

Giving Up the Goods: Rethinking the Human Right to Subsistence, Institutional Justice, and Imperfect Duties

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ABSTRACT *Either a person's claim to subsistence goods is held against institutions equipped to distribute social benefits and burdens fairly or it is made regardless of such a social scheme. If the former, then one's claim is not best understood as based on principles setting out a subsistence goods entitlement, but rather on principles of equitable social distribution — a fair share. If, however, the claim is not against a given social scheme, no plausible principle exists defining what counts as a reasonable burden for any of the available agents to secure subsistence. No justifiable principle exists implying generalised perfect duties any agent could clearly follow or clearly breach that secure subsistence conditions for others. At best we can justify rescue duties under very specific conditions, or general but imperfect duties to improve arrangements. Neither of these obviously correlates with human rights standards. Attempts in the literature to overcome the dilemma by claiming basic rights can correlate with imperfect duties or can generate duties to work towards institutions that 'perfect' our imperfect duties, are faulty. I then show how the dilemma can be avoided by accounts of human rights focusing on minimum respectful treatment rather than goods or interests.*

In this article I challenge the idea that there can be rights with the *rationale and content* of securing subsistence goods for people. I do not question whether sometimes one can be entitled to minimum provisions on a different basis. For example, social justice standards entitle us to a *fair share* of the social product. In certain circumstances, fairness can imply the minimum necessary to enjoy equal rights as a citizen. Yet, that is not the same as subsistence and in other circumstances the same standards can entitle us to more than this. By contrast human rights aim to articulate minimal entitlements that do not vary with social or personal achievement.¹ I argue that the minimum they aim to articulate is not best understood as entitlement to access the goods needed for a given purpose, even the purpose of subsistence. Rather it is best understood as an entitlement to a minimum kind of *treatment*. That will have different implications in terms of goods entitlements in different contexts. The minimum treatment view does not, however, challenge social and economic rights — it just makes their basis and content more nuanced.

My argument takes the form of a dilemma. Either a person's claim to subsistence goods is held against institutions equipped to distribute social benefits and burdens fairly and equitably or it is made regardless of such a social scheme. If the former, then one's claim is not best understood as based on principles setting out a minimum goods entitlement, but rather on principles of equitable social distribution — a fair share. If, however, the claim is not against a given social scheme, there will be no plausible principle defining what counts as a reasonable burden for any of the available agents to

secure subsistence. That means there is no justified principle implying perfect duties any agent could clearly follow or clearly breach that secure subsistence conditions for others. At best we can justify perfect, but particular, rescue duties under very specific conditions, or general but imperfect duties (allowing a degree of personal discretion concerning what any of us must do). Neither of these obviously correlates with human rights standards, for reasons I shall give. For more than singular duties such as rescue duties and imperfect duties to apply an institutional social agent with special redistributive powers is needed. But this reintroduces the first horn of the dilemma above: for that kind of agent the relevant standard is a fair share, not a minimal right. Attempts in the literature to overcome the second horn of the dilemma through claims that basic rights can correlate with imperfect duties or that basic rights can generate duties to work towards institutions that ‘perfect’ our imperfect duties, are shown to be faulty.

My conclusion is that entitlement to a share of goods and duties to carry corresponding burdens can only be appropriately established in special institutional contexts. In those contexts the standards of social fairness apply. Human rights standards engage distributive questions differently: they define *impermissible reasons* on which to base distributive policies, ones implying negligent disregard. They are better understood as standards of minimum treatment rather than entitlement to minimum goods provisions.

The Claim

Call a right the content of which is access to a minimum amount of any set of goods a ‘minimum content right.’ This kind of right is independent of social circumstances in that the purpose that defines its content, such as securing agency, is not sensitive to social or personal achievement. This kind of right allows one to stake a valid claim to the resources needed to fulfil that purpose and no more. That is different from the claim that in social cooperative circumstances there is a minimum ‘floor’ to just entitlement. A right to a fair share of the goods of social cooperation might, *in extremis*, only justify the minimum needed to equip people as social participants.² But social or personal circumstances will make this the case not the rubric of the right. Call that a ‘circumstantial minimum claim’. On that basis, the socially enabling minimum is mandated only in *some* circumstances. In others we are entitled to different amounts, the varying content of entitlement being set by the social aim of fairness.³ In what follows I argue that minimum content rights are not justifiable in political communities because they prescribe minimal rather than fair shares. Yet, outside of political communal contexts there is no coherent account of what constitutes a justifiable imposition of burdens for any specific agent that will secure the resource claims of all.

I assume, *arguendo*, we would have little trouble identifying the minimum level of resources necessary for the purpose a minimum content right might serve. These purposes can include: enabling agency, securing a ‘minimum worthwhile’ life, a minimally decent life, or the minimum necessary to enjoy any other rights.⁴

First Horn of the Dilemma

Political institutions with power and authority to assign rights and duties to their citizens have a duty of care to assign those rights and duties justly. In contemporary political

philosophy, the content of this duty is the subject of contending theories of social justice. What characterises liberal-egalitarian social justice theories is that they appeal to social values in explaining and justifying social rights, values like reciprocity, fairness, equal concern, and community.⁵ This distinguishes the rights from a-social claims to entitlements that might hold outside of these relationships.

Importantly, these accounts of justice are relational and ‘contributive’. That is, the values behind them imply that social entitlements are not based on an absolute notion of what anyone must have, but at least in part on considerations of people’s relative advantages in a social order. Equalising resources, allowing inequalities only where these benefit the least advantaged, and equalising opportunities are ideals for which comparisons of people’s relative advantages matter. The latter inform what anyone must receive and what she must contribute. Furthermore, these comparisons include not only those goods people might enjoy or personal needs, but also people’s contribution, or ability to contribute, to the redistributive scheme. People’s entitlements, then, partly depend on what they do. In a scheme favouring equality of opportunity, someone who can work and produce an income but chooses not to will not necessarily be entitled to the same as those taking on more burdens.

