

Book Notes

The Idea of Human Rights. Charles R. Beitz. New York: Oxford University Press, 2009. Pp. 256. \$34.95.

One of the great legacies of World War II is an ambitious global movement that aims to protect the rights of individuals, regardless of the rights that their own governments may choose to extend to them. This movement has manifested itself in an increasingly dense web of treaties seeking to regulate state behavior, the creation of international organizations attempting to serve persons directly, and even the eradication of states deemed unfit to protect the most urgent interests of their citizens. But despite the fact that the rhetoric and global practice of human rights has become increasingly more complex, efforts to provide a coherent moral theory explaining what exactly human rights are and what obligations they place on global actors have lagged. Recognizing this void in political theory, Charles Beitz's *The Idea of Human Rights* seeks to provide an explanation of human rights offering a solid philosophical foundation that would extend protections to individuals regardless of geographic boundaries.

Beitz begins his analysis by making two critical observations. The first is that “human rights has [sic] become an elaborate international practice” that continues to receive an increasingly larger share of material resources and international attention. Of particular significance to Beitz's argument is the fact that the participants in this complex global enterprise have continued to attribute utmost importance to the moral claims that underpin the endeavor. According to Beitz, the emphasis on the theoretical tenets of human rights is important but underdeveloped. Beitz's second observation is that, despite this rising importance, the “practice of human rights can also evoke a disabling skepticism.” This skepticism takes many forms, and often is directed at the difficulty in defining the scope of human rights or the high costs associated with interventions to enforce them. With these two observations as a foundation, Beitz clearly articulates the goal that animates his book: to contribute to a coherent explanation of the moral considerations justifying the practice of international human rights, while also ensuring that his theory can resist a variety of skeptical claims, including criticisms from those individuals who consider themselves advocates for global justice.

After outlining the two observations that motivate his project, Beitz discusses two possible approaches to developing a theory of human rights, neither of which, he believes, can adequately explain the international human rights enterprise as it is currently practiced. The first is naturalistic theories, which view international human rights as rights that all human

beings possess in virtue of “their humanity.” Under this view, human rights exist regardless of the prevailing legal or social structures, and attach to all persons notwithstanding their spatial or temporal locations. The second approach is agreement theories, which seek to argue that, although there are serious disagreements about the nature of political and social rights in the world, “overlapping consensus” can be reached on a core set of moral standards that constitute human rights. Although both of these views have their advantages, Beitz argues that these two approaches invite misunderstanding because they do not adequately explain the function that international human rights are meant to play in regulating the behavior of political actors. Moreover, neither approach reflects the historical development of human rights, where the initial architects of the project sought to enshrine protections without endorsing the concept of a single or agreed upon conception of human nature.

After offering a critique of each of these two possible approaches, Beitz puts forward what he considers a “practical” approach to international human rights. This practical approach draws heavily from insights from John Rawls’ book *The Law of Peoples* by looking at the functional role of human rights in practice to “constrain our conception of human rights from the start.” From these insights, Beitz argues that the practice and discourse of international human rights are aimed at protecting individuals’ most urgent interests from the acts and omissions of states. At this stage in his argument, to illuminate the core features of human rights, Beitz creates what he refers to as a “two-level model.” In this model, states have a first-level interest in attending to citizens’ interests, but when this fails to happen, international actors on a second level are justified in intervening at the expense of state sovereignty to guarantee the rights of individuals. Since the global community does not have a single unitary actor that can take steps to protect the rights of individuals, states acting unilaterally or in concert often take on the task of correcting for the shortcomings of the rights-violating state. In the eyes of Beitz, taking this practical approach has the advantage of developing a view of human rights that relies on current global discursive practices while avoiding many of the pitfalls of attempts to generate a coherent justification for this project by appealing to a prior set of ideas or beliefs. In other words, Beitz’s core argument is that the goal of developing a theory of human rights should not be to formulate a list of rights or to develop a single mechanism to show how those rights should bear on practical choices. Instead, this book argues that the goal when developing a theory of rights should be to clarify the ways human rights should be used in global political discourse and to articulate what considerations should be taken into account in the development of the international practice of human rights.

