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Specifying Human Rights

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Human rights are typically identified under specific headings: the right to life, to security of person, to freedom of expression, to freedom from slavery, to due process, and so forth. But beyond those headings, notoriously, the trouble starts. What normative content the rights have, what they *mean*, for the right-holder and for others in terms of obligations and burdens, is a matter of specification. One could treat this specification as a legal question, the interpretation of legal provisions in statutes, prior decisions, or practices. But there is a question in morality that should influence that legal specification: what is the *morally* justified content of any human right? What can holders of such rights legitimately claim from others and, correspondingly, what morally justified burdens does this imply for those others? One school of thought, call it the *democratic specification* tradition, holds that at least in part the specified moral content of human rights, not just the content of legal rights, must be what a democratic political community decides it to be. Specified human rights as moral rights, then, are hybrids: inherently moral in the abstract but inherently political in their specification.¹

In what follows I challenge the cogency of the key theses of democratic specificationism on human rights, which I take to be two:

- 1) **Weight-of-Interests thesis:** to justify the existence of a *moral right* a person must have an interest that is sufficiently important so as to imply obligations for others to secure that interest, and that means interests must be weighed against each other to establish their relative importance.
- 2) **Specification thesis:** Which interests have the requisite degree of importance to become *human rights* by implying obligations for others is a question that must be settled by democratic decision making, where the relative importance of different interests (and corresponding costs and burdens) is weighed.

Not all views committed to the specification thesis are explicit about the weight-of-interests thesis.² However, that thesis is necessary to give the specification thesis enough structure to frame an argument. I will explore, and challenge, both.

¹ S. Besson, 'Human Rights and Constitutional Law: Patterns of Mutual Validation and Legitimation', this volume, ch. 15); S. Benhabib, *Dignity in Adversity* (Cambridge: Polity, 2011). Benhabib takes specification to be a fundamentally political-legal question: universal claims are specified as different 'normatively defensible' (80) legal entitlements, deriving their content and legitimacy from the democratic nature of political orders (73ff).

² eg, Besson, in this volume, holds the first (4) and second theses (5). Benhabib argues that abstract human rights can only acquire a concrete content through a process of democratic deliberation, Benhabib, *Dignity in Adversity*, 73ff. However, while she states that human rights justification must presuppose a conception of human needs (65), her argument for democratic specification of moral rights

The principal argument offered for the specification thesis is what I shall call ‘contextualism’. This is the idea that whether an interest is sufficiently important so as to ground specific duties, and so rights with some normative content, is a matter sensitive to features of a social context. Democratic specification theorists take the central feature to be the way that members of a democratic society collectively weigh the importance of an interest against the burdens required to secure it.³

But there are two possible understandings of contextualism here, objective and subjective. The objective version appeals to different objective features of a context, such as scarcity, to justify the need for a different weighing exercise in each different context. But that kind of contextualism in fact relies on clear, pre-contextual, principles to establish the priority of any interest. Whether a given tax burden should be borne by fellow citizens, for example, in conditions of scarcity will depend on what constitutes a fair distribution of benefits and burdens. That in turn depends on what counts as a plausible moral principle of fairness, which is not itself a context-sensitive question. The views of the political community are not relevant to which, if any, principle is justified and applies. Objective contextualism, then, does not support the specification thesis and in fact undermines it. The subjective version of Contextualism offers a moral reason for taking the democratic decisions of the political community to be decisive in establishing the relative weight, or importance, of interests. The equal status of citizens entitles them to an equal say in that rights-specifying question, and that is a reason to take a democratic decision to be decisive. The problem with this argument, however, is that it runs together the separate questions of what constitutes political legitimacy and what justifies moral rights. What counts as an authoritative decision for a political community, a basis for valid law for example, is a wholly different question to what is the *morally* valuable way to prioritize interests. That latter question concerns the intrinsic merits of one scheme of priority over another. Moreover, a plausible role for human rights standards is to define the limits of acceptable political authority—when, for example, even a collective political decision can be judged wrongful enough to fail to have legitimacy.

In the last part of the paper I also question the weighing-of-interests thesis and the whole weighing metaphor as appropriate for justifying rights, given their special role in practical reason.

I. Interests and Well-being

Before considering the two theses just identified, I will clarify some essential terminology. The version of the view on which I am focusing is articulated in terms of interests and their importance in specifying what a right requires.

An interest, here, is a component of a person’s well-being that can be advanced or thwarted, where well-being is understood as the degree to which one successfully pursues

is not explicitly articulated in terms of weighing interests. See also S. Meckled-Garcia, ‘Which Comes First, Democracy or Human Rights?’ *Critical Review of International Social and Political Philosophy*, 17(6) (2014): 681-688.

³ Besson, ‘Human Rights and Constitutional Law’, 5.

one's plan of life or conception of the personal good.⁴ There are conditions under which one can better pursue one's chosen plan of life or one's conception of the good, which is to say conditions under which one enjoys the securing of certain interests. Rights, in interest-based views of this kind, represent people's valid claims to having such conditions secured for specific interests. Enjoying an above survival state of nutrition can be seen as a component of a life plan and plausibly improves people's well-being. A right to nutrition would be a valid claim to having certain conditions in place where one can achieve some such level of nutrition. It is important to note that burdens corresponding to securing an interest also engage interests for the person shouldering the burdens. That person could use the effort, time, and resources her burden implies towards pursuing her own interests and well-being. A burden or a cost, then, is effectively a thwarted interest. So when I go on to discuss weighing of interests, this will often be shorthand for weighing the importance of interests secured versus the importance of the thwarted interests for those shouldering the burdens.