On these accounts, then, specific social justice rights to resources will be derived from putting these principles together with information about people’s ability to contribute and their advantages/disadvantages in the scheme. So, what amounts to a fair share will be sensitive to people’s talents, social positions, material advantages, and differing needs. Social fairness does not, for that reason, entitle people to an absolute amount or even the amount necessary for a given, a-social, purpose. It entitles us to the amount the principles and the information together determine is a fair share.

Crucially, however, such views constrain contribution in terms of *reasonable* burden. We do not have a duty to fellow citizens to dedicate our lives entirely to improving their condition. Rather distributive principles must give a reasonable weight to a person’s pursuit of her own legitimate life aims, commitments, and other moral responsibilities (call these ‘legitimate commitments’ from now). Otherwise, it would be permissible to turn us into full-time servants of the wellbeing of others. This is the reasonable burden constraint on distributive principles:

R: For a claim to some outcome to be a genuine entitlement, the implied burdens for others of securing or allowing the outcome must be justifiable as reasonable and reasonably assigned.

[*Reasonable* here means due weight is given to people’s capacity to develop and pursue their own legitimate commitments.]

Theories of social justice are candidate solutions for how to reconcile the social good with R. They offer principles of fairness or equity for distributing benefits and burdens in ways that respect individuals’ ability to develop distinct commitments and pursue separate lives.⁶ Each person’s required contribution is limited through guaranteed liberties and fair opportunities to pursue her life aims. Thus, Rawls’ liberty and difference principles or Dworkin’s equality of resources allow people to pursue different amounts of social goods, given their different aims, whilst nevertheless requiring social contributions from them.

These principles focus on the operation of social institutions with oversight and authority, capable of defining patterns of social benefit and burden shares over time.

Political institutions are capable of shaping distributive patterns by assigning social rights and duties and doing so continuously. This capacity equips them to reasonably bear the burden to maintain such patterns fairly. On the other hand, it would be unreasonable to require individuals to adopt the production and maintenance of such patterns as the central concern guiding all choices in their lives. Such an all-consuming burden would distort their ability to pursue distinct lives, and is to that extent incompatible with R.

Importantly, the principles that best express fairness and equal concern do not require redistribution according to a minimum. They *might* imply some minimum entitlement given certain circumstances, individual or social.⁷ But vary the circumstances and the content of the rights will vary. Social fairness may sometimes justify a circumstantial minimum claim, because social resources are limited or because an individual's contribution does not warrant more. But that is not a minimum content right, as the entitlement varies with availability of social resources or individual contribution even if personal needs stay the same. Furthermore, the minimum can be considerably more than subsistence given it is defined in terms of a social cooperative aim such as having the resources necessary for equally exercising one's citizenship rights. Real social participation requires, for example, information access, means of communication, effective levels of education, transport, and equality of opportunity to take up official roles.

Rawls, for example, says that any reasonable conception of justice will incorporate as a basic minimum 'measures ensuring for all citizens adequate all-purpose means to make effective use of their freedoms.'⁸ But this is defined in terms of what people need to genuinely participate on equal terms.⁹ It is worth emphasising that it is not what anyone is entitled to regardless, but the amount some members are owed in some circumstances, for fair social cooperation. The minimum depends on what it takes to achieve this social end and who gets it on the resources available to society and personally to citizens. Change those resources and fairness will warrant a different share.

Just Sufficiency?

A response to this is that one family of social fairness theories seems to favour minimum content rights: 'sufficientarianism'.¹⁰ This restricts just redistribution to the amount that is 'enough' on some account of a sufficiently good life. That is the maximum content of entitlements under sufficientarian social justice. Once again, however, the idea of a sufficient social share does not equate to subsistence.¹¹

If we do interpret sufficiency as subsistence, a deeper problem emerges: why value a social order that redistributes according to a minimum, even when it could, without breaching R, redistribute above that? The sufficiency view would have to show that redistribution above the minimum violates the values motivating social justice. Yet, equal concern, fairness, and reciprocity do not inherently have low ceilings. If the redistributable goods truly matter for citizens' lives, then we cannot be indifferent to how they are distributed just because subsistence is secured. Someone may have enough to eat, but the possession of more resources by her peers gives them greater opportunities for pursuing their conceptions of the good. That seems to matter enough to make redistributing them more plausibly fair than leaving them untouched above the subsistence minimum.¹² Unless there is a value that trumps fairness here, leaving the distribution of goods that matter for people's lives to fall where it may is implausible as an account of social justice.¹³

On social-cooperative accounts of social fairness, then, justice is not adequately or plausibly expressed by a minimum content right such as subsistence. So, whilst in certain personal or social circumstances my legitimate claim will be to a basic minimum, describing these rights as rights to subsistence is a mis-description. Theories of equal concern or fairness will abhor cases where, at no cost to fairness, the social product could be distributed so everyone is above a minimum threshold and yet a political order fails to do this. And as I have pointed out even the social minimum is not defined according to subsistence, and so might vary significantly from it.

This is not purely a terminological point as the two points of view, social justice claims and a minimum content right to subsistence, will diverge over specific cases. On the latter view, a society supplying any given person with subsistence would thereby be just. Yet, social justice would deem this an injustice in certain cases: if the person in question was, as a matter of social fairness, entitled to more. Minimum content rights could instead be taken to refer to what people are socially entitled to *in extremis*, as I put it above. But there is no reason to think that means only subsistence. Furthermore, it would not be a minimum content right, but what a right to a fair share implies *in extremis*, with a different set of entitlements appropriate in all other circumstances. Campaigning for subsistence rights then, as a matter of social justice, would get the emphasis wrong and potentially the wrong result.

