

## Health Care as a Human Right: The Problem of Indeterminate Content

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Two essays collected in Allen Buchanan's *Justice and Health Care* are illustrative of his longstanding, wider engagement with one of the most challenging issues in the philosophical accounts of rights. A central issue in both essays is the familiar concern that if a determinate account of the 'content' of a right—what Joel Feinberg calls the right-holder's 'claim to'—cannot be provided, then the very idea of a right as a justifiably enforceable claim owed to a claimant is in doubt.<sup>1</sup>

In his 1984 essay, 'Health Care and the Right to a Decent Minimum', Buchanan addresses the objection as it pertains to debates about rights to health care. He observes that prominent defences of health care as a right suffer from 'an embarrassing theoretical lacuna', namely 'the lack of a principled specification of a decent minimum' (36). His argument proceeds in two phases.

The critical argument challenges Norman Daniels's reliance upon a variant of John Rawls's principle of Fair Equality of Opportunity as the singular rationale justifying a right to health care. The particulars of his argument are well known, and they remain among the most trenchant criticisms of Daniels's influential views. But the key conclusion Buchanan defends is that Daniels's rationale cannot provide an adequate solution to the problem of the indeterminate specification of a right to health care. The contribution of the specific health care services needed to preserve a person's 'normal opportunity range', and thus a requisite degree of opportunity, is not the only reason or even the most important reason to value access to medical care (24).

Buchanan's positive argument is meant to bypass the seemingly unresolvable conceptual issues inherent in a rights-based approach. While the distinguishing mark of a right is that its correlative duties always provide *pro tanto* reasons for state enforcement, duties based in beneficence do not entail the contrary proposition that they never supply sufficient moral warrant for enforcement. Buchanan then argues that instead of searching for a single rationale that can specify a determi-

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<sup>1</sup> The link between the justified enforceability and the demand for determinate content is one emphasised in Maurice Cranston's critique of an expansive list of human rights. Allen Buchanan, *Justice, Legitimacy, and Self-Determination* (Oxford University Press, 2004) 195–6.

nate right, a more persuasive defence of an enforceable social guarantee of some health care goods and services can be grounded in a plurality of rationales, based in imperfect duties of beneficence, the cumulative weight of which adds to their overall justificatory force. However, a further key point is that even the pluralist justification, on its own, is not equipped to fill in all of the details. Instead, we should recognise that the ‘character and scope of the list of services of a decent minimum is a matter of collective choice ... All that is necessary is some fair procedure for reaching a social decision’ (36). A procedure-driven institutional solution is thus offered as an alternative to reliance on the theoretical rationale for the right as a means for providing a full and determinate specification of the notion of a decent minimum.

The specification challenge remains a central issue in Buchanan’s later writings, but the context is one in which a commitment to working from within a human rights project is evident. Buchanan’s 2004 essay ‘Specifying the Content of a Human Right to Health Care’, co-authored with Kristen Hessler, proceeds under the assumption that the problem of the indeterminacy of rights is sufficiently resolvable such that a defence of a right to health care is not only a viable philosophical project for the domestic context, but that it is a project that can be developed as part of a more encompassing theory of human rights. Such a project is especially ambitious inasmuch as human rights, on his account, are ‘standards of transnational justice, minimal conditions that a just international order would require every state to meet in its treatment of human beings, both domestically and abroad’.<sup>2</sup> Not only must the task of specification be achieved in ways that survive worries about the inherent indeterminacy due to the abstract nature of its underlying rationale, but it must be specifiable in ways that allow it to survive charges of parochialism.

Indeed, Buchanan emphasises the significance of the specification challenge for defenders of a theory of human rights. He observes that one of the crucial theoretical desiderata in evaluating any critical philosophical reconstruction of the grounds of the practice of human rights is its ability to ‘help determine the content of various human rights’.<sup>3</sup>

For Buchanan, the specification challenge takes its particular shape from his assumptions about the nature of the kinds of eligible rationales that might underlie rights. His theoretical approach is one that supposes that rights are not ‘moral primitives’ but are based on ‘human interests [that] are shared by all persons because they are constitutive of a decent human life’.<sup>4</sup> The upshot of such an approach to human rights, including a right to a decent minimum of health care, is that an inescapable part of the task of specifying a right’s content is the central role for moral reasoning based upon a ‘grasp of what the necessary conditions for a minimally good or decent life are’.<sup>5</sup> Moreover, the interest-based conception of

<sup>2</sup> Allen Buchanan, *Human Rights, Legitimacy, and the Use of Force* (Oxford University Press, 2010) 52.

<sup>3</sup> Allen Buchanan, ‘The Egalitarianism of Human Rights’ (2010) 120 *Ethics* 679, 692. The same point is made at the outset of the 1984 article as well.

<sup>4</sup> Buchanan (n 1) 125, 127.