Specifying a right, for the purposes of this paper, means specifying which agents have obligations to act so as to secure the conditions associated with a right and which burdens they and others must bear. Elsewhere I have argued for a distinction between burdens associated with a right and the obligations corresponding to a right.⁵ Obligations are just one type of burden or cost corresponding to a specified right. Other examples include the opportunity costs that satisfying someone's claim will imply. Burdens of whichever kind must nevertheless be justified if we are to justify the specification of a right.

So, if Jane has a right to have a promise kept, then the specification of the right provides a means by which one can identify who must act and what burdens others (including those who are obliged) must *justifiably* shoulder. It is sufficient for specifying a right that it specifies a type-description of the relevant features that pick out duty-bearers. 'The person that has made a promise' picks out promise-based duty-bearers, and 'anyone in a position to officially punish me' might pick out those against whom my right to due process is held. By joining together such descriptions with facts (Joe made the promise to babysit) we can judge that the right is held against Joe, and so that Joe has an obligation to babysit for Jane, and it is justifiable that others forego babysitting services from Joe (shouldering those opportunity costs), because his time is justifiably occupied babysitting for Jane. However, the specification that matters for a theory of rights, and that concerns democratic specification views, is clearly the deriving of justified duty-bearer type, duty type, and burden type, *descriptions*. After all, a concern with weighing interests is motivated by the need for an account of which burdens are justified and when rather than predicting for whom

⁴ Raz, eg, defines well-being as consisting in 'a wholehearted and successful pursuit of valuable relationships and goals', J. Raz, 'The Role of Wellbeing', *Philosophical Perspectives*, 18(1) (2004): 269–94, 269. A variety of views exist on what constitutes well-being, ranging across accounts based on sensations like happiness, desire satisfaction, informed desire satisfaction, needs satisfaction, and 'objective list' accounts, J. Griffin, *Well-being* (Oxford: Oxford University Press, 1986). What is important to note is that different degrees of well-being can be had on all of them, depending on what degree of the relevant object (sensations, satisfactions, and objectively listed goods) one achieves.

⁵ S. Meckled-Garcia, 'Giving up the Goods: Rethinking the Human Right to Subsistence, Institutional Justice, and Imperfect Duties', *Journal of Applied Philosophy*, 30(1) (2013): 73–87, 79.

they will be justified. So, the names and addresses of those on whom the obligations will fall, as a result of applying such descriptions, is not a question of moral theory but rather of its application.

For the purposes of this paper also, I will not consider what makes something into a right, as opposed to merely a duty, say.⁶ Instead I focus on the ‘justification conditions’ for any claim specified as a set of burdens for others. That is, how does one show that a given rights claim can justify a set of corresponding duties and duty-bearer descriptions from which we might derive concrete judgements? Call that the *normative content* of a right.

By *democratic* specification, in what follows, I will not necessarily mean there has to be a full democratic legislative process for every specifying decision. So long as legal institutions, including courts, are validated as part of a democratic constitutional order their decisions can count as the decisions of a democratic political community. Nothing in the following argument turns on whether a demos or a judge decides how a right should be specified.

So to restate the democratic specification view, human rights cannot be adequately specified such that we know their normative content for a specific social context unless we can decide how to ‘weigh’ or ‘balance’ interests, so as to decide which interests reach the threshold of ‘sufficient importance’ necessary to imply obligations for others. Only a democratic political community can do that, which is to say that whilst human rights must be moral rights imposing moral duties, their specification must be the result of a political–legal process. Prior to such a democratic process, the content of such rights cannot be adequately specified, and so cannot be said to exist as concrete entitlements.⁷ For that reason human rights are inherently moral but also inherently political or legal.

It is worth noting how this contrasts with an interest-based view. Tasioulas, for example, concedes that the specification necessary for a right to be ‘claimable’ might require a democratic decision or even negotiation.⁸ However, he rejects the idea that the right does not really exist in the absence of such a specification. This is because he takes it that we can know an interest to be important enough to justify a right, given our knowledge of certain practical considerations (‘the constraints set by human capacities, available resources, and general features of social life’).⁹ Specification is needed simply because there are various ways to protect or further an interest, and choices have to be made.¹⁰ The democratic specification view, on the other hand, holds that whether interests are sufficiently important to justify rights is itself a matter to

⁶ That is a conceptual question about the meaning of the term ‘right’. ‘Interest theories’ have been offered as identifying (categorizing) what is distinctive about rights versus duties say, but in this paper I am concerned with views that take rights to be grounded in the weighing of interests, and more specifically the weighing of interests by a democratic political community.

⁷ Besson, ‘Human Rights and Constitutional Law’, 7.