The attractive alternative to subsistence as social justice is to propose these as distinct rights held outside or in spite of social cooperation.¹⁴ Perhaps these rights apply regardless of the presence of an agent of social distribution and irrespective of which social cooperative scheme one is a member. That, however, means appealing to a different value than the social-cooperative values I have mentioned. Here, the role for subsistence rights would not be to answer the special moral question posed by redistributive institutions. Rather, they must define ‘free-standing’ entitlements, independently of what constitutes a socially fair share.

Second Horn of the Dilemma

Yet, here we face another problem. Call this the ‘legitimate burden constraint’. In the cooperative social context I mentioned above fair contribution is an integral part of justice. Any reasonable principles for distributing social goods will direct authorities to take into account the burdens of producing or contributing the goods. The entitlements the principles prescribe must be fair in terms of the cost to others of securing them. The principles must, therefore, set out a fair distribution of goods *and* burdens — in relation to each other. Imposing more tax or work on someone than is fair, in order to improve the common good, is as unjust as failing to benefit anyone to the requisite degree.

However, fairness of this kind is only appropriate for social institutions with the power to frame social goals, fix contributions to those goals, and adjust these in response to changing shares and circumstances. Those powers make institutions social justice-apt in this sense. Outside of such schemes it is unclear how much burden falling on any agent fairly corresponds with securing a given degree benefit for others. How much sacrifice of one person’s aims and goals, for example, is justifiable in order to secure subsistence for another over a lifetime? In the absence of shared state institutions, subsistence would have to be secured for any and all by people carrying both a share of

material contributions and of the action to fix others' subsistence problem. But there is no obvious index defining how much any person should justifiably sacrifice, in terms of her own distinct life aims, to secure the subsistence of the needy. Correspondingly, that means that the level of entitlement for others is also unclear in this context.

I am assuming that for any person to have an entitlement to a particular outcome, the burdens on others to produce or allow that outcome must be justifiably imposed. Only if those burdens are just can we say that the claim of entitlement is a valid moral claim.¹⁵ Could we avoid this problem by stipulating an arbitrary level of contribution? Justification here means something specific: showing the burdens anyone will shoulder are R-reasonable. It must recognisably give due weight to prerogatives for persons to pursue their own aims and commitments versus pursuing the wellbeing of others. An arbitrary burden share does not obviously satisfy this test, and so cannot be said to be valid.

There is an important stream in contemporary human rights theory for which constraint R is problematic. These theorists aim to identify and justify human rights entitlements, within certain practical limits, by reference to the (sufficient) 'importance' of certain goods or interests for people's lives.¹⁶ For these theorists the allocation of specific obligations to people, to secure the interests or goods in question, is a separate question 'downstream' from whether the rights, including a right to subsistence, are justified.¹⁷ So long as certain practical constraints are observed (e.g. the principle 'ought implies can') and implausibly excessive demands on society are excluded, reflection on the importance of the goods is sufficient to justify a claim as valid.¹⁸ Yet those goods need to be *important enough* to validate a claim *given* the burdens satisfying them will imply for others.¹⁹ A claim must be justified by showing the burdens implied by satisfying it are R-reasonable. So, for the importance of a good to count as a reason to render a claim to it valid, enjoyment of the good must not imply *unreasonable* restrictions on others pursuing their legitimate commitments.

These views could stipulate that the impact of burdens on our legitimate commitments should not count for anything against secure enjoyment of the minimum goods in question. In that case they violate condition R.²⁰ Alternatively, they might assume that the burdens do matter, but not enough to threaten the validity of the claim. Yet this latter assumption implies these views have a criterion for what counts as a reasonable versus unreasonable degree of burden, such that we can tell that the burdens associated with securing subsistence will satisfy the criterion (thereby respecting R). Else it is mysterious why one would believe fulfilling an interest, such as subsistence, is sufficiently important to justify all possible corresponding burdens. It may turn out that securing subsistence for others requires me to live a life dedicated solely to this aim in my efforts, choice of profession, relationships, and life plans. Is there any circumstance where that would be R-reasonable? Appealing to the idea that the interest is of sufficient importance to override those burdens just begs the question. A justified criterion of overriding importance must be one that explains why the burdens implied by satisfying the interest are indeed reasonable, and justifiably 'overridden' as considerations.

Perhaps, instead, these accounts take rights as interests important enough to justify burdens on others 'for the most part'. Yet, it is unclear that this is the case without spelling out what the legitimate burdens are or will be. So again, one needs the account of what kinds of burdens to look out for as unreasonable. The burden of proof, then, is on these theorists to show that their justification of a subsistence right is R-compliant. Whilst our interests in subsistence goods might be important *considerations* in judgements

about rights, it is unclear when these convert to justified *entitlements* without a criterion for R-compliant burdens.²¹

One can concur with such theories that specifying burden allocation up front is an excessive demand on a theory of human rights.²² A theory of human rights need not identify present and available agents in all circumstances to carry the burdens for even the most plausible rights. But there is an imprecise notion of specification at work here. This level of agent and burden specification for all circumstances may be implausible when claiming a right; rights are indeed in that sense dynamic. But condition R rather highlights the need for a criterion, or principle, for what counts as reasonable burden, and by which we could identify those agents/people whose burdens will be R-reasonable, across different circumstances.

