

What Human Rights Are There—if Any—and Why?

Abstract

Are there human rights to a good such as social welfare, which depends on circumstances, and on the needs of a putative right-holder? Is justice constituted by rights? Does it take belief in God to understand the grounds of human rights? The essay responds to Nicholas Wolterstorff's answers to these questions.

Keywords

conditional rights, European Convention, grounding of rights, human rights, justice, Universal Declaration.

A right is an entitlement (to something good) that must be respected regardless of good things that might be achieved by disregarding it. But the modern human rights instruments seem to list good things in general. Is there a human right to good things in general? And what makes a right human?

In the first section I will discuss Nicholas Wolterstorff's views, in *Justice: Rights and Wrongs*,¹ as to which rights are human rights. I will ask whether it is possible for the rights in the Universal Declaration of Human Rights to be human rights, when so many of them depend on the existence of a political community of a particular sort, or on the needs of a particular putative right-holder, or on conditions that vary from one community to another, or from one time to another. In the second section, I will ask whether human rights are as important an aspect of justice as Wolterstorff says, and in the final section, I will ask whether it takes belief in God to have a sound understanding of the grounds of human rights.

The Universal Declaration of Human Rights and Conditional Rights

The Universal Declaration is the most lavish human rights instrument. It proclaims rights that are to be found in other modern charters, such as the European Convention, or the Canadian Charter of Rights and Freedoms—to life, liberty, security of the person, freedom from slavery and torture, freedom from discrimination, arbitrary arrest or detention, fair hearings for the determination of rights by an independent and impartial tribunal, freedom from retrospective criminal penalties, freedom from arbitrary interference with private and family life, freedom of thought, conscience, religion, opinion, expression, assembly, and association.

It also proclaims a right to asylum, a right to take part in government (with voting by universal suffrage), a right to social security, to work with favourable remuneration, to protection from unemployment, to form trade unions, to rest, to a standard of living adequate for the health and well-being of a person and his or her family (which includes the right to clothing), to education (in fact, to compulsory education), to parental choice over the kind of education, to free participation in cultural life, to enjoyment of the arts and a share in the benefits of scientific advancement, and to 'a social and international order in which the rights and freedoms set forth in this Declaration can be fully realized'. And more.² It sounds as if the drafters wrote out whatever might be good in social life in the conditions of the twentieth century, and asserted a right to it.

Can there be human rights to all that? Is the Universal Declaration wildly excessive?

Wolterstorff on what Human Rights there are

Wolterstorff says that a human right is 'a right attached to the status of being a human being' (p. 313). 'Attached' is a term of art: a right is attached to a status 'if, when one has the right, one has it on account of having that status' (p. 315). There are not many human rights,³ in Wolterstorff's view.

The Universal Declaration proclaims many positive rights (or 'benefit rights'), but Wolterstorff says that there are 'relatively few positive rights that are truly human rights' (p. 314). Not the proclaimed right to education (because those incapable of education don't have it, p. 314). Not the right to a holiday with pay, because it is attached to the status of salaried employment, and not to the status of being a human being (p. 314). Wolterstorff says:

Prominent among those benefit rights that are truly human rights are rights to the benefit of protection against bodily assault; every human being is capable of utilizing such a benefit (p. 314).

But on Wolterstorff's own terms, I do not think that such a right can truly be a human right. The capability of utilising a benefit is insufficient to give a person a right to it. In some circumstances (if I am the meanest, biggest human being in the neighbourhood...), I may need no protection against bodily assault, and then (though I might be capable of utilising it), why should I be able to demand protection from anyone? I think that a human right to a benefit must be conditional not only on capacity to benefit, but on a need for the benefit. I conclude that, on Wolterstorff's theory, no positive rights are human rights. They attach to needs, not to human status.

Wolterstorff says that it is 'easier to find examples of negative rights that are truly human rights'. Here is an example: 'the right not to be tortured for the pleasure of the torturer' (p. 316). But Wolterstorff does not claim that there is a universal right not to be tortured; in fact, he suggests that there may be no such right (p. 316). He says that (if a person 'does not have a right against us to our refraining from torturing him'), 'though it is a human right, it is not a universal right' (p. 316). And he says that torture is permissible if refraining from torturing a person would violate a right that others have, that you should torture him for their good (though he does not say whether other people can ever have such a right).

