I am not quite entering debates about the best theory of probability, qua theory of probability. Rather, I am indicating the sense of probability relevant to human rights morality.

⁴¹One example is McCarthy, "Rights, Explanation, and Risks." One exception is Perry, "Responsibility for Outcomes, Risk, and the Law of Torts," pp. 108-15.

⁴²As an anonymous reviewer points out, the problem of joint-ness is not unique to risk imposition. After all, in the event of a crash, any *harm* befalling the biker is caused by both parties. Acceptable background risk is the special and pressing issue confronting risk imposition (and it is the matter that receives attention in what follows). Nonetheless, recognizing joint-ness is typically crucial in rendering determinate risk imposition: without a baseline of coordinated behavior or expectation, we are frequently not in a position to identify the risk imposer.

anyhow, risk is an inevitable feature of life (social or not). We tell the texting driver that texting put others at risk, and there is a clear sense in which the statement is true.⁴³ However, if we intend the statement to operate normatively, we require a normative response to: compared to what?

To answer the question, we must appeal both to recognized standards of conduct in a social environment and a level of background risk appropriate to the environment given general characteristics of the context. Consider what permits the standard of care in negligence law to offer a meaningful and effective basis for regulating risk. In conjunction with other legal standards and social convention, it coordinates expectation in the interactive environment: cars to center of the roadway, bikes to the perimeter; tennis at parks, trucks on the road. Moreover, aside from coordinating behavior, the standard of care establishes a legally acceptable degree of risk that one can introduce into an interactive environment. Requirements not to drive while distracted or operate an undermaintained vehicle serve to reduce the overall quantity of risk. Duties of care do not typically eliminate risk. Rather, they (at least implicitly) supply a standard of appropriate background risk for an interactive environment of a certain type. When I drive carefully, I generate risks, but not unacceptably (so far as the law goes). When one fails with respect to a duty of care (e.g., by driving while distracted), tort law can (despite risk's pervasiveness) indicate the failure as the risk imposer by referring to a standard of appropriate background risk.

In moving the conceptual apparatus outside the context of negligence law, I will not be concerned with anyone's actual views about acceptable background risks. This would be insufficiently normative from the point of view of human rights.⁴⁴ We must supply a moral standard for acceptable background risk. Nonetheless, the analysis models how to supply determinacy to "risk imposition." Risk imposition refers to the elevation of risk to at least one protected interest above the acceptable rate in the context of interaction. I *impose a risk* by making it appropriate to describe a protected interest as a member of a class with a higher relative frequency of at least one kind of injury than is *acceptable* (a normative criterion requiring explication). The model provides a method for singling out wrongdoers and a comparison point (or baseline) for what constitutes wrongdoing. To treat human rights as protections against standard threats is to understand the relevant wrongdoing as risk imposition:

⁴³Compared to similar circumstances without a texting driver, the expected losses are higher.

⁴⁴It would, I think, be insufficiently normative from the view of a well-functioning system of tort law. See Anthony R. Reeves, "Foreseeability and Strict Liability in Torts: A Moral Analysis of Liability for Environmental Injury," unpublished ms.

an agent fails by failing to keep risk to dignity interests at acceptable background levels. The moral challenge is now clear. Given some social environment, what counts as an acceptable level of background risk to human dignity?

4. Risk and the Standpoint of Protected Interests

4.a. An approach to defining acceptable risk

From the point of view of human rights, imposing a risk is standardly the wrong-making feature of a decision or policy. However, does my interest in bodily integrity require that I have only a .001 chance of injury of a certain type, or .005, .01, .02, .05, .1, .15, .25, .33 ...? These are dramatically different duties, and though we should not expect absolute precision from our moral political concepts, we should expect some determinate guidance on how to approach the question from a successful institutional morality. Again, if the argument of section 3 is successful, we cannot avoid the issue. We typically need a standard of acceptable background risk to dignity interests to know what it would mean to wrong another with respect to her human rights.

Moreover, simply referring to other normative elements of a human right (protected interest, duty, duty-bearer) is unhelpful here. If we establish, for example, that “normative agency” has a moral significance in human dignity that could (in principle) ground weighty duties in another, that does not tell us the degree of threat to be mitigated. Of course, the moral importance of the interest will certainly be relevant to how much protection is required, but we need a principled way of incorporating that importance into a risk-responsive standard of care required of others. Existing theories of human rights do not provide such guidance. Additionally, knowing that certain agencies are duty-bearers is likely important to setting a baseline, but does not itself tell us what they are responsible for. A range of policies will be feasible and available to the agent (with accompanying trade-offs): which set of policies is rendered nondiscretionary by virtue of epistemic risk to my interests? Finally, it seems clear that conceptual analysis of “duty” will not, by itself, move us forward. We must introduce additional normative considerations.