So far I have shown that if securing subsistence is to imply individual burdens, then we lack a criterion of reasonable cost. The same is true collectively. For, in the absence of collective justice-apt institutions, the burdens implied for any one state to help all needy persons are costly. These include resources that could go towards fulfilling domestic obligations of justice, development, and other moral imperatives. So here too the fair burdens question arises.

Moreover, there is no clear co-ordinating rule agents could all follow that would collectively produce and maintain, over time, a fair distribution of burdens and benefits (as the coordinating agency of the state can, in principle, do domestically). In assigning burdens, collective institutions can take into account resources and abilities, and changes in these. They can do so whilst giving reasonable weight to individuals' pursuit of personal commitments. In the absence of shared institutions this fairness function would have to be played by a rule that, if followed by individuals and separate states, will coordinates actions to successfully secure subsistence for the needy whilst taking those fairness factors into account.²³ That such a rule could be developed which even takes into account changing circumstances is not plausible.

Rescue

Now consider, by contrast, a clear personal obligation to supply some individual with some minimum subsistence goods. Meeting someone in the wilderness in need of food that we can spare, for example, triggers clear reasons to assist. But, the difference between these cases and the ones under scrutiny is that the reasons do not emerge from a general requirement to help all persons in need. That would violate condition R. Rather it is a reason to assist where what picks out the recipient is more than the fact that they are in need. Additional considerations include a relationship established by the moral luck of crossing someone's path, and that the costs of assisting are not unreasonable.²⁴ Increase the numbers of people we meet in this condition, or the kind of assistance they need (e.g. life-long care), so that efforts to assist will consume all but our own subsistence resources, and we condemn the rescuer to a life servicing others. Making this into a moral obligation clearly violates R.

One response to this would be to stipulate that securing certain human goods implies obligations whatever the costs. Indeed, the obligations associated with rights against enslavement, for example, would seem to apply irrespective of the (opportunity) costs of repudiating slave ownership. However, the disvalue of slavery does not clearly trump all

considerations of burden related to securing *freedom from slavery* even in normal cases.²⁵ Positive obligations to prevent enslavement for all humans face the same problems of defining reasonable or fair burden. In order to have such obligations, and a sense of failing in them, there must be a clear notion of what constitutes a reasonable contribution towards global slavery prevention. That implies a principle directing us as to what amounts to a reasonable and sufficient level of contribution and what does not. It seems implausible that there are such clear principles, outside of social-cooperative contexts. Formulating one is made more implausible by the variety of individual positions and resources, and its ever-changing nature across the globe.

Perfecting Imperfect Duties?

There are two salient features of the problem of global lack of access to subsistence goods: A) There is no plausible principle imposing reasonable, clear obligations on the available agents to supply the goods, because there is no clear sense of what constitutes a reasonable balance between legitimate personal commitments and securing those goods for others; B) global need is a matter of great import to which we might only make non-decisive contributions, but which nevertheless has some moral call on us. In such cases it makes more sense to speak of *imperfect* duties rather than human rights. By imperfect duties I mean duties to incorporate concern for others' wellbeing in our lives with no stipulation as to the degree of contribution.²⁶

Among the various accounts that have been offered for the distinction between imperfect and perfect duties, one key feature seems pertinent here. The content of some duties is in part defined by a degree of agent-centred discretion whilst the content of other duties does not. What constitutes 'too great a cost' for one person, will take into account commitments to legitimate relationships, other moral obligations such as responsibilities of care for children, and pursuit of legitimate life aims and projects. These commitments might differ significantly across people, and each one of us must exercise judgement and integrity in balancing their different demands.

The burdens associated with fully addressing the aim of global subsistence could easily crowd out these individual commitments. So it makes more sense to accommodate this aim through a duty to include it in one's judgements about personal aims. It can be adopted as a project to be integrated 'appropriately' into our personal commitments, and balanced against them in our life plans, rather than a standard for judging specific actions as right or wrong.²⁷ Given a person must balance different ends in her life, including other moral responsibilities, what emphasis she gives to any project will be a matter of personal moral judgement. One individual might, given other imperatives, have reason to work hard on an aim in her retirement years whilst another might dedicate more time to it in her mid-working life. So long as the individual judges with integrity, there is no fixed pattern for integrating personal commitments.

This kind of incorporation of concern for others' wellbeing cannot, however, correspond to a right to subsistence goods. This is because no obvious connection exists between genuinely adopting an aim and actually securing any particular outcome. Reasonable incorporation of an aim means making a commitment to pursue that aim *given* one's other legitimate commitments, rather than actually achieving that aim. The upshot of this is that justifying imperfect duties to address subsistence for the needy falls

short of establishing an entitlement to the outcome itself. After all, an entitlement to subsistence goods implies the burdens associated with *actually* securing those goods are justified. That is, it implies more than a right to *some* contribution being made to the general cause.

A number of contributors to the literature on subsistence rights concede that, outside an institutional order, concern for others' subsistence can only intelligibly imply imperfect duties. Yet, they argue, this does not prevent those concerns having a rights status. This is based on two types of claim: (a) imperfect duties can justify assigning specific claims held against specific persons by stipulation, thus establishing rights against those persons,²⁸ and moreover, (b) we plausibly have duties to 'convert' our imperfect duties into perfect ones: to work towards creating institutions with fair standards allocation, assigning perfect duties corresponding to others' rights. These 'mediating' institutions are viewed, in these accounts, as 'consolidators' of imperfect duties corresponding to subsistence rights.²⁹ Both responses are flawed.

