

## Why Respect for Freedom Cannot Explain the Content and Grounds of Human Rights

Response to Laura Valentini, “Human Rights, Freedom, and Political Authority”

(*Political Theory* 40, 5: 573-601)

Modern theories of justice were forged in the crucible of the social contract tradition, in which the norms of social and political life are viewed as the product of a hypothetical agreement among equals on shared terms of cooperation. In this context, political communities are viewed paradigmatically as communities of rational agents, i.e. communities of persons capable of deliberating rationally and concluding agreements.<sup>1</sup> If political communities are viewed in these terms, then it is natural to view the subject of rights in its purest form as a rational, self-determining agent, and to view anyone outside this category as an aberration rather than as a typical case of the subject of rights. This is borne out by the work of the leading social contract thinker of the twentieth century, John Rawls, who stipulated that a “person,” the bearer of rights and duties within a political community, is someone who enjoys the “two moral powers,” namely, the capacity for a sense of justice and the capacity to hold and revise a conception of the good.<sup>2</sup> Rawls and his successors rarely speak about humans who *lack* the two moral powers, whether infants, the cognitively impaired, or the mentally infirm, and the few times they do mention them, they seem to view them as imperfect specimens of rational adults, whose dignity stems from their potential or progressive acquisition of the moral powers.<sup>3</sup>

Yet neither Rawls nor other liberal thinkers who give theoretical primacy to individual liberty have managed to produce a clear and cogent rationale for extending the dignity of autonomous agents to those who fall on the fringes of the social contract, those who, far from being autonomous agents with a developed conception of the good, are totally dependent on their caregivers and either temporarily or permanently disabled from making their own choices about how to live. Any theory of rights premised on the equal dignity of autonomous

rational agents must properly explain how or to what extent we can ascribe dignity to radically heteronomous and/or cognitively impaired human beings. Otherwise the case of children, the mentally disabled, and the insane will continue to be treated as puzzling “outliers” in the “penumbra” of the theory of rights.<sup>4</sup> But they are human beings, and if they do indeed have rights, as most of us would recognize, then they surely deserve better.

The tendency of liberal thinkers to place exclusive or near-exclusive value on rational, autonomous forms of life while glossing over the value of less rational and less autonomous forms of life is reflected quite clearly in a recent article in *Political Theory*, which attempts to ground human rights exclusively in the value of freedom. In her article “Human Rights, Freedom, and Political Authority,” (*Political Theory* 40, 5: 573-601), Laura Valentini contends that “human rights are derived from the universal right to freedom, namely each person’s innate right to a sphere of agency within which to pursue her ends and goals without being subject to the will of others” (574). Valentini contends that her freedom-centered account “explains our most deeply held convictions about the nature of human rights” (578). Yet, as I show below, by fastening on freedom and rational agency as the justificatory and explanatory root of all human rights, Valentini implicitly rules out a range of legitimate human rights claims just because they deviate from her arbitrarily narrow conception of who counts as a bearer of rights and of what counts as a right.

There is certainly something to be said in favor of the “freedom-centered” approach to human rights. First of all, a freedom-based explanation of human rights is simple and elegant: human rights are interpreted simply as those entitlements that a State ought to guarantee its citizens (a) out of respect for their status as “potential or actual self-directing [agents]” (574); and (b) as a way of affording them the conditions under which they can enjoy a protected sphere of agency. Second, a freedom-centered account seems, in many respects, to fit the practice of rights as we know it, since the idea of freedom figures very prominently in modern

civil and human rights claims; not to mention the fact that many rights mentioned in influential human rights documents such as the European Convention of Human Rights seem readily explicable in terms of their contribution to human freedom. For example, the rights to religious freedom, political expression, property, a fair trial, and freedom from servitude, all seem to contribute in essential ways to the capacity of an agent to direct his own life according to his own lights.

Yet like many elegant explanations, the freedom-centered account of human rights is a bit *too* elegant. In what follows, I shall argue that Valentini's theory is illustrative of the limits of autonomy-centered approaches to justice and rights, in two respects: first, her theory proposes an implausibly restrictive view of our *reasons for respecting* human rights; and second, it fails to convincingly account for the *content and scope* of human rights. I will conclude my critique by very briefly presenting the main elements of a broader perfectionist and dignitarian account of human rights, which can be readily extended to non-autonomous human beings.

### **Valentini's Use of Freedom to Justify and Derive Human Rights**

A theory of human rights must explain what human rights are, and why they constitute morally legitimate claims on a certain range of agents. I shall assume for the purposes of this discussion that there is a certain range of entitlements that really do constitute human rights, by which I mean, roughly speaking, fundamental entitlements enjoyed by human beings as such, whose violation is an assault on their dignity, and which deserve some form of protection, whether by the state or by some other entity. An adequate normative account of such rights would have to answer at least two basic questions: first, why do we attribute fundamental entitlements of this sort to human beings (or some subset of human beings)? Second, on what basis should we specify the *content* of human rights?