⁸ It is ‘an important issue, one to be addressed through further moral and empirical investigation and possibly even negotiation or formal determination within the context of democratic politics or judicial reasoning’, J. Tasioulas, ‘The Moral Reality of Human Rights’, in T. Pogge (ed.), *Freedom from Poverty as a Human Right* (Oxford: Oxford University Press, 2007), 94.

⁹ Tasioulas, ‘The Moral Reality of Human Rights’, 92.

¹⁰ Tasioulas, ‘The Moral Reality of Human Rights’, 94.

be settled by democratic institutions. It is unclear how one can know that an interest is important enough to justify a right without knowing the normative content of the right, given that 'important enough' must mean important enough to justify the specific burdens the right will imply for others. Tasioulas assumes that satisfying the practical constraints is enough, but without an account of how the specific burdens would be justified for those carrying them it is unclear that a claimed right has any justified normative content.¹¹ The two views overlap in accepting that (in at least some cases for Tasioulas) the normative content of a moral right can be settled by democratic decisions.¹²

II. Contextualism

The democratic specification view, as I am construing it, accepts that there are universal moral rights, and holds that these are based on interests sufficiently important to ground moral duties for others. A universal moral right of this kind can be justifiably claimed regardless of a person's institutional membership, as corresponding moral obligations can be specified independently of institutional membership. The right to have promises kept, for example, is a plausible moral right with corresponding obligations clearly falling on those who have made promises. By contrast, human rights are, on this view, inherently institutional moral rights. That is, they do not exist until they have been appropriately 'recognized' in a legal order as implying public institutional duties.¹³ When they do exist, however, these duties of public institutions are moral duties. The institutional nature of human rights is due to the fact that specifying the content of a human right necessarily requires resolving the question of which interests are of sufficient importance, or fundamental enough, to justify imposing burdens on others to secure their enjoyment. On the version of the democratic specification view I am considering, that question can only legitimately be decided democratically. Members of a political community must decide the threshold of importance by weighing interests against each other (burdens, or thwarted interests, included), and deciding what constitutes a standard threat from which interests must be protected, and what is feasible in securing those interests.¹⁴

This would contrast with a view that says human rights can be specified through working out a clear moral theory with principles for assigning burdens. On that kind of view specification occurs at the level of theory, and is independent of institutional decisions. The argument for this view rests on the idea that any specification of human rights must be sensitive to a given social context.¹⁵

¹¹ Similarly Raz says 'one may know of the existence of a right and of the reasons for it without knowing who is bound by duties based on it or what precisely are these duties', J. Raz, *The Morality of Freedom*, 184, yet he does think that there are principles of responsibility for working this out.

¹² See also appeals to democratic deliberation to settle the content of human rights in J. Griffin, *On Human Rights* (Cambridge: Cambridge University Press, 2008), 128 and 171.

¹³ Besson, 'Human Rights and Constitutional Law', 6; Benhabib, *Dignity in Adversity*, 65 and 74.

¹⁴ Besson, 'Human Rights and Constitutional Law', 4.

¹⁵ Benhabib, *Dignity in Adversity*, 73, 74, 80, 125, 130; Besson, 'Human Rights and Constitutional Law', 5.

Let me spell this argument out. In order to apply a right in a given context, one must be able to specify that right. In order to specify a right, one must adjudicate between the competing interests present in that context, available agents to act as duty-bearers, and feasibility conditions. That is, one must be sensitive to features of this context. This means deciding when an interest is sufficiently important so as to justify others carrying duties (for example, institutionally imposed duties to pay taxes). This raises questions of cost to those carrying the burdens. The view rightly observes that to ground a duty for others, one must also take into account the burdens and costs of that duty.¹⁶

So, the view stresses, interests can be general and important but the kind of importance that creates moral duties must take into account features of the context. That is because the ground for giving rights a clear normative content must be context sensitive.¹⁷ The right way to ensure that, on this view, is if collective institutions in a democratic order make decisions on the relative importance of interests and create legal rights that codify this.

On the democratic specification view, then, the correct response to the need for contextual sensitivity is to leave that specification to political and legal processes. Resolution comes through collective deliberation, decision making, and legality. In fact, human rights on such a view do not really have any meaningful normative content at all without this kind of specification.¹⁸ So, the moral nature of human rights is partly supplied by considering people's interests and partly by a democratic political order. Human rights are not, then, simply pre-legal moral rights that can be enforced through positive law. They are hybrid standards, part moral and part legal, in their specification but fully moral in their demands.

There is however a problem with an approach that passes the specification buck, as it were, to the political community. The contextualism in question can be understood as either objective or subjective. On the objective version, discernible and objective features of specific social conditions shape people's entitlements because they determine which agents and which burdens are in play. What is relevant are the facts about social circumstances that make a moral difference, such as who is in a position to take on the burdens, including the duties, and whether it is justifiable that people in that kind of position do so. Discerning what matters enough and what kind of burdens can be justly imposed requires a principle that, applied in different contexts and together with the facts, will tell us which agent types should bear responsibility and why. On the subjective version of Contextualism, on the other hand, how interests are compared and weighed to decide whether they ground obligations is a matter decided by subjective features: the views of members of the political community.¹⁹ This is the core contextual feature according to which human rights must be specified and made

¹⁶ Besson, 'Human Rights and Constitutional Law', 4 and 5.