Response (a) holds that we can have subsistence rights in the absence of justified burdens to secure the content of those rights. In answer to the problem of linking imperfect duties to definable subsistence claims at least one author has suggested this might be solved through a stipulation. For example, we can stipulate that any person with available resources must help the first deprived person that claims assistance from them.³⁰ But this misses the point. What constitute available resources, and so what constitutes a reasonable contribution, needs to be defined in a way that is R-reasonable. Social justice solves this through principles of institutional fairness. Without an equivalent principle, the degree of burden associated with helping others will not be justifiable as reasonable. The mere fact, say, that Paul has more resources than me is not a reason to treat those resources as available for redistribution. To claim he can justly spare them implies we have a criterion for deciding when his resources are either enough for his purposes or he has more than a fair share. That means a criterion of reasonable burden. Should Paul forego having children, reduce his friendships, abandon his vocation for a more productive profession, so that he can have more income to support lifelong subsistence for one of the needy? Stipulated solutions treat imperfect duties as faulty perfect duties that can be fixed by stipulating specificity into them, within the limits of justice. Unfortunately, without a clear criterion for reasonable burden there is no sense of what those limits are.

Alternatively, response (b) treats imperfect duties as indirectly connected to genuine entitlements. The idea is that subsistence rights justify imperfect duties to work towards institutional orders that will 'perfect' these imperfect duties by allocating fair burdens.³¹ Yet this assumes our imperfect duties are to produce institutions committed to minimum content rights.³² As I have argued, there is no rationale for institutions capable of fairly distributing cooperative costs and burdens to be subject to minimum content rights. There is every reason for them to be subject to principles of social justice. These may at times imply circumstantial minimum provision rights, as I have sketched. But they also imply a whole range of entitlements varying with individual and social circumstances. So, if we do indeed have imperfect duties to bring about institutions of justice, these correspond to the aim of establishing institutions capable of social fairness, rather than minimum content rights.³³

Perhaps our imperfect duties can, like duties of rescue, include duties to achieve at least subsistence for others. Yet, given what motivates authors turning to these imperfect

duties is the need for a plausible account of reasonable benefits and burdens, restricting benefit shares to subsistence is an unjustified presumption. The response would only work if our goal were setting up special institutions to allocate fair burdens, but only for the sake of securing subsistence for all, and no more. In that case imperfect duties to bring about those institutions would indeed be connected to minimum content rights. But it is unclear why institutions with the power of fair burden distribution should set aside obligations to also fairly distribute social benefits.

I leave aside two other ways that a right to subsistence might be used. The first is as a threshold for state's international legitimacy.³⁴ The second is as a measure of when institutions violate a 'do no harm' principle.³⁵ The first is not a substantive account of what individuals are owed. It is compatible with such a view that individuals are owed more than subsistence, as a matter of justice, yet subsistence is enough to hold off international intervention. The second use of subsistence also has a different purpose: to identify wrongful imposition rather than what is positively owed to people. In fact this argument is used precisely to avoid the excessive burden problems posed by a right to subsistence.³⁶

In sum, without a plausible account of which burdens are R-reasonable claiming there is a valid, a-social entitlement to subsistence is unjustifiable to any agent that might carry the resulting burdens. In social cases there are plausible accounts of fair burden, but not for minimum content rights. Rather they justify principles under which restricting a person's share of social benefits to subsistence goods can constitute an injustice. Saying to citizens denied their fair share: 'Ah, but we have fulfilled your human rights' inadequately responds to the charge of social injustice.

Not the 'Absent Duty Bearer' Objection

I should clarify here that I am not simply repeating Onora O'Neill's well-known argument against human rights to goods and services. That focuses on the apparent *absence* of duty bearers for rights to goods and services when there are no institutions to allocate duties to specific people. Instead, the above argument says that for the claimed content of any right to be a genuine entitlement, the *burdens* it implies for any person must be justifiable. It does not imply that for a human right to be genuine one needs to be able to specify present and available duty bearers with allocated duties in all circumstances. Rather it asks, both for envisaged types of capable agent and anyone else affected, whether their burdens would be justified.

O'Neill, however, stipulates human rights should be universal in the sense that there is always an *available* duty bearer against whom a claim can be made.³⁷ But that is a claim about what it means for human rights to be 'universal' rights.³⁸ It is distinct from the *substantive* question of whether and when it is reasonable to impose burdens on agents that are indeed present, or might be present in other circumstances. Given I can sometimes be out of reach of potential torturers, even freedom from torture will not count as a human right in O'Neill's sense of universal. If, however, universality means there are conceivable and plausible duty bearers for conceivable and plausible circumstances, then the rights of social justice are universal rights: we can conceive of plausible social circumstances in which the duties should be carried by certain institutions to treat us fairly. Furthermore, without posing the substantive question, O'Neill's challenge on where to lodge the claims

for certain rights can be answered through arbitrary stipulation, e.g. a rule that requires capable people to help the first needy person that approaches them.³⁹ I have, instead, questioned the plausibility of minimum content rights to subsistence goods, given the constraints on justifying associated burdens in social and non-social cases.

An Alternative Approach

There is an understanding of minimum standards that avoids these problems. The problems challenge the claim that human rights are rights directly to certain goods (needed for a certain level of wellbeing). The views that propose this treat these goods, within certain practical limits, as entitlements because of their *importance*. The question of legitimate burden is on these views split in two: 1) the content of corresponding obligations, which is a corollary of the entitlements;⁴⁰ 2) the actual allocation of burdens to specific agents, in the form of actual duties, which is treated as a practical or pragmatic question separate from the initial identification of entitlements and the content of corresponding duties.⁴¹ So, for example, the importance of the interests attacked by torture (absence of coercion, pain, fear, or health damage) establishes an entitlement to be free from torture.⁴² The content of corresponding duties will be to make torture-free conditions secure, either by eschewing torture or by supplying protections against torture. Specific burdens for specific agents are readily allocated by capacity, such as the capacity to torture, and this applies irrespective of the standard burdens it might imply. Where capacity does not clearly identify specific agents, as with the capacity to protect people from torture, the burdens of protection can be allocated by an institutional order levying fair tax burdens.