I cannot understand why Wolterstorff says that there is a human right not to be tortured; it does not attach to the status of being a human being. On his account, when a person has the right, he does not have it on account of having the status of a human being, but on account of being a human being who is not withholding information that could save the lives of many. So I see no case in Wolterstorff's book for a human right not to be tortured. And in that case, I wonder whether there really are any negative human rights, on Wolterstorff's theory. Similar things could be said about the so-called human right to life, as about the right not to be tortured.

So it seems to me that Wolterstorff ought to say that the following are not human rights:

- the right to life
- the right not to be tortured
- positive rights.

And it would not be difficult to debunk the fundamental freedoms (of religion, expression, and assembly), and also other freedoms specified in the Universal Declaration (to rest, to free participation in cultural life...) in similar ways. On this reckoning there might still be some human rights—including what we might call analytical rights (when the wrongness of a breach is at least partly built into the description of the right, such as the right to be free

from arbitrary detention), and the right not to be tortured for pleasure, and perhaps the right to be free from slavery (Article 4 of the Universal Declaration). But most of the Universal Declaration does not assert real human rights.

Wolterstorff says, 'Should the schedule of natural human rights that one arrives at...diverge markedly from standard lists of human rights, one would have reason to wonder whether one's endeavor was seriously flawed in some way' (p. 320). The Universal Declaration is *the* standard list, and although it is a particularly lavish one (the European Convention on Human Rights does not enshrine a right to clothing, or to social security, or to rest...), the schedule we have arrived at excludes much of what you will find in any of the standard lists of so-called human rights.

I do not actually think that is in itself a problem. Those lists are artefacts of a complex pattern of advocacy pursued for particular purposes of politics and public relations in a complex social and intellectual culture. They imply at least fragments of a moral philosophy, but we don't have any particular reason to expect that they offer (or even presuppose) a coherent moral philosophy, let alone a sound moral philosophy.

But still, let's ask if it is possible to read the Universal Declaration as proclaiming real human rights rather than fake ones.

Making the Universal Declaration Intelligible

If human rights are unconditional, and impose duties on everyone, then most of the 'human rights' listed in the Universal Declaration do not actually exist. Apart perhaps from the analytical human rights, they depend on various aspects of particular situations, and in particular they depend on crucial aspects of relationships between putative rights holders and those putatively subject to correlative duties (and on aspects of relationships between either party and third parties).

And there is no unconditional right to a fair hearing for the determination of rights by an independent and impartial tribunal. If you and I are nomads passing each other in the desert, and you decide that I have taken your family's sheep in the night, you ought to deal with me fairly. But you do not owe me a hearing for the determination of my right to possession of the sheep that you see in my camp the next morning, and certainly not a hearing by an independent tribunal. If a child steals something valuable from her brother, her parents do not owe her a trial before an independent tribunal before punishing her for the crime. Independent tribunals are good techniques for the prevention of certain sorts of arbitrary governmental decisions as to rights in modern societies that have legal systems. There is no unconditional right to them.

I claimed above that the rights to welfare are conditional in another sense. They depend on needs. A person does not have the alleged right to clothing, if she can provide for her own clothing (why should anyone give her clothing that she doesn't need?). And if a child cannot provide clothing for herself, it may be in the first instance for her parents or her big sister to provide for her (why should anyone else do so, if it is their responsibility?). The Universal Declaration simply does not say who bears the duties that correspond to the rights,⁴ or under what conditions the rights give rise to a particular duty. The only way to make sense of the Universal Declaration is to conclude that most of the rights are conditional on the need of the right-holder for particular persons or agencies to take action in order to secure or to promote the human goods that are implicit or explicit in the statement of the rights.

Can conditional rights be human rights? Unconditional human rights are human rights because every human being or human agency has a duty to respect or to promote the interest in question just because a person is human. For example, there is a human right to life, because a person's humanity is always a reason for everyone not to murder that person.