¹⁷ Besson says interests are 'transhistorical' but 'sufficient' importance and the 'fundamental' nature of some interests has to be determined by reference to a context, Besson, 'Human Rights and Constitutional Law', 5.

¹⁸ Besson, 'Human Rights and Constitutional Law', 5.

¹⁹ Besson calls this 'socio-comparative' recognition of interest importance, 'Human Rights and Constitutional Law', 5 and 6–7.

real.²⁰ The only relevant moral principle, then, would be one that says ‘if the political community decides to prioritise interests over burdens in a certain way, that is the content of human rights’.

The problem is that neither version of Contextualism gives adequate support to democratic specificationism. The objective version does not because it actually implies appeal to moral principles that are right independently of the decisions of political communities and can be used to judge those decisions. It is on the basis of those principles that we identify objective features of a social context that matter when judging what burdens are justified—ie, when specifying the normative content of human rights. Whether an interest is important in the right way so that a right should protect it will depend on applying principles to the objective facts in a judgement.

Whether a burden is justified, and for whom it is justified, will depend on discernible features about those who might shoulder it, such as being a member of a political community capable of treating its members fairly in terms of personal security. Those features themselves must be identifiable by reference to principles of justified burden for securing others’ interests. On an objective reading of contextualism, then, decisions of the political community might get it right or wrong as to what the relevant objective features are, and what duties are justified. They might wrongly prioritize Joe’s interests in quashing Jane’s views. This is because they do not define what is justified, the principles do. On the subjective version, on the other hand, the relevant features of a given context are decisions of the political community about how to prioritize securing interests versus costs to others. I begin by discussing the objective version and turn to the subjective version later.

Objective contextualism

Consider an interest such as the interest in nutrition. Should people in a given political community have rights to be provided with nutrition? This will depend on what securing that interest might mean for others. Securing the conditions for nutrition of any degree will imply that others must take on the burdens, such as contributing to the nutrition of those who cannot secure it for themselves. It will imply duties on agents in a position of authority to allocate burdens, such as allocating tax burdens, and duties on productive individuals to contribute through the tax burdens allocated to them. It will also imply costs incurred by others resulting from these duties, such as reduced opportunities to engage in financial exchanges with those who have been taxed or reduced opportunities in their family group when the breadwinners have increased allocated tax burdens. Whether these costs are justified by the pressing importance of the interests will depend on whether there is a suitable moral principle for justifying the allocation of burdens and benefits.

Political theorists have developed theories of distribution for allocating benefits and burdens in a society based on concepts of fair distribution or equal opportunities.²¹

²⁰ Besson, ‘Human Rights and Constitutional Law’—‘Only those interests...recognized as socio-comparatively equally important by members...can...give rise to duties’ (5); Benhabib, *Dignity in Adversity*, 64 and 74.

²¹ S. Meckled-Garcia, ‘Giving up the Goods’, 75–6.

Such principles indicate when interests are to be prioritized so much that others must carry obligations to respond to them. For example, Rawls' difference principle indicates that persons capable of obtaining unequal advantages should only be socially guaranteed those unequal advantages that are necessary for, or coincide with, improving the position of the least advantaged in society. An alternative view in the literature holds that people are entitled to equality of resources, even if ultimately their choices lead to different achievements.²² On these views a right like the claim to nutrition will imply obligations because of values like fairness and equal concern in a society. Fairness might indicate that the advantages of nourished people over un-nourished are socially unfair if the nourished can contribute to improving the condition of those at the bottom. Their tax burdens in doing so are justified burdens. Equal concern might tell us that others' nutrition must be paid for, say if it is not their choice to be under-nourished (as it might be for a person seeking weight loss) but due to society's arbitrary distribution of resources.

The point is that when it comes to deciding on whether interests are to be advanced, or burdens shouldered, according to objective features of a social context, we need guidance. That guidance, if we are to give a morally satisfactory answer, must take the form of a moral principle indicating which interests have the characteristics making them important in the right way: rendering the burdens corresponding to securing them justified. Which means the objective features of a social context that help us in specifying people's rights have to be features picked out by moral judgements and moral principles. Consider whether Jane Doe's interest in freedom of movement should matter more than an interest Joe Doe might have in constraining her. Consider a principle prescribing that interests in controlling others' movement for the purpose of disadvantaging religious minorities do not count as morally relevant considerations. On that principle Joe's interest would be ruled irrelevant as a basis for deciding whether to constrain Jane's movements. On the other hand, if Joe's interest in having his life protected from assault will represent a sufficiently high priority for constraining Jane's movements when she aims to assault him. Consider the political community's tax burdens in resourcing protection, of Joe from Jane. So long as the burdens are fair, on a reasonable account of fairness, Joe's interests in protection are fairly treated by being prioritized. In each case the objectively justified principle will indicate the order of priority. What a political community decides is the right balance between benefits and burdens, interests and the duties to secure them, is beside the point. If it concurs with the objectively right principle the polity gets it right. If it does not, it gets it wrong.