<sup>5</sup> *Ibid.*, 128.

rights reveals that the problem of specification of the content of a right is part and parcel of a more general philosophical problem. The specification challenge arises for various egalitarian theories of justice that take basic needs, human capabilities, or any account of well-being as the justificatory ground floor. In this respect, the prospects for success of the human rights project are very much aligned with the prospects of many similar programs of egalitarian theories of justice, and for this reason the worries about specification take on added philosophical significance beyond any theoretical concerns intrinsic to rights debates.

At first glance, it might seem that placing so much of the burden of specification on a theory of human interests as the foundational elements of human rights is at odds with the stated task of his 2004 essay co-authored with Hessler. In that paper, emphasis is placed on an institutional solution to the specification problem, and they press the case largely on the assumption that moral and political theory has very significant limitations on what it can contribute. They characterise as misguided any attempt to ‘delineate a universal, determinate standard defining the precise scope and content of the human right to health care’ (203). While the justification of a right to health care is said to depend upon the identification of some abstract human interests at stake, the content of that right is ‘necessarily vague and ... the appropriate forum for specifying its content is through appropriate democratic procedures, and not by moral and political theory alone’ (203).

Much of their argument against the prominence of a role of theory in the task of specification builds on a recitation of the failures of other theoretical alternatives, including vague appeals to human dignity and elastic accounts of human needs (208–13). And yet, given Buchanan’s own desideratum for evaluating alternative theoretical underpinnings for human rights, a theory of political morality must play a significant role. Indeed, the claim in this essay is properly nuanced: specification of the content of a right comes ‘not by moral and political theory *alone*’ (emphasis added).

Just how much role in specification to assign to theory, and how much to assign to institutional or procedural solutions, depends in large part on how the institutional solution is conceptualised and how the sources of indeterminacy are understood.

A common defence of institutional solutions and fair procedures is based upon assumptions about how quickly the capacity for theory to provide practical guidance runs out. But there is another way of thinking about the matter. It assumes that a considerable part of the specification task at the institutional level remains shaped by the rich theoretical resources available to any philosophically adequate account of human rights. John Tasioulas, for example, concedes the indispensable role for institutional decision, but he emphasises the need to ‘render content more determinate by making or reflecting an authoritative choice from among alternative eligible specifications of human rights norms’, and he concludes that human rights must have a ‘tolerably determinate content independent of any subsequent institutional specification’.<sup>6</sup>

6 John Tasioulas, ‘The Moral Reality of Rights’ in Thomas Pogge (ed), *Freedom from Poverty as a Human Right* (Oxford University Press, 2007) 76.

Buchanan makes a similar point in one of his more extended discussions of the institutional specification task, noting the importance of ensuring ‘principled variations’ among decisions made by separate nation-states.<sup>7</sup> Buchanan and Hessler acknowledge that the interests that ground a right to health care must ‘be determinate enough to provide the grounds for criticizing a system’ (217). Theory, then, necessarily has a large role to play as a part of the institutional solution, along with fair procedures.

How the balance is struck between purely institutional procedures and the guidance of theory within the task of specification is illuminated also by a distinction among sources of indeterminacy. On the one hand, there are what Buchanan has called ineliminable sources of ‘application indeterminacy’. These include differences in available resources and variations in institutional capacity for implementing rights.<sup>8</sup> Examples of this sort are discussed in the essay co-authored with Hessler. These seem like prime candidates for resolution by largely procedural solutions.

On the other hand, there are sources of ‘deep indeterminacy’ that perhaps are ‘not even soluble in principle’ by appeal to theory.<sup>9</sup> Examples of the alleged failures of appeals to human dignity and basic needs seem like species of deep indeterminacy, but elsewhere Buchanan lists some arguably more problematic issues. These include questions about how much protection is to be provided for any specific right, at what cost, and how to balance the need to secure one right against the need to secure other rights.<sup>10</sup> Put differently, many of these problems pose questions about the specification of a single right that arise from the assumption that the justification for the entire scheme of human rights rests upon a plurality of distinct interests, each having some separate and sometimes competing moral salience. These examples seem to point to particularly important circumstances in which the guidance of theory might run out.

Although Buchanan sometimes eschews the aim of providing a ‘fully developed normative theory of human rights’, his numerous essays are notable for the richness of the theoretical resources they can bring to bear on the specification problem in precisely the ways he thinks that a successful account of human rights should do.<sup>11</sup> I conclude by noting three such features, and I suggest that they offer reasons for optimism about a reasonably robust role of theory in shaping the institutional reasoning process, even in instances of deep indeterminacy.

First, the pluralist justification that is a source of indeterminacy also is a reservoir of theoretical resources that might prove useful for the specification of the content of particular rights and for prioritisation among human rights. The richness resides in the holistic and empirically informed model Buchanan employs for justifying the rights that should be included on a list of human rights and for assigning each its place within that scheme of rights. The model in rough outline

7 Buchanan (n 2) 56.

8 Buchanan (n 1) 181.

9 *Ibid.*, 185.