Nonetheless, we should not introduce moral considerations ad hoc. If we appealed to virtues of fairness, reasonableness, or efficiency, for instance, we would rightly wonder why that sort of consideration ought to enter here, at the level of settling the appropriate degree of risk mitigation for protected interests. Moral appeals here should be driven by concerns that move us to adopt the perspective of human rights. I suggest,

then, that we operate from the standpoint of the interests protected by our moral concern with human dignity. We have assumed, given the aforementioned division of labor in normative theorizing about human rights (section 2), that these interests engender obligatory concern: that is what it means to call them “protected.” The standpoint of these interests, then, is a morally important point of view—which is to say that we have reason to satisfy (or make available to the subject the satisfaction of) these interests. What, *from the point of view of these interests*, is an *acceptable* amount of risk *in the context of choice*?

Of course, in an ideal world, the answer is: none. Why, from the perspective of an interest, would any risk be regarded as acceptable? Our dangerous world requires compromises at two levels. First, insofar as human dignity protects distinct interests (e.g., in education, nutrition, or bodily integrity), and they cannot all be protected maximally, some profile of prioritization has to be given. The contours of this profile could be quite complex, with differing trade-off rates at different levels of satisfaction and protection. This is a matter for the theory of human dignity, so set it aside. Second, there are multiple bearers of protected interests, and no one’s basic human dignity counts for more than another’s. This is not quite to state a substantive principle of equality: it is simply to note that the dignity of each is entitled to consideration, and none more than any other. An agent responsible for human rights must regard the dignity of each person, within the proper scope of her concern, impartially.

I offer an approach, and then detail its justification. Hereafter, “subject” refers to someone who has human rights, and thus possesses the constellation of interests protected by human dignity. “Agency” refers to an agent who bears duties of human rights. To settle on a baseline of acceptable risk, we ask what profile of risk would be regarded as acceptable to each actual subject given the following constraints:

- (1) Each is restricted to relying upon a generic description of the circumstances. The description only includes facts relevant to protected interests and epistemically accessible to the agency.
- (2) Each reasons only on the basis of her protected interests.
- (3) Each is unaware of which actual social position she occupies.

We are then answering the question: when can we regard the subject as properly satisfied with the agency’s responsiveness to her interests given the actual circumstances and the presence of other, equally compelling, moral demands? Constraint (1) models the idea that epistemic risk, from the vantage point of the agency, is the relevant sense of risk for human rights. I argued for this idea in section 3. Since the relevant sense of risk is epistemic, we ask the subject to occupy the agency’s epistemic posi-

tion for the purposes of estimating the risk profiles of various policies. That position is defined by the degree of *well-conducted inquiry* rightly expected of the agency, not any actual inquiry undergone by the agency—that is, an agency's factually poor risk estimations will not define the risk profiles for idealized consideration by subjects. In taking up the agency's standpoint, moreover, we (at least implicitly) incorporate considerations of institutional competence. To take up its position is to acknowledge its capacities. Finally, the constraint centers our attention on aspects of the context salient to the protection of dignity interests. We omit other matters, and consider only facts relevant to protected interests, because the moral concern of human rights is dignity.

Constraint (2) further models this exclusive concern. Since we are solely interested in the subject's dignity interests, we can abstract from other interests, aims, and desires. This is not to say that there could not be other concerns of political morality; it is simply to say that, if there are, they are not part of the morality of human rights, and thus ought not figure into its standards of right conduct.

Constraint (3) models the impartiality of human rights. An agency owes equal concern to each person's dignity, so the fact that a nameable subject is a certain person (as opposed to some other subject) is of no consequence. That person *is* owed consideration—precisely the same as every other subject. Hence, we should not ask: which profile of risk would be acceptable to a person aware of which subject she is? That would permit her to give weight to a fact (i.e., that she is *this* particular person) that is irrelevant from the vantage point of human rights. Instead, we consider what would be an acceptable risk profile to each subject aware of the various actual social positions, but unaware of which position she will occupy. Put otherwise, an agency must adopt a scheme of policy that keeps risk at a level that would be acceptable to any natural person of the agency (from the point of view of her dignity interests) knowing she will occupy some actual, but unknown, subject's position. Otherwise, it violates at least one subject's human rights by virtue of risk imposition.