But freedom from torture is different from the goods underpinning subsistence. It is not a relevant consideration when considering the permissibility of an act of torture that torturers will bear certain burdens, such as foregoing some information, if they desist. Torture is straightforwardly prohibited as an end. Its benefits, in normal cases, should not even be weighed in the balance. But, when it comes to protection *from* torture there are indeed questions of appropriate distribution of protections and burdens. Whilst that does not alter the content of the right, it changes the scope the associated duties. Claims to subsistence goods have more in common with protection claims than with straight prohibitions. How much a person can claim from any and all others towards securing a subsistence good is indeed, as I have shown, a matter of fairness.

The 'sufficient importance' views cannot explain this difference. They assume the positive justificatory work of grounding entitlements is done by the importance of enjoying the goods. However, in the torture case it is not simply the enjoyment of conditions free of pain, suffering, and coercion that the right identifies. It is rather *the way* that those goods are secured or made insecure that matters. Torture renders these goods insecure by certain types of action and it is the nature of those that in turn converts the insecurity of the goods into a wrong. Consider the case where someone imposes pain and coercion not as a 'convenient' means to gather information, but rather in self-defence. In that case, the legitimate aim justifies the insecurity of these goods for the aggressor.

Minimum content rights, rights to the goods themselves, however do not distinguish different ways that access to those goods can be secured or hindered. Rather, the mere importance of subsistence conditions is taken to make them a moral aim, and justify any

burdens, within wide practical limits. Within those limits, it makes no moral difference whether someone fails to enjoy such goods because an agent blocked this for no legitimate reason or because others failed to get together and collectively provide access to the good.⁴³ Importantly, this is what makes such views vulnerable to the dilemma I posed above. They fail to take burdens and their reasonableness into account in setting entitlements; they breach R.

There is, however, an alternative interpretation of human rights as minimum standards. Human rights can be seen as standards of *minimum treatment* rather than entitlements to a minimum amount of some goods. On this alternative, human rights responsibilities are not outcomes-driven, but rather respect-based. Burdens are not justified by a benefit-burden trade-off, but the permissibility of certain actions and omissions given what they say about respect for others and the separateness of persons expressed in condition R.

As indicated above, torturing a regime opponent is unacceptable not because the interests associated with freedom from experiencing torture ‘outweigh’ the burdens for, say, a police officer in forsaking torture. Rather, torture is a form of treatment where the benefit-burden calculation is irrelevant given the burdens of abstaining from torture should (normally) count for nothing. Torturers treat people’s capacity to pursue distinct lives and commitments instrumentally: weighing them, and potentially sacrificing them, for other aims. They thereby fail to respect those distinct lives as such. This makes torture a qualitatively different case from one where benefit-burden trade-offs are permitted according to distributive values like fairness. There is no fair distribution of ‘abstinence from torture’ because the benefits and burdens of torture are excluded as considerations from the fairness calculus.⁴⁴ In fact, fairness inherently incorporates this: to be fair a distribution must also be R-reasonable. That is why, for example, the life benefits to the world’s sick of enslaving some of the healthy to look after them do not even count amongst morally relevant considerations in favour of doing that.

Now, it is not the case that every subsistence deficit is due to non-social agents acting on excluded reasons: those that subordinate the distinctness of a person’s life to their aims. Pursuing goals that are not directly beneficial to others is not this kind of denial, even if there are opportunity costs to others’ wellbeing. It would only be a subordinating action in this sense if the subsistence losses were due to a demonstrably unreasonable pursuit of personal goals. Showing that would mean, as I have said, supplying a criterion for what level of contribution to the plight of others is R-reasonable and what is not. We have plausible accounts of that for contributions in social arrangements, but outside of those arrangements, we do not have a plausible account of reasonable contributions to other’s wellbeing.

This view might seem to undermine economic and social rights. However, it does not undermine so much as nuance these rights. As a matter of social justice, institutions capable of assigning rights and duties have a duty of care towards their citizens to maintain fair distributions of benefits and burdens. Sometimes, however, these institutional agents will employ socio-economic resources in ways that fail to respect the separateness of persons, such as where people are starved intentionally or through culpable negligence. These are cases where people’s capacities to pursue distinct lives are treated as tokens that can be entirely subordinated to the institution’s whims. Human rights standards correspond to the prohibition of these kinds of acts, whether towards citizens, people excluded from standard social justice (e.g. convicts), or non-citizens.

Different economic and social rights identify different aspects of wellbeing that can be abused by political institutions in this way.

Failing to give people their fair share, or extracting unreasonable burdens from them, however, is a failing of social justice. So where 'human rights' demands are framed without specific limits (as in the ICESCR right to health), we can read them as the rights of social justice limited only in terms of social fairness. However, there are ways of sacrificing people's access to certain categories of social good that goes beyond lack of comprehensive fairness in shares of benefits and burdens. Where access to these goods is used or restricted in a way that subordinates people's capacity to pursue distinct lives, individually or as social participants, to the political aims of the state, we have a qualitatively different case. For example, where education is restricted on the basis of race, health on the basis of political support, or a government chooses to impose destitution on people for political advantage. In those cases, these individuals' capacity to pursue distinct lives or develop commitments is wrongly subjected to being weighed in the balance against other aims.⁴⁵ This is the territory of human rights proper.