In many ways Beitz’s work presents an important contribution to our philosophical understanding of human rights. The concern with his project,

however, is that he places great weight in the belief that the existence of the emergent practice of a global human rights *regime* is sufficient to provide a normative justification for the existence of human rights *in themselves*. Although this theory may free practitioners from having to appeal to natural rights or a false consensus to justify interventions, it offers only a limited instrument for criticizing developments in international law or arguing for the obligation to act in specific scenarios. Given these shortcomings, Beitz's major contribution may not be in providing a comprehensive theory of the nature of human rights, but instead in arguing for a particular methodological approach: that theorists should look to human rights as they are actually practiced and discussed in the world, infusing human rights theory with lessons derived from the international community's actual experience.

—Adam Chilton

Philosophy of Human Rights: Theory and Practice. David Boersema. Boulder: Westview Press, 2011. Pp. 456. \$46.00.

David Boersema's *Philosophy of Human Rights* is a lucid, unpretentious textbook that will serve college-level teachers acquainting students with contemporary rights theory, as well as general readers seeking an introduction to the field. The book follows a three-part division. Part I is an overview of basic issues in the philosophy of rights. It introduces readers to competing theories about what rights are, where they can be said to originate, and who or what can be said to possess them. Part II outlines the use of rights rhetoric in American and, to a lesser extent, global politics. This part shows how rights claims are raised by competing interests and profiles debates surrounding six rights that contemporary political groups often invoke. Part III is a brief appendix consisting of seven rights documents, including the Universal Declaration of Human Rights and the African Charter on Human and Peoples' Rights.

Each chapter of the book begins with a general discussion by Boersema, followed by brief selections from contemporary philosophers and humanists. The selections, which Boersema summarizes and clarifies, are meant to underscore some of the major axes along which contemporary rights theorists disagree.

Boersema's style reflects a commitment to modest pedagogy. He sidesteps jargon and generally suppresses his opinions, allowing readers to observe the concerns, tendencies, and rhetorical moves that characterize the writings of modern-day rights theorists. The focus is not on cataloguing the various positions that recent theorists have taken, but on providing an un-

derstanding of how university-trained philosophers tend to parse, study, and apply rights concepts. There is thus a kind of analytic transferability to Boersema's book; it sketches modes of thinking and argumentation that students will be able to apply to fields like literature, anthropology, and law. Indeed, Boersema's book will introduce readers to the broad intellectual procedures—the styles of reasoning—that have come to typify academic philosophy and the humanities as a whole.

Teachers may find the book's last six chapters, each of which illustrates debates surrounding an oft-cited right, less valuable than its treatment of general rights theory. The closing chapters seem perfunctory and do little more than hint at the degree of controversy surrounding, among others, victims' rights, children's rights, and the right to privacy. It seems that these chapters intend primarily to show how these well-known rights can be studied from a philosophical angle. The chapter on victims' rights, for instance, stresses that basic philosophical questions—e.g., questions about the moral meaning of desert and responsibility—are implicated in the debate over whether the resentment of victims should be allowed to influence criminal sentencing. Elsewhere in Part II, Boersema outlines some standard criticisms of rights *per se*. He details the view, most often associated with communitarian thinking, that rights consciousness conditions people to overlook their responsibilities to the social body. He also paints a fair-minded picture of the position that human rights have become a vehicle for the globalization of Western norms. Boersema is largely silent, however, on Marxian approaches to rights. Nor does he touch on non-Western (e.g., Buddhist or Hindu) ideas of responsibility, which bear more than a little resemblance to the rights concepts developed by our own culture.

The most rudimentary question one can ask about rights, perhaps, is whether they can be said to exist in the absence of law. Are human rights an inherent property of the world (natural rights), or merely a product of positive enactment (legal rights)? Though Boersema touches upon this question at several points, he never brings it to the fore, choosing instead to embed it in discussions of other themes. His book thus effectively introduces rights theory without stressing that the very existence of rights, their ontological status, is in many ways the most basic question of rights philosophy. Whether this is a weakness or a strength depends, of course, on one's perspective. Nonetheless, there may be a pedagogical advantage in addressing the ontological question at the outset.