It is important at this juncture to further clarify the notion of specification. One might say that there are a variety of ways to skin a cat, and similarly a variety of arrangements that might prioritize general and fundamental interests. Which social arrangements are feasible, and out of the feasible ones which are to be selected and, given that different arrangements will fall on different shoulders, on whose shoulders should they fall? These are all specification questions. Yet, those questions cannot be decided by moral principles given moral principles can only indicate what kinds of

²² R. Dworkin, *Sovereign Virtue* (Cambridge, MA: Harvard University Press, 2002), 65ff.

interests should be prioritized. They do not indicate how to operationalize securing those interests.²³ For example, securing people's interests in being free from slavery may have priority over the costs to the political community of doing so. But whether the police, a special institution, or a militia should do the securing will depend on circumstances and feasibility.

These questions of policy are rightly questions that a political community must decide. However, they have nothing to do with the *moral* specification of human rights. Whether a given police action, a tax scheme to pay for it, or a state's actions in requiring such actions (or all of these) are appropriate specifications of the right to be free from slavery will nevertheless depend on principles directing us as to how to prioritise the claims of greater security over claims not to have higher tax burdens. Which officers are available will depend on morally appropriate contractual conditions in working for the police service. Whether more officers can be employed will depend on available tax revenues, and that will depend on the productiveness of a given social set up, and what is morally justified in terms of production and the fair distribution of its benefits and burdens.

For some aspects of a right, such as the imperative not to enslave others, or not to enact legislation permitting such acts, the prioritization will not vary with resources, as they are straightforward prohibitions. For others, such as the imperative for a political community to protect its members from enslavement, the degree of protection will be sensitive to principles for prioritizing different demands, principles of fairness in what burdens citizens can be expected to shoulder for example. But in specifying the kind of agent that must carry the duty and the kind of duties they must carry, appeal to such principles is unavoidable. Whilst their specific application depends on objective contextual facts, the correct content of the principles does not. Nor does it depend on collective political decisions.

The reason why principled grounds for specification may seem a tall order is that human rights theorists have been inattentive to specification. Theorists have sought to base their views of justified human rights claims on identifying important interests. They have interpreted the relevant sense of importance of interests as detachable from showing over which burdens an interest has priority, and thus avoided supplying clear principles for interest prioritisation, and so for justifying burdens. This is partly due to a commonly held view that identifying human rights and specifying their corresponding duties are separate enterprises.²⁴ But identifying principles of priority or legitimate burden is nevertheless a problem that demands a solution in *moral* theory, and so one that cannot be avoided in offering a theory of human rights with a discernible practical content. In that enterprise there is no reason to think that a democratic community is uniquely positioned to ascertain the right principles, as there is no reason to think a democratic community uniquely gets moral theory right. The crux question is what reasons there are *on the merits* for adopting one principle and its

²³ cf Tasioulas, 'The Moral Reality of Human Rights' 92, 94 ff.

²⁴ Viz. M. Nussbaum, *Frontiers of Justice* (Cambridge, MA: Belknap Press, 2006), 277ff; Tasioulas, 'The Moral Reality of Human Rights', 93 and 99; A. Gewirth, *Human Rights: Essays on Justification and Application* (Chicago: University of Chicago Press, 1982), 15; Griffin, *On Human Rights*, 97 and 103.

prioritizing of interests over another. For objective contextualism, then, passing the buck to the collective is misconceived.

I am of course assuming here that democratic specification views are not motivated by scepticism about moral principles and about moral arguments generally. After all, the view seems to presuppose that some elements of human rights decision making, such as the selection of relevant interests for weighing which protections are necessary in providing the moral conditions for democracy, are not moral questions we should be sceptical about.²⁵ So moving from morality about interests to scepticism about how to balance them lacks coherence. An argument would have to be offered why in this special case there could be no morally justified theory of priority. Without that argument, the sceptical blade that cuts against moral principles would also cut against the moral value of having democracy and the point of engaging in balancing interests at all. Democratic decisions or the judgement of a court would then amount to coin-flipping exercises, with no special moral warrant for their outcomes.

There is a problematic position in the literature that has been highly influential and may lie behind this sceptical approach to specification. This originates in a branch of German constitutional scholarship.²⁶ It says that constitutional rights (which the view does not adequately distinguish from human rights) are not clear principles for imposing obligations, but rather instructions to optimise specific interests. Each interest represents a heading for a right (life, security of person, freedom from torture, freedom from slavery, and so forth). In the context of any one political community, however, the optimization of these interests for any one person will at times clash with the optimization for others, and with the collective interests of the political community.²⁷ That is why contextual judgement is needed to settle the content of what people are entitled to have on a case-by-case basis. Favouring this kind of judgement grants courts the authority to balance, and optimize, interests. On one reading of the view, there are no moral principles for prioritizing interests, which is the sceptical position I mentioned earlier. But as I have said, without a special argument to prevent such scepticism infecting all moral appraisals, including our appraisal of democracy

²⁵ Besson, 'Human Rights and Constitutional Law', 5; Benhabib, *Dignity in Adversity*, 60 and 65.