The above frame, being a contractualist device, resembles Rawls's hypothetical decision procedure at the legislative stage, but with several basic differences.⁴⁵ One is that the hypothetical frame is motivated by the moral point of view of human rights, not (necessarily) by the idea of a fair system of social cooperation. Another is that the decision is made directly in terms of acceptable risks to protected interests. A third is that we do not operate under the assumption that we are specifying principles

⁴⁵John Rawls, *A Theory of Justice*, revised ed. (Cambridge, Mass.: Harvard University Press, 1999), pp. 171-76.

for a well-ordered society. Nonetheless, the function of hypothetical acceptability here is to restrict the use of facts as reasons for decision. In adopting the standpoint, we can only rely upon the relevant considerations for the domain in question. In determining what would be rationally acceptable for some question under the constraints, we effectively articulate what the relevant reasons recommend.⁴⁶ We ignore what would be acceptable outside of the frame for the purposes of settling a normative standard, since it could reflect responsiveness to irrelevant facts.

For purposes of clarity, I summarize the argument. We noticed that human rights standards must largely be understood in terms of acceptable risk, and then asked how, from the point of view of human rights, we could arrive at a standard given the pervasiveness of risk and multiplicity of demands. To mimic Kagan's worry, for any given injury of concern to human rights, how do we nonarbitrarily determine if a probability of occurrence (between zero and one) is problematic? An ad hoc appeal to heterogeneous moral principles to solve the problem is unlikely to eliminate our sense of arbitrariness. The theory of human dignity tells us that certain interests mandate strong moral concern on the part of agencies. So, we adopt the perspective of the protected interests, as cognizable from the epistemic vantage point of the agency, and consider what would be satisfactory to persons deciding from the standpoint of those interests alone. Yet, this concern is impartial, in the sense that no one's dignity deserves greater consideration than anyone else's. We model this impartiality by asking: what profile of risk would be acceptable to each, from the point of view of protected interests, while ignorant of which actually existing social location he will occupy? Whatever the answer for a context, we have a determinate method—a principled way of approaching the problem of acceptable background risk—for the various normative purposes to which we wish to put human rights discourse. In other words, although we have a standard whose requirements are sometimes difficult to discern, especially in the real world of political decision, our judgment has a target. We have something to discern.

4.b. The context-dependence of the risk standard

The idea that appropriate risk responsiveness is context-dependent is familiar. Compare our understanding of safe driving in circumstances of a clear, dry, sunny day, with light traffic and a straight road to that of driving at night, with thick fog, icy and windy roads, and heavy traffic. Which

⁴⁶This seems in line with Rawls's view of the original position: see *ibid.*, pp. 15-19, and *Justice as Fairness: A Restatement*, ed. Erin Kelly (Cambridge, Mass.: Harvard University Press, 2001), pp. 14-18, 80-94.

actions are precautionary differs between the circumstances, and the degree to which we expect agents to mitigate risk also differs: the latter context will have a higher rate of acceptable risk. Although we rightly expect slower and more alert driving on icy roads, even the careful driver poses a greater threat to other roadway users compared to a situation with dry roads. Our intuitions here are partly shaped by the driver's capacity to mitigate risk given objective features of the circumstance.

Given that proper risk responsiveness is context-sensitive, we will, when considering acceptable risk, need to relativize the inquiry to the context of the subjects and agency. Human rights discourse ought to function outside ideal situations, so we will need to contextualize its claims to real-world circumstances. What would be acceptable risk (as defined above) given the general features of the subjects' and agency's context? Relevant contextual features for the description include: climate, geographical characteristics, presence of natural resources, the capacity and development of social and political institutions, available technology and feasible technological advances, culture and traditions, operative social conventions, political sociology, and any other general and epistemically accessible features that should be expected to have an impact on protected interests.

This is neither conservative (in the sense of treating the status quo as presumptively legitimate) nor undemanding, and it captures our sense that the requirements of human rights vary by context. A human right to education should not be understood to require a developing country to provide general access to quality post-secondary education (though it could have a duty to begin developing these institutions). However, it is straightforward to suggest that states with advanced, skill-intensive economies do have such an obligation—lack of access compromises one's ability to participate in the economy and hence adequately satisfy various protected interests. Taking another example, an agency in a region prone to tropical disease can only be expected to respond according to the state of scientific understanding and medical technology, but it must respond in earnest to mitigate the risk—developing infrastructure and regulatory regimes that can be expected to reduce the risk of infection to an acceptable level, as well as investing in research. To settle the appropriate baseline, we would need much more information (as seems right) about the circumstances to determine what would be impartially acceptable in them, including information about the agency in question. Yet we have, in principle, a meaningful basis for saying what does and does not count as a human rights violation.