Let us start with the problem of human rights *standing*: what is it that gives a certain range of entities the sort of moral standing that demands a level of respect that can support human rights claims? On Valentini's view, all human rights are derived from the right to freedom, enjoyed by "each person by virtue of her nature as a potential or actual self-directing agent" (574). Our obligation to respect human rights can thus be explained in terms of our obligation to respect the freedom of self-directing agents. In this respect, Valentini's approach to human rights is avowedly liberal, grounded in "a conception of human beings as self-directing agents, capable of acting in pursuit of ends they have set themselves" (579).

Valentini appears to view the value of personal freedom not merely as the fundamental reason for respecting rights in general, but as the key for unlocking or explaining the *content* of discrete rights. The guiding role of freedom in the derivation of rights is strongly implied by Valentini's definition of human rights as "those protections that any state must provide for its citizens if it is to make a reasonable claim to respect their right to freedom" (582). This is further corroborated by the fact that she derives a range of specific rights from the value of freedom, as part of her defense of the freedom-centered account. For example, she describes slavery as "a paradigmatic example of violation of the right to freedom," insofar as the slave "lacks a sphere of agency robustly shielded from others' interference" (579), and argues that there is a human right to democracy, insofar as "democratic participation most directly...ensures that a state speaks on behalf of its citizens" (589). Even welfare rights, according to Valentini, can be justified by a concern for individual freedom, since "poverty threatens not only freedom as non interference, but also freedom as independence. Destitution breeds subjection to the will of others" (590).

## **Limits of the Freedom-Centered Approach**

Upon reflection, there are several considerations that weigh heavily against the freedom-centered view, in spite of its prima facie plausibility. To begin with, the capacity for freedom or self-direction, whether actual or potential, is simply too narrow a basis for explaining human rights standing. There are human beings who plausibly qualify as human rights claimants yet do not neatly fall under Valentini's paradigm of the "self-directing" agent. Valentini appeals in her article to human rights claims involving able-minded rational adults—rights such as freedom from slavery, the right to democracy, and the right to welfare. These sorts of claims could plausibly be traced back to a right to freedom. But respect for freedom seems to have much less to do with the human rights of radically or partially heteronomous persons such as infants and the cognitively impaired, who do not get any explicit mention in her account.

Consider, by way of example, the right of an infant to bodily integrity or freedom from genocidal murder. This right cannot be plausibly explained by an appeal to the value of a self-directed life. True enough, if the infant is murdered, she will never reach the age of reason or live to make a rational choice. Thus, murder eliminates her prospective life as a self-directing agent. But surely it is the flagrant attack on the *actual* life of individual human beings that most naturally explains the wrong of genocidal murder, rather than the interference with their potential or future rational agency?

What if we were to concede, arguendo, that it is the *potential* or future rational agency of the infant that justifies our respect for her right to bodily integrity or freedom from genocide? This might work for the case of infants en route to autonomy, but what about those suffering from permanent or irreversible cognitive impairment? Consider, for example, a person with sufficient intellectual impairment that he is radically dependent on his family or caregivers to help him get through the day: he is essentially stuck in a sort of perpetual

infancy. Such a person is neither a “potential” nor “actual” self-directing agent, given his chronic cognitive impairment. He is fundamentally “[subject] to the will of others” (590) on a permanent basis, i.e. in the very condition that Valentini considers anathema to human freedom. If we are to consider such a being as a bearer of human rights, as I suspect many would allow, then how can we explain the force of such rights within Valentini’s freedom-based account?

Let us now turn to the question of content. Valentini suggests that the content of any human right is derived straightforwardly from the preconditions for rational agency: “Human rights,” she asserts, “are necessary and sufficient conditions for a reasonable implementation of persons’ right to freedom” (581). But I am skeptical that all human rights can be considered simply as “necessary and sufficient conditions” for safeguarding the right to freedom. Human rights are not just rights to the conditions of rational agency, but rights to have one’s most basic needs for bodily and emotional integrity, health, and personal security protected from attack and severe deprivation. As it happens, the fulfilment of these basic needs does generally *support or facilitate* rational self-direction, at least in the case of those with sound rational faculties. But it would be quite a stretch to justify the protection of every basic human need exclusively as one more contribution to rational agency, especially given that not all subjects of rights are capable of exercising rational agency.

### **A Perfectionist Alternative to the Freedom-Based Account**

It is important to distinguish between the fundamental reason for considering someone as a bearer of human rights, on the one hand, and the derivation of discrete human rights, on the other. Valentini does not separate these two questions, so she implicitly gives the same answer to both of them: freedom or self-direction serves simultaneously as the normative ground and explanatory source of all human rights. But this answer misses the mark for *both*

questions. Consider the first question: “what qualifies someone as a bearer of human rights”? Human dignity is a better answer than potential or actual rational agency, because it captures an important range of human rights excluded by the freedom-centered account, namely, the rights of human beings who fall beyond the “pale” of full rational agency. But what is so special about being human? Why does humanity confer dignity? Here, I can do no more than hint at an answer, which other authors have developed at great length: what confers dignity is participation in a species that *by nature* affords its members the power of rational agency, broadly construed (knowledge, love, freewill), even if particular human beings are excluded by some defect, disease, or other circumstance, from enjoying the rational agency typical of their species.<sup>5</sup>