²⁶ Alexy takes constitutional rights to be instructions to optimize interests under their headings, and the role of judges in a constitutional democracy to solve the problem of how to optimize in conditions where these rights conflict (where a decision on what gets optimized must be taken), R. Alexy, *A Theory of Constitutional Rights* (Oxford: Oxford University Press, 2002); R. Alexy, 'Constitutional Rights, Balancing and Rationality', *Ratio Juris*, 16 (2003): 131–40. See also K. Moller, 'Balancing and the Structure of Constitutional Rights', *International Journal of Constitutional Law*, 5(3) (2007): 453–68; M. Kumm, 'Constitutional Rights as Principles: On the Structure and Domain of Constitutional Justice', *International Journal of Constitutional Law*, 2 (2004): 574–96. Often the balancing metaphor accompanies a conception of 'proportionality' as optimizing different interests (especially where collective interests are also in play), see: M. Kumm, 'Political Liberalism and the Structures of Rights: On the Place and Limits of the Proportionality Requirement', in S. Paulson and G. Pavlakos (eds.), *Law, Rights, Discourse: Themes from the Work of Robert Alexy* (Portland, Oregon: Hart Publishing, 2007); K. Moller, 'Proportionality: Challenging the Critics', *Oxford Journal of Legal Studies*, 10(3) (2012): 709–31. For a critique of the balancing conception of proportionality, see G. Letsas, this volume, ch. 17. Democratic specification views are clearly influenced by the idea of legal institutions balancing (or proportionately optimizing) interests.

²⁷ Whether or not the collective interests of a political community can reduce to the interests of each of its members is a question I shall leave open here.

itself, that position would be self-defeating. Another reading of this position is to take optimization to mean a principle requiring we maximize important interest protections, and I will return to that in section III. Now I turn to the subjective version of contextualism.

Subjective contextualism

One might also think that in conditions where people disagree over what the right principles might be, then there is moral warrant for the answer to be settled democratically.²⁸ This is a moral argument for democratic deliberation. That takes us to the subjective version of contextualism, which offers a moral argument in favour of settling interest-weighting disputes by democratic deliberation. This view effectively hones in on decisions of the political community as the relevant features of the context that decide how interests should be prioritized. For this to count as relevant, then, we need a moral argument for making such deliberations decisive. But, as I will show, the most plausible moral argument for the decisiveness of democratic deliberation can only make it decisive for a different purpose. It can tell us which interpretation of human rights a society should adopt for enforcement purposes, *all things considered*; it cannot decide the morally right specification of the normative content of human rights.

The moral argument, as offered by democratic specification theorists, is that in a democratic context, people are given an equal say in the rights and burdens to be socially enforced. This equal say both recognizes that they have interests worthy of protection and accords them an *equal* memberships status in the community.²⁹ Recognition means giving each an equal say in assessing what that status means, what burdens are justifiably imposed in securing each other's interests.³⁰ The moral value behind this idea is the expression of political equality and what this means for distributing rights to political *participation*.

But there is a difference between what counts as a legitimate procedure for deciding which rights should get socially or legally *enforced* and the right basis for deciding the *moral* content of human rights. There may indeed be morally good reasons to accept collective decisions on what socially guaranteed rights members of a political community are to enjoy, even decisions that get it wrong within reasonable limits. Where there is pervasive moral disagreement in a pluralist society we might need to reasonably resolve some debates over society's rules as a practical necessity, even if those debates have not been resolved intellectually, and even if there are some moral questions for which no one has developed clear and definitive answers. Out of the available decision-making processes to move on practically some respect the equal status of citizens more than others: democracy respects equal deliberation and input whereas

²⁸ Viz. 'Philosophical differences will still persist in articulating the content of such recognition', Benhabib, *Dignity in Adversity*, 65.

²⁹ Benhabib, *Dignity in Adversity*, 74; Besson, 'Human Rights and Constitutional Law', 5, 6, 8.

³⁰ 'The recognition of human rights is done mutually and not simply vertically and top-down, and... human rights are not externally promulgated but mutually granted by members of a given political community'; 'it allows for the mutual assessment... of the recognition of the corresponding rights and duties...', both Besson, 'Human Rights and Constitutional Law', 5.

authoritarianisms do not. Public legal institutions complement this form of respect, as they provide a transparent decision-making forum on how legislative decisions should be interpreted and their consequences adjudicated. But this is all justifiable as legitimate on the basis of citizen equality (not itself justified by democratic decisions). It is, on those grounds a very different project to answering the *normative* question of what moral rights people can legitimately claim regardless of their fellow citizens' practically constrained decisions.

It is important to note what is at stake here. Without a special argument shielding some rights from having their content democratically decided, the democratic specification view implies every right, and every element of every right, must be subject to interest priority-orderings decided by a political community. There is no exception, because any possible practical content that any right could have requires prioritising some interests over others. Even something as straightforward as the prohibition on slavery implies a priority ordering in terms of the interests of those enslaved versus those who might benefit from it.³¹ As I argued earlier, claiming *all* moral decisions should be subject to democratic practical decisions in this way is self-defeating. It implies we have no moral reason to even accept the basic rights that make democracy itself possible, giving it some moral warrant. Democratic rights, after all, imply prioritizing some interests over others. Note that the version of democratic specificationism I have been discussing is indeed committed to a value basis—equal status—that justifies the democratic process.³² So, moving to subjective contextualism cannot, on this view, be justified by adopting general scepticism about specifying moral rights.