Conditional rights are obviously not universal in that sense: a person's humanity is not always a reason to give him or her clothing or food.⁵ But in another sense they have a form of universality, because in certain circumstances everyone has the right. For example, there is no unconditional human right to have a fair hearing by an independent tribunal before being punished, but in the conditions of the United Kingdom today, there is a human right to a fair trial on a charge of theft (insofar as competent political authorities in a modern society with a legal system have a duty to provide *any human being* with a fair trial by an independent tribunal before punishing him or her for a crime). Any human being, in those circumstances, would have the right. I will call rights of this kind '*conditional human rights in the strict sense*'. Some welfare rights are conditional human rights in the strict sense.

There would be nothing wrong with keeping the phrase 'human rights' for the unconditional ones. After all, there really is no general human right to a trial before being punished, and no general human right to be given clothing. But it is fair enough to call the right to a trial a human right, in a community where political authorities cannot legitimately punish *any human being* for a crime, without a trial. Calling it 'a human right' highlights the universality of the considerations that require a trial in such a community. Conditional human rights in the strict sense can well be called 'human rights', insofar as they are rights held generally by human beings (whether at all times and places, or in the conditions of *this community today*) because they are human beings.

Wolterstorff addresses the possibility of describing every right held by any human being as an instance of the application of a 'conditional human right' (p. 314). So we could describe 'the right to receive a monthly Social Security check from the US government' as an instance of a human right 'to receive a monthly Social Security check from the US government if one is a US citizen age sixty-five or older' (p. 315).⁶ If we use 'human right' in this loose sense, all rights of human beings are human rights. Wolterstorff says:

But these are fake rights, pseudo rights. Consider the purported human right to the good of being formally educated if capable of being so educated. Now consider a human being who is not so capable. What is the difference between this human being enjoying this life-good to which he supposedly has a right, and not enjoying it? What is the difference between my wronging him by depriving him of this life-good to which he supposedly has a right, and my respecting his purported right by bestowing on him this life-good? There is no difference (p. 315).

That argument seems attractive; if a right is conditional, there is nothing that counts either as respecting or as violating the right when the condition is not met.

But the argument is a powerful solvent that dissolves human rights. Think of the human right that I said there is, *in the conditions of the United Kingdom today*, to a trial before an independent tribunal on a charge of theft. If we are not in those conditions, and I find that another nomad has stolen my sheep, what is the difference between my wronging him by depriving him of this life-good to which he supposedly has a right (the good of a trial before an independent tribunal on a charge of theft *if* the conditions are similar to those in the UK today), and my respecting his purported right by bestowing on him this life-good? There is no difference. Wolterstorff's argument dissolves the idea of conditional human rights.

Can we rescue it? The rules of phrase construction in the English language do not determine in what sense a right must be 'human' to count as a human right. It would make sense to use the phrase 'human right' only for rights that are unconditionally rights of every human being, or for all rights held by a human. And we could stipulate a technical sense for some purpose. Even if we do not stipulate a special meaning, we need to use the term 'human right' with some definiteness, if it is to be a useful tool for discussing what is to be done, or for critiquing what is done (that is, if it is to be a useful tool for its purpose). Doing so is not a stipulation, if we do not adopt an arbitrary measure for determining the meaning

of the phrase—that is, if there is a rationale for using it one way rather than another.

It would not make a very useful term out of ‘human right’, to use it in the loose sense, to include every right held by any human being. If the US Congress enacts that US citizens over 65 are entitled to social security, they have that right on account of a fact that sets them apart from other human beings. It is useful, by contrast, to view some rights (such as the right to a free press) as conditional human rights, because the right-holder’s humanity is one of a set of general conditions for the right, which sustain the use of the term ‘human right’ for rights of general application to human beings. So, for example, we can say that there is a human right to a trial by an independent tribunal for the determination of an allegation of theft *if we are in a society like the UK*, where the process is a good technique for prevention of arbitrary decision making by political authorities.