Now consider the second question: “on what basis can we derive the content of discrete human rights?” Assuming that human beings deserve special consideration and treatment in virtue of their human dignity, we are obligated to protect their most fundamental interests, at least insofar as they fall within our sphere of responsibility. These interests are typically protected by certain legal guarantees, to be enforced or implemented by the State or some other competent body. For example, human beings have a basic interest in nutrition, healthcare, bodily integrity, security, education, and freedom of conscience. These interests are sufficiently fundamental that one can plausibly speak of a *human right* to nutrition, healthcare, bodily integrity, security, education, and freedom of conscience to be enforced and respected by the State and/or other responsible parties.<sup>6</sup> This perfectionist foundation for rights recognizes freedom as a critical dimension of human well-being, but does not ignore or minimize the well-being of humans who are deprived of rational agency. In this respect, it is clearly superior to a freedom-based derivation of rights.

I hope I have by now convinced the reader that an exclusive appeal to the value of freedom and rational agency cannot explain the normative force and content of human rights.

In this respect, the failure of Valentini's account is instructive, because it provides a vivid illustration of the limits of a broadly neo-Kantian/Rawlsian conception of the rights-bearer as a self-determining rational agent. To sum up, the freedom-based approach to human rights is inadequate on two grounds: first, on the basis that the normative force of the human rights of those lacking rational agency cannot be explained by respect for their *freedom*; and second, that the substantive content of human rights cannot be derived exclusively from the conditions necessary for the exercise of freedom—that a broader range of basic human interests is at stake than the interest in rational agency.

Finally, I have gestured toward a possible solution for overcoming the limitations of the autonomy-based approach to rights, namely, to rethink human rights in dignitarian and perfectionist terms. On this view, it is *human dignity*, conferred by participation in a species characteristically endowed with rational powers of knowledge and freewill, that explains the normative force of human rights claims; while it is an irreducible ensemble of *basic human interests*, such as the interests in nutrition, bodily integrity, health, security, education, and rational agency, that explain the content of discrete human rights. Much more could be said to flesh out a dignitarian and perfectionist account of human rights, but I hope I have said enough to bring out its relative advantages when compared with autonomy-centered accounts.



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<sup>1</sup> Prominent representatives of this tradition include Thomas Hobbes, John Locke, and Jean Jacques Rousseau, and more recently, John Rawls, David Gauthier, and Jurgen Habermas.

<sup>2</sup> See John Rawls, *Political Liberalism*, *The John Dewey Essays in Philosophy* (New York: Columbia University Press, 1993), 19.

<sup>3</sup> See, for example, John Rawls, *A Theory of Justice* (Cambridge, MA: The Belknap Press of Harvard University Press, 1999), §77, 443: “When someone lacks the [capacity for moral personality] either from birth or accident, this is regarded as a defect or deprivation [...] Only scattered individuals are without this capacity, or its realization to the minimum degree, and the failure to realize it is the consequence of unjust and impoverished social circumstances, or fortuitous contingencies.” For a critical discussion of the moral standing of children in Rawls’s theory of justice, see Williamson M. Evers, “Rawls and Children,” *Journal of Libertarian Studies* 2, no. 2 (1978). For an autonomy-centered defense of children’s rights, see Michael A. Freeman, “Taking Children's Rights More Seriously,” *International Journal of Law, Policy and the Family* 6, no. 1 (1992).

<sup>4</sup> The case of infants, the disabled, and the insane are almost always relegated to the sidelines of liberal theory, and are rarely foregrounded in general theories of human rights. I am not the first person to point this out. For other critiques of liberalism’s excessively rationalist paradigm of political community, see inter alia, Alasdair MacIntyre, *Dependent Rational Animals: Why Human Beings Need the Virtues*, The Paul Carus Lecture Series (Chicago and Lasalle, Illinois: Open Court, 1999), esp. chap. 1, “Vulnerability, dependence, animality,” and David L. Tubbs, *Freedom's Orphans: Contemporary Liberalism and the Fate of American Children* (Princeton University Press, 2007).

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<sup>5</sup> For a similar approach, which grounds human dignity in our shared “rational nature,” cf. Patrick Lee and Robert P. George, “The Nature and Basis of Human Dignity,” in *Human Dignity and Bioethics: Essays Commissioned by the President’s Council on Bioethics* (US Independent Agencies and Commissions, 2008), 409-433. This bioethics collection showcases a variety of approaches to human dignity, including contributions by Adam Schulman, Daniel Dennett, Robert Kraynak, Leon Kass, Martha Nussbaum, and Susan Shell.

<sup>6</sup> This interest-based approach to the derivation of rights is broadly consonant with that proposed in Charles Beitz, *The Idea of Human Rights* (Oxford and New York: Oxford University Press, 2009), 136-144.