The (non-sceptical) democratic specification solution, then, only makes sense if it serves some *value* that is also part of the initial impetus to develop an account of human rights. As I have shown, one such value is giving people an equal say and an equal status in their collective institutions, to thereby respect their equal moral status.³³ That value is perfectly well served by accepting a fundamental role for democratic institutions, plus judicial propriety, in *practical* decision making. However, as also argued, what makes a correct form of *practical* decision making is not the same as what makes a correct moral decision, otherwise democratic decisions could not themselves have any moral warrant. Correct practical decision making is simply morally justified decision making under specific constraints, such as having processes that respect all members of the political community equally.

The same candidate value is also an excellent candidate for underpinning a view about the right way to prioritise interests. This is the value of treating people in a way that shows equal respect for their status and equal concern for the way their lives will fare in the face of non-optional collective institutions. But if that is the point of the enterprise, it is not well served by claiming the morally justified content of the values,

³¹ For those uncomfortable with describing a preference for torture, either instrumental or intrinsic, as just another interest in a priority ordering this section can be phrased in terms of preferences that should be discounted. We still need a principle that sets out criteria for which those are.

³² See n 30.

³³ Viz. '... the threshold of importance and point of passage from a general and fundamental interest to a human right... may be found in the normative status of each individual qua equal member of the moral-political community', Besson, 'Human Rights and Constitutional Law', 5.

of equal respect and concern, is a matter for practical decision-making procedures. That value must inform us in determining which practical decision-making procedures are legitimate and the extent, and the limits of, their legitimacy. That is why slavery, even if it were underwritten through a majoritarian ‘democratic’ process could never represent a rightful prioritizing of interests, nor could absence of due process, or general suppression of dissenting political speech and associations. Which is to say that some decisions can be so wrong that they are illegitimate regardless of the constraints under which they are made, even if it is normally reasonable to decide matters democratically under such constraints. For other rights, such as those seeking to best express equal mutual concern for members of a political community, there might be leeway under these constraints to allow us to implement what is not the morally right solution on the merits, but the right on the merits of the decision-making procedure.

Of course, democratic specificationism is motivated by a desire to establish which interests should be prioritized and the apparent difficulty in pure moral theory of doing so. One reason that apparent difficulty is the *kind* of moral theory such views appeal to in trying to explain moral rights—interest-based accounts looking to establish the priority of interests by ‘weighing’ how important their fulfillment is for each person’s well-being. There are inherent problems with that theoretical framework that underpin specification problems, as I show in section III.

III. Weight-of-interests

The weighing-of-interests component of the view, as I have construed it here, is not specific to democratic specification theories. However, it gives some structure to the democratic specification argument.³⁴ Nevertheless, the view that rights must be justified by reference to the relative importance (weight) of interests is a widely held view. There are, however, two possible readings of the idea that an interest has ‘sufficient importance’ (is of sufficient weight) such that it grounds obligations. The reading that the democratic specification approach needs, however, is the less plausible of the two.

On the first reading, the importance of an interest is in terms of its importance for a person’s well-being. For example it is usually highly important for a person to enjoy even minimal well-being that such interests as water, food, freedom from attack, and so forth, are secured. On the second understanding of importance, securing an interest is important by reference to some moral value, such that prioritizing this interest realizes that value and failing to prioritize it does not, or even runs counter to it. So, equal pay for equal work is more in line with the value of fairness than random pay for equal work. The additional pay a person in the random pay system might get in the equal pay system might be of marginal importance to her well-being, given her life aims. More pay may not alter the well-being of someone whose life satisfaction is focused on her work. Yet the distribution is hugely important for fairness.

The democratic specification view needs the first sense of importance. The view says a political community must deliberate under conditions of equality in order to weigh

³⁴ ‘Of course, there has to be a threshold of importance at which a given interest is regarded as sufficiently fundamental to give rise to duties and hence to a right’, Besson, ‘Human Rights and Constitutional Law’.

how important, or fundamental, interests are. That weighing (or ‘balancing’) results in decisions as to the importance of interests and what the threshold of importance is for grounding duties. If an interest in increased personal security for Paul has sufficiently greater weight than Peter’s interest in avoiding increased taxation, this will justify duties to pay more taxes. But for any scheme proposing decisions about obligations on the basis of weighing the importance of interests, there has to be a common currency of importance in terms of which the interests are compared.

I am assuming the only relevant common currency here is the importance of interests to people’s well-being. Yet, however important an interest is in that sense, that fact is not even a *prima facie* ground for moral obligations. That is because grounding duties for others requires an account of when, and why, those others must prioritize Paul’s interest over their own in pursuing their own lives as they wish. In other words it requires a third factor: an account of when an interest is of overriding importance: when it demands that we override the interests others have in not being burdened.