4.c. Discursive functionality and impartial acceptability

We might ask: Why focus on what constitutes a “violation” of human rights? Perhaps human rights discourse is valuable simply insofar as it effectively directs our attention to serious human-caused deprivation or harm. One response is that the standard of right conduct is essential to nonarbitrarily determining what harms ought to register in our moral consciousness. Another response is that it is attractive to see human rights as offering benchmarks for recognitional legitimacy, just war, the extent of sovereign immunity, justified intervention of various kinds, the adequacy of institutional responses to poverty, when reparative obligations are owed, and the like. To offer a benchmark is to tell us when an agency is failing—when it is acting irresponsibly or wrongly with respect to subjects’ human rights. Different levels of departure from the standard may implicate different moral responses (e.g., official condemnation vs. intervention), but having a determinate sense of what counts as departure is essential for the idea to give us a grip on the kind of issues just noted. Slightly differently, the understanding of human rights suggested here, as protections against risk impositions to dignity interests, maintains a discursive functionality in the absence of consensus regarding foundational matters in normative ethics. We need a determinate sense of what counts as a human rights violation (i.e., a wrong) if we wish to attach normative consequences to its occurrence or nonoccurrence. Impartial consideration of protected interests supplies the prospect of this without demanding contractualism or consequentialism (e.g.) to the core. It merely requires assent to a moral view of human dignity.

The analogy with tort law is again helpful. However we interpret the duties of care in tort,⁴⁷ we understand them to set the standard for what counts as wrongful risk imposition. When I impose a risk (e.g., by driving carelessly), it has certain normative consequences—most notably, it renders me liable for foreseeable injuries that are within the risk. If I abide by my duties of care, I remain largely immune from reparative legal obligations for the harmful effects of my actions. Here “care,” “wrong,” “liability,” and “repair” have determinate, interrelated normative roles—and valuable ones in that, along with other legal standards, they give us an operational normative system regulating what we owe

⁴⁷There are two prominent moral interpretations of the duty of care in tort law. A “cost/benefit approach” treats it as an efficient allocation of responsibility given the aggregate of legally recognized interests. For a recent defense, see Barbara H. Fried, “The Limits of a Nonconsequentialist Approach to Torts,” *Legal Theory* 18 (2012): 231-62. A “fairness-based approach” treats it as embodying reciprocity among persons. For a classic statement, see George Fletcher, “Fairness and Utility in Tort Theory,” *Harvard Law Review* 85 (1972): 537-73.

each other in large domains of interpersonal conduct. Similarly, human rights concepts can perform their, perhaps quite different, requisite functions for international morality, even if we understand the underlying obligation (as in tort law) in terms of imposing risk. To put it roughly, we might think of agencies as having a certain normal moral (and sometimes legally recognized) status in the international political order when they comply with human rights: they can participate in various forums, enjoy immunities, enter certain agreements, and so on. When an agency fails in terms of standard threats to protected interests, its normative status changes (how so depending on the severity or character of the violation(s)): it may now (to take some examples) be liable to condemnation, exclusion from certain forums, intervention of various kinds, or international prosecution. Again, the idea of risk imposition enables human rights to serve as a meaningful discourse of international morality.

One might doubt that I have provided enough determinacy for the above task. To settle on a baseline for acceptable risk, I ask: what would be impartially acceptable to subjects, from the standpoint of their protected interests, given a generic description of the context? Given the context-dependence of the answer, it is difficult to say much more in advance of considering any particular human rights claim, and evaluating any claim still requires careful judgment. Yet, one may think, I have not sufficiently indicated what “acceptability” amounts to in principle, leaving such judgment unguided. Are we simply looking for maximum expected value in terms of protected interests (i.e., optimal protection of dignity in aggregate)? Or, must we be, independent of expected value overall, sensitive to distribution of risk (i.e., does “acceptability” constrain risks that a person can bear)? Which of these or other alternatives is acceptable from the point of view of the hypothetical frame?