10 *Ibid.*, 182–4.

11 *Ibid.*, 118.

assumes that in addition to the identification of basic human interests that figure in a minimally good life, there is a need for further arguments that establish the reasons for some heightened measure of institutional protection, an evidence-based assessment of the specific threats to those interests, and some empirically accurate assumptions about what is generally required to protect them adequately.<sup>12</sup>

An important consequence of this model for reasoning about rights is that it can be used to illuminate a variety of interdependencies among rights and the specific ways in which the fulfilment of their counterpart duties satisfy or promote simultaneously the fulfilment of other rights. A variety of examples reveal the ways in which a focus on these interdependencies can provide guidance for dealing with practical matters of priority and implementation. Education, for example, on certain empirical assumptions might promote better health, along with improved prospects for avoiding domination by others in the political arena and marketplace.<sup>13</sup> Arguments along these lines would favour both priority for securing certain rights to education and certain ways of specifying the right in practice in order to capitalise on the multiple beneficial effects.

Second, the interest-based rationale for human rights is regulated by a further consideration that can add to its determinacy. Buchanan's list of human rights is refereed by an overarching commitment to ensuring an opportunity for a minimally good life or a decent life. An overarching principle of this kind, while familiar in rights discussions generally and in egalitarian political theory, might sound rather vague and unhelpful. However, such a notion can regulate both the floor and the ceiling of political aspiration. It operates to define the lower boundary in ways that exceed the aims of mere survival. In particular, the idea of a decent life, as Buchanan observes, connotes societal standards that exceed mere requirements for sustaining biological existence.<sup>14</sup> As such, the idea of decency might be used to argue for the inclusion of pain relief at any stage of life, as well as for a variety of ancillary social services beyond narrowly defined medical care services.

The idea of a minimally good life sets an upper bound, not of moral aspiration in general but of strictly justice-based concerns we associate with rights. Because human needs are insatiable, the limits of capacities for human improvement along any dimension of well-being are not readily ascertainable, and hence some guidance is needed. Not every life-enhancing or life-prolonging intervention is required for a decent human life, but affordable interventions that prevent life from being cut significantly short of what is technologically possible are well within what a right, regulated by the aim of achieving minimally good lives, requires, as are interventions that prevent life from being too burdensome with preventable disease and loss of functional capacity.

Third, Buchanan also argues that any plausible rationale for human rights must include room for concerns about preservation of equal status. The place of so-called 'relational egalitarianism', or direct concerns about one's moral and polit-

<sup>12</sup> Buchanan (n 2) 53; Buchanan (n 1) 128.

<sup>13</sup> Buchanan (n 2) 60, 62.

<sup>14</sup> *Ibid.*, 59; Buchanan (n 3) 684–707, esp 707 fn 47.

ical standing among others, might be accounted for theoretically in various ways within human rights justifications. A theory might incorporate equal status or equal standing considerations as elements of well-being, or such concerns might be seen as distinct elements of the rationale for human rights, additional to well-being concerns. Or some mixed strategy might be employed. Buchanan tips his hat in favour of what he takes to be the more direct and secure grounding of equality concerns as separate from well-being concerns, but in any case, there is the potential for adding determinacy to the content of rights once such theoretical concerns earn a place within the justificatory grounds for a rights theory.<sup>15</sup>

Buchanan suggests two kinds of ways in which equality-related concerns might shape the content of rights.<sup>16</sup> One concern is simply the risk that the more fortunate may view persons who are far less advantaged materially as having an inferior status. Given imaginable empirical premises, it could be argued that lacking the full range of health insurance benefits, or getting medical assistance only upon the completion of a very onerous, public, and highly intrusive entitlement process for showing of economic need, might run afoul of such equality-related concerns. Another equality-related concern is that material inequalities and the lack of other social resources can also place a person at greater risk of being subjected to the exploitation and domination of others. Again, given plausible empirical assumptions, it is possible to argue that the lack of access to effective and safe forms of reproductive services for women would be incompatible with a right to a decent minimum.

Whether Buchanan would endorse any particular conclusions of the sort I have suggested is not the point. What matters is that with the aid of empirically informed arguments and premises, theoretically rich frameworks that supply the underlying, pluralist justifications for human rights can further the aim of greater specification of the content of rights in precisely the way Buchanan suggests. His pluralist approach to human rights justification, including its incorporation of some equality-based concerns, is especially attractive because of its normative richness. The fact that such a pluralist approach to justification can do much to blunt the force of concerns about the lack of a sufficiently determinate specification of the content of any proposed right is one of many reasons to appreciate the significance of Buchanan's many contributions to the advancement of human rights theory.

<sup>15</sup> Buchanan (n 3) 686–7.

<sup>16</sup> *Ibid.*, 686.