But in this sense, the right of American senior citizens to a monthly social security cheque from the US government is not even a conditional human right, because the conditions for holding the right include particular facts about the right-holders, which distinguish them from other human beings. There is an element of universality in my right, in the United Kingdom today, not to be punished for a crime without a trial (even though it is a right I would not have, if I were a nomad in a world without political communities). I have *that* right (in *these* circumstances) just because I am a human being. That element is missing from the right of US senior citizens to a cheque from the US government.

So here is a proposal for how to use the term ‘human right’: let’s use it for the rights that I have called unconditional human rights, and also for conditional human rights in the strict sense, because both share a relevant form of generality. This proposal happens to make the Universal Declaration’s self-description as a declaration *of human rights* more intelligible.

No human rights document is designed simply to answer the question, ‘what rights do people have just because they are human?’ Each is designed for a political purpose, and most are designed to have particular legal effects. The purposes, and the legal effects, are of great importance to the content of the rights that the document ought to proclaim. A human rights document authorising compulsory judicial review had better not enshrine rights that the court in question cannot justly and effectively articulate and enforce (this is why the European Convention on Human Rights is not as lavish as the Universal Declaration—the ECHR is applied by a court).

Because of those purposes of the human rights instruments, we should not look for a complete list of human rights in any charter of human rights. Not even in the Universal Declaration. The content of the rights that it proclaims is very broad because it is just a declaration—an aspirational document with no enforcement mechanism. But even the Universal Declaration had a political purpose of focusing and endorsing political action in the UN and in Member States. It gives a (very broad) content to the terms ‘fundamental freedoms’ and ‘human rights’ in the UN Charter, which does have legal effect. Even the Universal Declaration was not an attempt to proclaim all and only the rights that persons have just because they are human (such as the human right not to be betrayed). Judicially enforced codes of ‘human rights’ focus on something much more restricted, but intelligible: those human rights that can legitimately and usefully be protected through particular legal (and other institutional) processes.

The Universal Declaration *is* excessive, but in particular respects, and not because there are no conditional human rights. Not all the rights in the Universal Declaration are human rights, even in the conditional sense of ‘human right’. For example, even in a modern state, it was too broad to say that everyone is entitled to an independent tribunal for ‘the determination of his rights and obligations’ (Art. 10), as that would prevent any administrative authority from determining anyone’s rights. Even though independent tribunals are necessary for many decisions (such as criminal prosecutions), there is nothing generally wrong with administrative authorities determining rights (although there ought to be

independent tribunals with general jurisdiction to control the use of legal power by administrative authorities). There are other overly extravagant assertions of rights in the Universal Declaration.⁷ But my conclusion is that much of it states genuine universal human rights, if we understand 'human rights' in the same (strict) conditional sense in which we must understand it in, e.g., the European Convention, or the French Declaration of the Rights of Man.

This fact explains what might otherwise seem to be a confused manner of speech in the human rights industry. The best way to explain that manner of speech is as an attempt to articulate those rights of persons that deserve, for the particular political and legal purposes of a particular document, to be asserted as human rights.

Are Human Rights as Important an Aspect of Justice as Wolterstorff Says?

Is justice 'constituted of rights' (p. xii)? Let us accept Wolterstorff's explanation of the basis of natural human rights, for the purpose of argument. I suppose that the most serious problem of injustice today is the failure of the wealthy to respond to the needs of the poor. But if I am wealthy, a poor person does not necessarily have a right to my help. If C is destitute and I am wealthy, and there aren't any other people around, then C has a right to my help. But in the ordinary course of life in the twenty-first century, there are more poor people than I can effectively help. A poor person's need is not a reason for me to help that person regardless of other good things that I might achieve. D does not ordinarily have a legitimate complaint if I devote myself to helping E who needs help, in such a way that I am unable to help D (although particular circumstances and relationships can give a particular person a right to my help).

The poor do not even have a right to equal consideration. One should never treat persons as if they had less worth than they have (Wolterstorff rightly calls this an '*Ur-principle*', p. 370). But I do not necessarily do that, if I know that D is poor (or I know that there are millions of destitute people in D's country), and I devote myself to helping E instead, without considering helping D or anyone else.