I can say several things. First, I can admit the objection’s point and still emphasize the gains made here (insofar as the arguments are successful) in determinacy and human rights theorizing. We know what human rights standards must typically answer to: acceptable risk in the hypothetical frame. A successful argument regarding compliance or non-compliance with human rights must plausibly address the constraints of the frame, and supply a plausible answer to the question it poses. Second, Barbara Fried forcefully argues that it is unclear that contractualism and consequentialism offer markedly different advice for most regulatory contexts, where we are operating from the *ex ante* perspective of risk and have well-defined and properly weighted interests.⁴⁸ This models the standpoint of the hypothetical frame once a theory of dignity is in hand.

⁴⁸Barbara H. Fried, “Can Contractualism Save Us from Aggregation?” *Journal of Ethics* 16 (2012): 39-66.

So, for two plausible approaches to addressing the frame's question, we should not assume substantially different responses. After all, tort law gets along well enough despite disagreement about the justification and interpretation of its standard of care, suggesting a reasonable amount of convergence on acceptable risk.⁴⁹ Substantiating the point rigorously would require engaging with general discussions of the nature and desirability of contractualist constraints on risking.⁵⁰ I cannot do this here. However, I can sketch the motivations and character of two salient responses to the hypothetical frame. Doing this will, I hope, blunt the sense that we have not made gains in determinacy, and illustrate the nature of remaining indeterminacy.

Take two candidate standards for acceptable risk. "Efficiency" defines acceptable risk as that with the highest expected value in the aggregate (considering exclusively the properly weighted dignity interests of all relevant persons in the context). "Equity" departs from efficiency by constraining the distribution of risk among persons according to some standard(s) of equality, optimizing expected dignity value within those constraints. It might be thought that articulating the level of proper background risk in terms of acceptability to each qualified standpoint rules out efficiency. After all, each person's dignity counts equally, and we understood this to require a unanimity that effectively imposes a veil of ignorance. Unaware of which actual social position I could occupy, should I not reject any solution that would permit unequal protection of my interests? Or, I permit inequality only on the condition of improvements for the riskiest position. The interests in question are of basic significance, so it might seem appropriate to choose the policy scheme with the least bad risk profile—it is a rational response to the kinds of inter-

⁴⁹We might wonder whether tort lawyers share a principled basis for determining reasonable care, especially given that in difficult cases the question is left to juries. Perhaps there is no thoroughgoing consensus, but even juries will be attempting to discern what counts as adequate precaution in such cases, and their judgment (in virtue of this) will be constrained to some range of answers.

⁵⁰I think it is safe to say that, currently, it is not entirely clear what, precisely, contractualist constraints amount to from the ex ante perspective. For various discussions, see: Thomas Scanlon, *What We Owe to Each Other* (Cambridge, Mass.: Harvard University Press, 1998), pp. 202-41; Sophia Reibetanz, "Contractualism and Aggregation," *Ethics* 108 (1998): 296-11; Rahul Kumar, "Defending the Moral Moderate: Contractualism and Common Sense," *Philosophy & Public Affairs* 28 (1999): 275-309; Elizabeth Ashford, "The Demandingness of Scanlon's Contractualism," *Ethics* 113 (2003): 273-302; James Lenman, "Contractualism and Risk Imposition," *Politics, Philosophy & Economics* 7 (2008): 99-122; Fried, "Can Contractualism Save Us from Aggregation?"; Aaron James, "Contractualism's (Not So) Slippery Slope," *Legal Theory* 18 (2012): 263-92; Christopher Morgan-Knapp, "Nonconsequentialist Precaution," *Ethical Theory and Moral Practice*, published online 23 December 2014, DOI 10.1007/s10677-014-9552-6.

ests in question when ignorant of one's actual position, even if it reduces the overall value of expected outcomes.

However, it is unclear that "equal risk" is adequately motivated by the frame. Imagine that an agency can respond to a debilitating epidemic by developing and distributing Vaccine A, which will reduce the chance of infection for the entire population to .1, or Vaccine B, which will leave about 10% of the population with a .15 chance of illness, and 90% of the population with a .01 chance of illness. If I am equally likely to be any particular person, it appears rational to choose the profile of risk that optimizes expected outcomes,⁵¹ perhaps especially when all the interests in question are of basic significance. Moreover, equiprobability is facially recommended by the impartial decision position defined in section 4.a. The agency owes consideration to each *actual* subject's dignity in the circumstances, so impartiality appears to render perfectly appropriate treating each social location as equally possible in the hypothetical frame. The efficiency interpretation of acceptable risk is not easily defeated.