International institutional standards are primarily directed at how state agents treat those under their effective control. It is not surprising that these standards refer the burden question to (unspecified) principles of social equity.⁴⁶ That is, these standards to some extent presuppose social institutions that have the authority to engage in distributing social goods and costs, institutions that are social justice-apt. The social measures they imply, then, are better understood as triggering the logic of social justice standards rather than minimum content rights. References to 'core obligations' by standard-setting bodies, on the other hand can be understood as indicating when state policies mistreat people with regard to the wellbeing categories identified above. Those bodies refer to a 'prima facie' failure when significant numbers of people fall below basic levels of wellbeing.⁴⁷ Which implies a prima facie indicator of neglect rather than an account of economic justice.

Conclusion

If the argument of this article is right, institutional contexts challenge the appeal of minimum content rights. In those contexts minimum content rights are a diversion from social justice. Deprivation is a matter of social injustice or, where grievous, a violation of obligations not to subordinate people's pursuit distinct lives to other ends. Furthermore, it is possible to go some way to addressing a-social cases in terms of imperfect duties for individuals and governments to address those institutional orders unable or unwilling to establish social justice, and towards rescue of the people that suffer as a result. This includes working towards rationalising current systems of rescue through improved institutional moral standards for rescue by, for example, ruling out strategic conditioning of aid. This approach to guiding people's actions seems no less clear and no less plausible in practical reason than framing these matters in terms of minimum content rights that lack reasonable principles by which we can judge the justice our actions.

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NOTES

- 1 Henry Shue, *Basic Rights*, 2nd edn. (Princeton, NJ: Princeton University Press, 1996), p.18.
- 2 'In extremis' covers cases where an individual's choices in a society lead to only a minimum entitlement and where society cannot afford to supply each with more than the minimum (within conditions described as the 'circumstances of justice' in the literature; see Paula Casal, 'Why sufficiency is not enough', *Ethics* 117,2 (2007): 296–326, p. 310).
- 3 Shue says people have a right to 'at least subsistence' but this is because, he says, people might (or might not) have *other* economic rights that are nevertheless separate from the right to subsistence (op. cit., p. 23). This right is thus a minimum content right.
- 4 Alan Gewirth, *Human Rights: Essays on Justification and Applications* (Chicago, IL: University of Chicago Press, 1982), p. 20; James Griffin, *On Human Rights* (Oxford: Oxford University Press, 2008), p. 33; Thomas Pogge, *World Poverty and Human Rights*, 2nd edn. (London: Polity, 2008), p. 54; Alan Buchanan, *Justice, Legitimacy and Self-Determination* (New York: Oxford University Press, 2004), p. 128; Shue op. cit. p. 19.
- 5 Viz. H. L. A. Hart, 'Are there any natural rights', *The Philosophical Review* 64,2, (1955): 175–191, p. 185; John Rawls, *A Theory of Justice*, rev. edn. (Oxford: Oxford University Press, 1999), §3; Ronald Dworkin, *Sovereign Virtue* (Cambridge, MA: Harvard University Press, 2002), p. 1; G. A. Cohen, *Rescuing Justice and Equality* (Cambridge, MA: Harvard University Press, 2008), pp. 32 and 41 ff.
- 6 This is not a self-regarding prerogative, Cf. R. J. Arneson, 'Moral limits on the demands of beneficence' in D. Chatterjee, ed., *The Ethics of Assistance* (Cambridge: Cambridge University Press, 2004), pp. 44 ff., rather an imperative to give appropriate weight to agents' pursuit of their own commitments.
- 7 Casal op. cit., pp. 323 ff.
- 8 John Rawls, 'The idea of public reason revisited' in S. Freeman (ed.), *Collected Papers* (Cambridge, MA: Harvard University Press, 1999) p. 582.
- 9 For example, van Parijs' basic minimum, as the basis for *equal* freedom for all, is not limited to subsistence: P. van Parijs, *Real Freedom for All* (New York: Oxford University Press, 1995) pp. 32–41.
- 10 For example, Harry Frankfurt, 'Equality as a moral ideal', *Ethics* 98,1, (1987): 21–43 and Roger Crisp, 'Equality, priority, and compassion', *Ethics* 113,4, (2003): 745–763.
- 11 Casal op. cit., 313 ff.
- 12 Casal op. cit., 311ff.
- 13 Cf. cosmopolitan sufficiency in Gillian Brock, *Global Justice: A Cosmopolitan Account* (Oxford: Oxford University Press, 2009), pp. 62 ff.
- 14 Cf. Hart op. cit., pp. 184–6.
- 15 I take 'valid claim to G' to mean a moral reason for person A to enjoy access to good G that defeats non-moral considerations (inclination, personal aims) for others not to shoulder the burdens associated with A's access to G.
- 16 Alan Gewirth, 'Duties to fulfil the human rights of the poor' in T. Pogge (ed.), *Freedom from Poverty as a Human Right* (Oxford: Oxford University Press, 2007), p. 223; Griffin op. cit., pp. 97 ff.; Shue op. cit., p. 161; J. Tasioulas, 'The moral reality of human rights', in Pogge op. cit. (2007), pp. 78 ff.
- 17 See W. Hirsch & M. Stepanians, 'Severe poverty as a human rights violation: weak and strong' in A. Follesdal & T. Pogge (eds), *Real World Justice* (Dordrecht: Springer, 2005), p. 300.
- 18 See references at note 17 supra.
- 19 I use 'burdens' instead of 'obligations', as obligations are only one type of burden in addition to, for example, a reduced set of opportunities for others.
- 20 The same problem applies to stipulating a 'cap' on contributions, unless an account can be given of how the cap indeed respects R for burden bearers. Cf. R. Noggle, 'Give till it hurts: Beneficence, imperfect duties, and a moderate response to the aid question', *Journal of Social Philosophy* 40,1 (2009): 1–16, pp. 4 ff.
- 21 This is not a conceptual but a substantive claim: *justified* entitlement implies a plausible justification can be given to those who must shoulder corresponding burdens.
- 22 For example, Griffin op. cit., p. 108; Tasioulas op. cit., pp. 91 ff.; Shue op. cit.
- 23 So, this fairness problem cannot be sidestepped by appeal to the seriousness of 'leaving victims without redress', as asserted at Z. Stemplowska, 'On the real world duties imposed on us by human rights', *Journal of Social Philosophy* 40,4 (2009): 466–487, pp. 482–3. What is missing is a clear notion of what constitutes just redress in the first place.
- 24 On circumstances specifying duties see: V. Ignieski, 'Distance, determinacy and the duty to aid', *Law and Philosophy* 20,6 (2001): 605–616, pp. 606–7. For 'moral luck', see Bernard Williams, *Moral Luck*