For any two interests, if they are interests of the same person it makes perfect sense that, when deciding which she has reason to act to secure, she has most reason to choose the interest that matters to her the most in the scheme of her aims and overall conception of the good. That is a key aspect of well-being and its value—the degree to which someone gets to pursue her conception of the good. But things are different if these interests belong to different persons. While an interest might be of high importance to Paul, that is not by itself a reason for Peter to prioritize securing that interest, given securing his own interests will be important for him too. Peter needs a reason to prioritize securing Paul’s interest over those of his interests thwarted by taking on these burdens. But the fact that Paul’s interest is important to his well-being is not the right kind of reason.

What is needed is a value-based reason: a reason for Peter to value prioritizing the securing of another’s interest over his own. And that reason must guide Peter as to how much priority he should give the interests of others, given he has interests of his own. The same structure of reasoning applies to the social case as using social resources such as taxes implies tax burdens for people and so calls for a justification for prioritizing others’ interest over our own burdens. This is why human rights theorists often appeal to moral values such as dignity or minimal decency, to justify placing priority on securing a minimal list of interests. One could also appeal to values like fairness, which on one view means the interests of the least advantaged are prioritized over those of the most advantaged. It is fair that those inequalities enjoyed by those who can achieve them because of social cooperation are taxed for the sake of those not otherwise in a position to benefit so much from that cooperation.

So the first reading of importance, as simply importance for a person’s well-being, will not get us to human rights (moral reasons to act in ways that are beneficial to some and burdensome to others). We need a moral value, perhaps expressed as a moral principle, like fairness or respect, and that is the second reading of the notion of importance.

On this reading, importance is priority in terms of serving a moral value. But note that this priority is not of the kind involved in balancing and weighing. A right, as a

type of practical reason, must be able to *silence* some considerations, including other interests. Consider a version of the earlier example where someone's conception of the good involves dedication to a discriminatory religious view. A worshiper might have an interest, as a result of pursuing a life of dedication, in discriminating against other religions. The holder of such a view might claim a right to discriminate. The correct response to such a claim is not that non-discrimination is sufficiently important to others, in terms of some value like fairness or dignity, that it outweighs the importance of the devotee's interest in discriminating in terms of fairness or dignity.³⁵ Rather, the correct response is that her interest does not even count as a relevant consideration. It automatically gets a weighting of zero in all equations. The moral priority of rights, then, is a more complex form than the weight-of-interest-importance view suggests.

There is one candidate for a moral value that would seem to instruct us to look at how much securing interests contributes to a person's well-being. That is any moral view that values actions maximizing well-being, because more protected well-being is better than less.³⁶ An example of this would be a kind of 'interest calculus' where securing an interest is prioritized if it produces an overall gain in well-being.³⁷ On that kind of view, we are indeed required to weigh interests against each other in terms of their contribution to well-being, but we must then consider them in the aggregate to decide what duties they ground. An interest deserves securing on this view if it contributes to a higher sum of secured interests. Whilst this is indeed a candidate for the second interpretation of importance, it is unfortunately retrogressive as an account of human rights. It implies that individual-centred concerns are beside the point, and an individual's plight only matters enough to ground rights when it contributes to the common good. If not fully a utilitarian view, this is open to similar objections to such views, based on the intrinsic importance and value of individual destinies.

In summary, there are significant problems with the weight-of-interests view that frames the prioritization problem to which the democratic specification approach is supposed to resolve. A challenge to that framework is the idea that we sometimes prioritize some interests over others, and impose some burdens as a result, not because of their respective contributions to well-being but because doing so serves a moral value such as equal respect. I sketch the beginnings of such a view elsewhere.³⁸

³⁵ I am here emphasizing the capacity of rights to block other considerations or 'reasons'. Other authors have stressed this characteristic of moral rights, see R. Dworkin, 'Taking Rights Seriously', in his *Taking Rights Seriously* (Cambridge, MA: Harvard University Press, 1978); J. Waldron, 'Pildes on Dworkin's Theory of Rights', *The Journal of Legal Studies*, 29(1) (2000): 301-207, 305; Meckled-Garcia, 'Giving up the Goods', 83ff.

³⁶ This will include different views on maximization, such as straight aggregate increase and pareto improvement.

³⁷ Another example, proposed by Marmor, is an 'interest calculus' (a 'cost-benefit analysis') to decide what burdens are justified in terms of maximizing overall interest protection, A. Marmor, 'On the Limits of Rights', *Law and Philosophy*, 16(1) (1997): 1-18, 10ff, yet he eschews the idea that this implies any kind of utilitarian calculus, because utilitarian calculi require 'quantitative commensurability' of interests. Whether that is sufficient to separate this form of aggregation from utilitarianism, I shall leave aside here. It is nevertheless a consequentialist view of rights, given what is required as a matter of right is decided by its consequences for the interest calculus (although I note that Marmor claims his view is not consequentialist, 'On the Limits of Rights', 14).

³⁸ S. Meckled-Garcia, 'Giving up the Goods'.

IV. Conclusion

In conclusion I have offered some reasons for doubting the cogency of the specification thesis and the weighing-of-interests thesis. This challenges versions of democratic specification subscribing to either or both theses. I hope also to have given some general reasons to re-consider the idea that human rights can be grounded in the weighing of interest, in terms of their importance for well-being. This is not a sceptical challenge to human rights, as there are candidate accounts of human rights that do not suffer from the problems of well-being-based accounts.