It is plainly true that questions about the content, reach, and efficacy of rights are contingent on the more basic question of what it means to say that rights exist. A good deal of confusion can thus be avoided if, before turning to more specific aspects of rights theory, students first consider precisely what sort of entity is meant by the word "right." There are several pedagogical advantages of an ontology-based approach. If a student is able to develop an opinion with regard to what kind of thing a right is—a

natural phenomenon, perhaps, or a social construction, or some combination thereof—she will have a conceptual foundation upon which to organize subsequent subject matter. Another advantage of stressing the ontological question is that doing so forces students to consider the relation between rights and everyday moral intuitions. Human rights theory is in many ways a species of moral philosophy, and students will be able to build a more unified, coherent worldview if they understand how people's ordinary moral preferences determine the ways in which they opt to think about rights. It may be wise, therefore, to attend to how beginning students integrate unfamiliar rights concepts into their existing notions of morality. Like any new subject, human rights theory will be more meaningful to students if they can see where it stands in relation to the things they already know, or believe they know, about the world.

One simple lesson that emerges from Boersema's book is that, even if one takes the view that rights are no more than legal fictions, the fact that they tend to reflect our intuitions about how people ought to be treated may endow them with a significance that we would not wish to ascribe to other social conventions. Insofar as lessons of this sort are valuable, Boersema's textbook will be able to play a valuable role in any humanities-oriented education. Without trying to break new ground, Boersema aims to acquaint young people with the particular ways in which intellectuals in our culture have come to think, speak, and write about rights. The extent to which it is in our interest to preserve these traditions is a question that every responsible teacher will need, inevitably, to answer for herself.

—Philip Petrov

Law of Asylum in the United States, 2011 ed. Deborah E. Anker. Eagan, Minn.: Thomson West, 2011. Pp. 732. \$175.00.

With *Law of Asylum in the United States*, Professor Deborah Anker has created an invaluable tool for scholars, students, practitioners and adjudicators alike. It is the most comprehensive resource on asylum law in the United States and the first treatise that coherently analyzes U.S. asylum law in the light of international law sources and international human rights standards.

While the United States ratified the United Nations Convention Relating to the Status of Refugees ("Refugee Convention") in 1968, it did not adopt any statutes addressing its treaty obligations until 1980. Since then the law of asylum, which in the United States includes protection through refugee status and protection through withholding or deferral of removal,

has, according to the author, developed in a “patchy and *ad hoc*” manner. In this treatise, the author not only extensively describes the development of U.S. asylum law and its current stage. She also critically analyzes the legal doctrine by demonstrating discrepancies in the domestic law and comparing the U.S. interpretation of international refugee law to that of international and foreign authorities. This analysis leads her to draw some firm conclusions, particularly regarding the performance of the Board of Immigration Appeals (“BIA;” the first appeals authority in asylum cases), which shows “lack of leadership” according to Professor Anker. Finally, the treatise includes suggestions for improvement of U.S. asylum law.

In part, U.S. asylum law is domestic law based on international treaty obligations. The treatise starts in Chapter 1 with an overview of the various sources of international law, of the historical development and interpretation of these treaty obligations, and of the forms of protection provided by the United States that are not based on international obligations. Throughout the treatise the author consistently provides the reader with detailed historical insights into the development of U.S. asylum law. For example, Chapters 2 and 3 examine the standard of proof for demonstrating the need for protection and the evidence required to meet that standard, respectively. Both chapters set out how the standard of proof and the standards for admissibility of evidence were first developed in cases before the BIA and immigration judges, how they were eventually codified in different legislative enactments, and how the law developed after codification.

In the twelve years since the publication of the third edition of the treatise, Professor Anker has conducted an extensive review and compilation of the relevant domestic, international, and foreign law, resulting in a thoroughly comprehensive and updated fourth edition of the *Law of Asylum in the United States*. Among the most innovative aspects of this new edition is its extensive reference system, containing direct links to the primary sources in the treatise’s online version, available in WestlawNext. Moreover, the breadth and depth of case analysis in the fourth edition enables the author to flag inconsistencies in the interpretation and standards applied by the BIA as well as by the immigration judges, sometimes even within the same circuit.