Nonetheless, efficiency troubles, as it seems to matter how risk is distributed. A situation in which half of subjects have a .1 chance of injury and half a .02 chance appears less acceptable than one in which all subjects have a .06 chance of suffering the injury. Yet, efficiency treats them as equivalent.⁵² We might even be willing to tolerate some overall increase in risk to dignity for the sake of equity, e.g., .07 risk of injury for all. Moreover, the kind of inequality in risk distribution that the efficiency interpretation (in principle) tolerates might appear at odds with a basic sense that human rights are partly individual trumps against collective aims. For "equity" to be a viable interpretation, however, it must do two things. First, it must show how the "separateness of persons" or "reciprocity" or some similar moral constraint emerges from the basic commitments of human rights. Perhaps this can be done in the theory of human dignity. Second, it must show how this constraint operates when we collectivize risks⁵³ in the frame such that we have guidance as to when an unequal risk profile for an interest is unacceptable. I have attempted to structure the frame to permit a constraint on acceptability here, and to allow any intuitions regarding acceptable risk to operate, but it requires determinacy.

These brief comments are intended to illustrate the large degree of

⁵¹The basic point has been familiar since John Harsanyi, "Cardinal Utility in Welfare Economics and in the Theory of Risk-Taking," *Journal of Political Economy* 61 (1953): 434-35. For illuminating discussion, see Allan Gibbard, *Reconciling Our Aims: In Search of Bases for Ethics* (New York: Oxford University Press, 2008).

⁵²For more elaborate cases, see Lenman, "Contractualism and Risk Imposition."

⁵³For some relevant considerations, see James, "Contractualism's (Not So) Slippery Slope."

convergence in what the standards require, rather than settle an appropriate interpretation. In the vaccine case, efficiency and equity *might* require different policies (depending on how, precisely, the equity constraints are defined), but both register the following (all else equal) as human rights violations: (1) failure to enact public health policies that enhance the effectiveness of the vaccination, (2) distributing any alternative vaccine (e.g., a cheaper one) that leaves the infection rate above .1 generally, and (3) doing nothing to mitigate the threat of infection. In other words, the remaining indeterminacy in the risk standard acceptable in the hypothetical frame concerns hard cases operative at the level of fine-tuning a response to a threat, or sitting at the margins of our policy-making.⁵⁴ Acceptable risk, as defined by the hypothetical frame, renders determinate human rights claims for sizeable arenas of political practice, leaving such discourse capable of being meaningfully operationalized as a normative system.

Have I simply collapsed human rights into contractualist or consequentialist approaches to political morality? No, these considerations arise as answers to the hypothetical frame. Human rights will supply a normative commitment to human dignity—the theory will provide an independent account of why human dignity mandates our concern, in the sense of constricting the scope of permissible exercise of discretion. It will also settle the domain of interests that is the scope of that concern. We appeal to impartial acceptance, as a contractualist device, at a different theoretical level: to settle, in a principled way, how to accommodate the competing demands of multiple subjects in a risky interactive environment. So although impartiality here will specify the *content* of the human rights duties for agencies once we identify the protected interests, it will not *ground* the protection of those interests. The hypothetical frame is a procedure that responds to what we have assumed are the well-grounded demands of human dignity and hones our attention to matters relevant from the standpoint of the multiplicity of demands in a given context. For instance, the argument that we give for protecting certain interests as a matter of respecting human dignity could be deontic in character: that these interests trump or preempt certain other valuables in the domain of political decision because of the moral importance of human dignity, but require efficiency in risk mitigation among themselves. The basis for the duty to protect would not be utilitarian, but the duty would require utilitarian-like efficiency with respect to protected interests.

⁵⁴It is difficult, for instance, to imagine a real-world scenario approximating a .1/.02 vs. .06 decision.

5. Conclusion

Human rights have become an important feature of the discourse of international morality. We should, I think, welcome the critical vantage they offer our politics and law. However, the warmth of our welcome should be predicated on our ability to show that human rights claims are meaningful in a way that can assist practical political reason, and be resistant to manipulation. This requires demonstrating that there is a principled way to understand what they require, and to evaluate the sorts of human rights claims adduced at the start of the paper. My aim here is to be a subpart to that effort, by introducing some determinacy into the element of dutiful action. Given the context-dependence of proper agential responsiveness to standard threats, it will frequently be difficult to discern violations. However, if successful, the approach does make discernment a possibility, and this is crucial for human rights to perform the important functions of a viable international morality.⁵⁵

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⁵⁵I am grateful to Nicole Hassoun, Christopher Morgan-Knapp, Lori Watson, Kristen Hessler, and two anonymous referees for this journal for generous comments on earlier drafts of this paper.

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