But do all persons have a right to equal respect? Yes, but I do not show D disrespect merely because I do all I can to help E. Suppose that for some reason I can help just one person. If I do so, I do not necessarily wrong the others. If I do not help even one, I act wrongly. But I do not wrong any particular person. I have not violated any person's legitimate claim that I ought to have helped him or her. But I act unjustly. The poor are not a collective right-holder, and it may well be the case that no individual person has a right to my help. If the wealthy give no help to the poor, it is a massive injustice, but it is not necessarily a violation of any right (in fact, it could only be a violation of any right in special circumstances). So, although there are natural human rights and it is unjust to dishonour them, justice is not constituted of rights, and violation of rights is not the central problem of injustice today.

And in the Christian way of thinking, I think that rights are even less central to the general question of just conduct. If the point is to follow Christ, then a Christian is called to take an attitude to other human beings that is not focused on compliance with rights. With that attitude, we will not commit the abuses of human rights that are mentioned in *Justice* (see p. 311). But the rights of the people we deal with will not be the reason for our disposition towards them, any more than their rights are the reason for God's disposition towards them. Human rights are not held against God. The covenant with Israel was a structure of rights, but the history of the covenant shows that respecting people's rights is not God's principle of action in dealing with people.

Contending for the protection of human rights in the twenty-first century may be a great vocation for a Christian, and doing so by using the characteristic vocabulary of the interna-

tional human rights movement is not necessarily untruthful, and may (or may not—it depends on all sorts of matters of political, social, and economic culture) be an effective way of doing so. But respect for rights is not at the centre of the Christian calling.

Does it Take Belief in God to Have a Sound Understanding of the Grounds of Human Rights?

Wolterstorff doubts that human nature gives persons ‘a worth sufficient to account for their having rights, including human rights’ (p. 351). But, in his view, ‘the relational property of being loved by God’ confers that worth on them. Being loved by God is a property that ‘gives to each human being who bears it the worth in which natural human rights inhere’ (p. 353).

Was it God’s wisdom to create human beings in his own image, and having done so, does God have reason to love human beings? Or is it God’s non-rational preference to love human beings, so that their worth (or, perhaps, that aspect of their worth that makes them rights-bearers, and distinguishes them from other valuable creations such as cats or spiral galaxies) is bestowed by the act of love? Wolterstorff describes being loved by God as a ‘worth-imparting relation’ (p. 352), but I wonder if it may be a worth-implicating relation.

If there is reason for God to love people (given what they are, as created), then I think that there are implications for what Wolterstorff says about the possibility of a secular understanding of human rights. The reason for which God loves us is sufficient ground for human rights; it is in part knowable to us, though imperfectly. We do not altogether understand what it is to be human; we should not conclude that our worth lies merely in our capacity for agency, or for language, or for rational thought. The Christian approach to human rights should be very decidedly species-ist, if only because, if we know of God’s mercy and self-sacrifice, we have reason to believe that human beings are specifically valuable.⁸ Yet we can partly see how distinctly valuable people are, and we can partly understand why God would be incarnate *as* a human being and die *for* human beings.

If the worth that grounds human rights is *bestowed on people by God’s act of loving them*, then our value as human beings is incomprehensible without belief in God. In that case, Wolterstorff is right to conclude that there is no sound secular argument for human rights. For all that people without faith in a loving God know, they may as well join Nietzsche and Rorty, and campaign for whatever arrangement is convenient to their urges.

But if our worth is *conferred on people by God’s making us as we are*, then God cannot but love us, and our worth is there to be seen. A true understanding of human rights is not completely attainable in this world, but the start of that understanding is possible (and may itself be a reason for belief in God). All people can see, in part, the same basis for human rights that a Christian can see, even though none of us sees it clearly. A Christian and a non-Christian can both explain why there is a human right not to be tortured,⁹ based on an explanation of the way a human being is; both explanations will be incomplete but may yet serve the purpose. And then the difference between a Christian and a non-Christian perspective on human rights is that the Christian has a hope of better vision, which is a reason for humility in the attempt to understand the worth of a human being. I think that non-Christians may share in the intellectual aspect of that humility. But they can only do so if they recognise the complexity and the mysteriousness of what the Universal Declaration calls, ‘the inherent dignity of the human person’ (see pp. 312–13), and their own incomplete understanding of it. They do not share that intellectual humility if, for example, they try to make the mere capacity for agency or for rational argument itself into the ground of rights.