- (Cambridge: Cambridge University Press, 1982), chapter 2; See also R. Dworkin, *Justice for Hedgehogs* (Cambridge, MA: Belknap, 2010), pp. 277 ff.
- 25 ‘Abnormal’ cases might include slavery versions of the ‘ticking-bomb’ scenario, B. Brecher, *Torture and the Ticking Bomb* (Oxford: Blackwell, 2007), pp. 14 ff.
- 26 *Viz.* formulations 7 and 8 of the perfect/imperfect duty distinction in G. Rainbolt, ‘Perfect and imperfect obligations’, *Philosophical Studies* 98,3 (2000): 233–256, p. 233 and Noggle *op. cit.*, pp. 6 ff.
- 27 Cf. Patricia Greenspan, ‘Making room for options: Moral reasons, imperfect duties and choice’, *Social Philosophy and Policy*, 27,2 (2010): 181–205.
- 28 Even with compensation according to some views, *viz.* Stemplowska *op. cit.*, pp. 482–3; Cf. P. Gilibert, ‘Basic positive duties of justice and Narverson’s libertarian challenge’, *Southern Journal of Philosophy* 44,2 (2006): 193–216, p. 204.
- 29 Henry Shue, ‘Mediating duties’, *Ethics* 98,4 (1988): 687–704, p. 703; C. Beitz & R. Goodin, *Global Basic Rights* (Oxford: Oxford University Press, 2009), p.15.
- 30 Stemplowska *op. cit.*
- 31 Shue *op. cit.*; Kok Chor Tan, *Justice Without Borders* (Cambridge: Cambridge University Press, 2004), pp. 51 ff.; E. Ashford, ‘Duties imposed by the human rights to basic necessities’ in Pogge (ed.) 2007, *op. cit.*, p. 216, accepts this is an imperfect duty; E. Ashford, ‘On the alleged dichotomy between positive and negative rights and duties’, in Beitz & Goodin (eds) *op. cit.*, p. 110; Hinsch & Stepanians *op. cit.*, p. 311.
- 32 Beitz & Goodin (eds) *op. cit.*, p. 15; Shue *op. cit.*, 1996, p. 16.
- 33 *Viz.* Rawls’ natural duties of justice: Rawls *op. cit.*, 1999, Chapter VI, § 51.
- 34 J. Rawls, *The Law of Peoples* (Cambridge, MA: Harvard University Press, 1999), pp. 61 ff.; C. Beitz, *The Idea of Human Rights* (Oxford: Oxford University Press, 2009), pp. 163 ff.
- 35 *Viz.* Pogge’s interpretation of freedom from poverty as a negative right, T. Pogge, ‘Shue on rights and duties’ in Beitz and Goodin *op. cit.*, pp. 125 ff.
- 36 *Ibid.*
- 37 Onora O’Neill, *Towards Justice and Virtue* (New York: Cambridge University Press, 1996), pp. 131 ff.
- 38 Hinsch & Stepanians *op. cit.*, p. 303.
- 39 Stemplowska *op. cit.*, pp. 482–3.
- 40 Griffin *op. cit.*, p. 108.
- 41 *Viz.* Griffin *op. cit.*, p. 103 ff. and Tasioulas *op. cit.*, pp. 92 ff.
- 42 For example, Buchanan *op. cit.*, p. 124.
- 43 What criteria define legitimate practical limits is not answered by these theorists beyond ‘ought implies can’, and general statements about ‘plausibility’, ‘practicability’, and excessive demandingness, e.g. Gewirth 1982 *op. cit.*, p. 19; Griffin *op. cit.*, p. 98; Pogge 2007 *op. cit.*, pp. 14 ff., Tasioulas *op. cit.*, p. 78.
- 44 Or rather, the prohibition on torture prohibits acting on reasons that express disregard for people’s status as separate persons. Deciding whether to torture by weighing burdens and benefits expresses disregard in this way, *viz.* J. Waldron, ‘Pildes on Dworkin’s theory of rights’, *The Journal of Legal Studies* 29,1, (2000): 301–307, pp. 302 ff.; Dworkin *op. cit.*, p. 330.
- 45 Note that it is weighing people’s capacity in this way, and acting on that, which is the wrong, not the fact that people have any degree that capacity to pursue a distinct life or develop commitments. That separates this view from an approach, like Nussbaum’s, that sees capabilities as ends to be pursued for human flourishing.
- 46 *Viz.* UN Committee on Economic, Social and Cultural Rights, *General Comment 14* (UN, 2000), para. 12b, fleetingly invokes a ‘principle of equity.’
- 47 For example, UN-CESCR, *General Comment 3* (2000), para. 10.