Illustrative is Chapter 4, which discusses the meaning of persecution, its agents (e.g., states, state agents, non-state actors), and the question of how severe the harm suffered or feared by the applicant must be for it to constitute persecution. This chapter includes descriptions of cases from the last thirty years in which some BIA and immigration judges have recognized specific types of harm as rising to the level of persecution, while others do not find a showing of persecution from similar facts. For instance, case law generally shows that “detention alone does not rise to the level of persecutory harm, unless specifically prolonged or aggravated by other factors such as serious physical abuse or other egregious conditions of confinement.”

Professor Anker highlights one case in which the Ninth Circuit held that “detention of a day, where the petitioner was beaten and shocked with an electrical rod, compelled a finding of past persecution,” while in another case the First Circuit found that “two separate beatings—one involving pipes with chains attached that left the prisoner unconscious and required hospitalization—did not rise to the level of persecution.”

In addition to inconsistencies in domestic case law, the treatise demonstrates that the interpretation of treaty obligations by U.S. courts has, on various themes, diverged from interpretation of the same provisions by authorities such as the United Nations High Commissioner for Refugees (“UNHCR”). One of the most contentious issues in U.S. jurisprudence, as outlined in Chapter 5, is the link or nexus between persecution and its grounds. Whereas the Refugee Convention states that the persecution must be “for reasons of” one of the five grounds enumerated in the treaty, the U.S. statute uses the language “on account of.” This seemingly minor textual difference initially led the BIA and judges in U.S. courts to focus on the intention or motives of the persecutor. The Refugee Convention does not, however, require an asylum applicant to establish that the perpetrator had such intentions; it requires only a showing that the persecution was related to one of the enumerated grounds. Professor Anker demonstrates how, over the last fifteen years, U.S. jurisprudence has shifted into closer accord with the Refugee Convention. Anker argues that the greatest challenge to further alignment between U.S. and international legal standards is the BIA, “which frequently articulates conflicting standards, or articulates a coherent standard, but applies a different one, thereby failing to follow through on the principles or logic of its own jurisprudence.”

Chapter 6 provides another example of the way in which U.S. law has developed in tension with international law. Specifically, she describes how the U.S. legislature sought to bring domestic law into agreement with its treaty obligations regarding the conditions under which refugees may be excluded from protection. The law that Congress ultimately passed, however, reflected an interpretation of the Refugee Convention’s exclusion clause that was inconsistent with that of other international legal bodies and included additional material and procedural bars for asylum. By signaling and describing such discrepancies between domestic and international asylum law throughout the treatise, Professor Anker indicates where and how U.S. asylum law could be reformed so that it is in greater harmony with international human rights standards, which the author clearly and rightfully promotes.

The final Chapter is dedicated to the United Nations Convention Against Torture, which the United States ratified in 1994. Article 3 of this Convention prohibits the return of persons to a territory where they would be at risk of being subjected to torture or other inhuman and degrading treatment, also known as the principle of *non-refoulement*. The United States

recognizes this obligation and provides protection by refraining from expelling anyone considered to fall within this category, a practice known within the domestic legal regime as withholding or deferral of removal. Noting that the United States jurisprudence regarding Article 3 of the Convention Against Torture is “in its nascent stage,” the treatise extensively discusses international and foreign sources, such as the jurisprudence of the European Court of Human Rights and the Inter-American Court of Human Rights. In so doing, Professor Anker brings to the forefront relevant international precedent to stimulate further development of Article 3 protections in the U.S. legal system, and provides guideposts to ensure that this development advances in accord with international human rights standards.

Through the incorporation of international and foreign sources, the inclusion of a thorough reference system, and the analytical description of all relevant domestic case law from the past thirty years, Professor Anker effectively constructs the foundation for her critical analysis of U.S. asylum law. The fourth edition of *Law of Asylum in the United States* is an important contribution to this area of law and potentially marks the first steps towards a more coherent and integral interpretation of asylum law across domestic jurisdictions and with respect to international standards.

—Lara Talsma