I do not know to what extent these remarks contradict Wolterstorff’s idea about bestowed value. Are we of great worth because of the way we are (which is God’s doing), or because having created us, God then took it upon himself to love us? That is probably not a well-formed question. The moment of creation is not separated, in the providence of God,

from the present moment in which God loves the world. But if God has reason to love people, then the grounds of human rights are not entirely inscrutable to human beings today. Insofar as the nature¹⁰ of human beings is comprehensible to us, we can see the very thing that is the reason for the worth that God sees in us. A sound explanation of the basis of human rights need not mention God. Describe humanity as it is, and you have described the facts that ground human rights. Even without belief in God, it is possible for us to have a sound grasp (though far from complete) of the grounds of human rights.

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- 1 Nicholas Wolterstorff, *Justice: Rights and Wrongs* (Princeton, NJ and Oxford: Princeton University Press, 2008). Page references appear in parentheses in the text.
- 2 See <http://www.un.org/Overview/rights.html>.
- 3 I will use the term 'human right' for what Wolterstorff calls a 'natural human right', that is, a human right not conferred by an act of human authority or social convention.
- 4 The Preamble says that the General Assembly proclaims the Declaration 'as a common standard of achievement for all peoples and nations', but does not say that all peoples and nations owe it to you to provide you with adequate clothing.
- 5 I don't know if they are human rights in Wolterstorff's sense: when we have them, do we have them on account of our status as human beings? Or on account of our status as human beings who need help?
- 6 I think that we could go further and turn it into an instance of a *natural* human right by adding as conditions (e.g.) that the US should have legislated for such a right, if there is natural reason for compliance with such legislation.
- 7 Favourable remuneration for work (Art. 23(3)) is not a human right (not even conditionally) if some humans can rightly be given work to do without favourable remuneration in some circumstances, which I think is the case. Work with favourable remuneration is simply a human good. Failure to give favourable remuneration *can* be a wrong (it can be a structural wrong in an employment market), and even an abuse, in some situations, but it is not in itself a breach of a human right. As for Article 28, providing that 'Everyone is entitled to a social and international order in which the rights and freedoms set forth in this Declaration can be fully realized', I don't even know what it means.
- 8 Though the specific value of human beings does not in itself mean that there are no feline rights. And for all we know there may be non-human creatures of comparable worth to human beings.
- 9 *A note on torture*: if I refuse to disclose the location of the time bomb that I planted to kill many, I have no legitimate grounds for complaint if you torture me. But it would still be wrong for you to torture me, and I think the resources were available in *Justice* to *exclude* the possibility that you may have an obligation to torture me to save my victims. I think that on the Christian view of things (and on other views too, potentially), you should treat me as something 'irreducibly precious' (p. 360), and let go of the sense that you will be responsible for my murders if you don't torture me to try to prevent them. Only a desperation that is incompatible with Christianity could seem to justify torturing me to prevent me from killing people. Whether we say that there is a right not to be tortured (even to extract information illegitimately withheld that might save many) is not terribly important: there is no such right in a sense (I deserve to be tortured or worse in that situation; it would not be unfair to me), and there *is* a right in a sense—and a human right too. If (as Wolterstorff says) I am 'irreducibly precious', that gives you an exclusionary reason not to treat my body and mind as a demolition site.
- 10 I think Wolterstorff is too generous when he says that 'One does not have to believe in

human nature to believe in natural human rights...even the person who does not believe in human nature can hold that the properties and relations composing that status just naturally have a worth that grounds human rights' (p. 321). It is nonsense to say that human beings have no nature (though it would not be nonsense to say that nothing in their nature gives them a right to anything). It would be self-contradictory nonsense to say that human beings have a status composed of properties and relations, but have no nature.