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About this Book

Human rights have been described at various points in history as ‘nonsense’ by their detractors and as ‘secular religion’ by their supporters. They are inescapably controversial, but at this point in time many people believe they are indispensable. Human rights provide a set of normative standards against which the performance of governments can be assessed, and are referred to increasingly in the quest for social, cultural and economic justice as well as for the protection of civil liberties. In this risk-conscious age, where security looms large as a political goal, human rights can provide the language and concepts to ask critical questions about the harms, benefits and limits of state action and inaction. Is the security of some people being pursued at the expense of the rights of others? Or are some fundamental rights and freedoms being sacrificed completely in the name of community safety, in a way that will benefit no one in the longer term? We believe that the positioning of criminology in an arena in which individuals and groups encounter the power and the promise of the state makes the critical study of human rights an essential element of contemporary criminological inquiry.

The purpose of this text is to build bridges between the knowledge domains of criminology and human rights. It is aimed at established criminologists and advanced students of criminology with little or no prior knowledge of human rights. While the book is suitable as a text for specialized undergraduate or postgraduate courses in human rights, crime and criminal justice, it has also been drafted with the independent reader in mind. In the first section, we provide a broad, multidisciplinary introduction to human rights concepts, and the law and practice of human rights. In the second section, human rights thinking is applied systematically to a range of well-established topics within criminology and criminal justice. In the final section, we identify some broad research themes within criminology that we believe illustrate the growing relevance of human rights in a globalizing world.

The book does not include important developments relating to the creation of the International Criminal Court and its dealings with large-scale international crimes such as genocide, war crimes and crimes against humanity. Nor does it review the ground-breaking work that is being done

by criminologists on transitional justice and peacemaking in international arenas. This is not because we consider these topics to be irrelevant to criminology or insignificant in the wider scheme of things. Rather, it is because important and highly specialized books are already being written on these subjects (see Parmentier and Weitekamp 2007; Stanley 2009; Braithwaite et al. 2010; Savelsberg 2010).

Moreover, these emerging areas of study extend the scope of criminology beyond the usual concern with the maintenance of social order within generally peaceful and stable societies, towards an engagement with fundamental questions of war and peace. While we wish to endorse these developments towards a more globally aware discipline, our focus is deliberately on the more familiar concerns of what we call ‘everyday criminology’, as it is usually practised within advanced democracies. Instead of seeking to extend the boundaries of criminology to become more globally focused, we are attempting to locate human rights within more well-trodden criminological territory. Rather than seeing human rights as applicable only to distant places with unstable and undemocratic governments, we hope to illuminate some of the connections between domestic criminology and the international human rights arena. This leads us to consider how human rights can be relevant to the operation of criminal law (Chapter 6), crime prevention at the local and national levels (Chapter 7), accountable policing (Chapter 8), and the pursuit of criminal justice (Chapters 9 to 12).

Our approach to the promise and pitfalls of human rights is both circumspect and hopeful. We are mindful of the arrogance of simply assuming the universal acceptance of human rights, the naivety of the unreflective conflation of human rights with the content of human rights law, the danger and hypocrisy of using human rights as a shield while pursuing individual or elite interests, and the limitations of law of any kind in the face of entrenched injustice. Still, we see in human rights an important framing that is becoming essential for criminologists to understand, if not embrace, under conditions of globalization that are transforming both the world and the discipline.

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SECTION 1

Understanding Human Rights

The term 'human rights' can be used in a superficial way that amounts to little more than sloganeering. But if human rights are to count for more than empty rhetoric, it is important to have a sound understanding of the origins and meaning of the term.

In this section we explain the multifaceted nature of human rights — as political philosophy, international law and socio-political practice. We concentrate on the concept and meaning of human rights, initially with minimal reference to criminology, and assume little or no prior knowledge of either human rights law or theory on the part of the reader.

In Chapters 1 to 3 we discuss the nature of human rights as moral standards, as legal constructs and as a basis for political claims, and outline some of the major objections to applying human rights in these contexts.

In Chapter 4 we introduce the idea of collective rights and explain the tensions between individual and group rights. We then relate this discussion to one of the most fundamental principles of human rights — non-discrimination, which is also a core concern within criminology.

Finally, in preparation for Section 2, where we apply human rights thinking systematically to specific areas of criminology, we summarize in Chapter 5 some of the ways in which human rights perspectives are already being applied within criminology.

The Origins and Idea of Human Rights

Key concepts

Natural rights – Social contract – Universality – Inalienability – Indivisibility

1.1 Introduction

Reference to human rights is commonplace in contemporary societies. But what does the term actually mean, and where does it come from? In this chapter we consider human rights as *normative* or moral claims that operate primarily in the space between individuals and the state. Human rights set out rules and standards about how governments and populations should behave. It is their prescriptive character, stating what *should* be, rather than what *is*, that identifies human rights as a system of normative claims.

1.2 What are human rights?

Whatever we think about what human rights are, where they came from and what are their limits, it can be said that ‘commitment to human rights is a commitment to a moral vision of how the world should be regulated’ (Fagan 2012: 19).

The concept of rights has existed in various forms since ancient times (see, for example, Haas 2008). In modern times, rights came to be associated with individuals rather than collectives, and conceptualized as *human* rights. This way of articulating the relationship between individuals and the state is often traced to social contract theory, as developed by liberal Enlightenment philosophers, most notably British philosopher John Locke. According to Lockean social contract theory, citizens make a notional pact with their rulers to give up some of their individual autonomy (or sovereignty) in return for

the provision of collective security. This is a rather risky venture, since governments can misuse the power that has been vested in them by the people. Human rights are intended to be a tool for mitigating this risk of misuse. They express the parameters of that political bargain, and propose limits on the ways that governments can exert their power over citizens. The language of rights is therefore tightly interwoven with the philosophical underpinnings of the liberal democratic state, and can be seen as a kind of citizen's insurance against tyrannical government.

This way of understanding human rights, as a 'bulwark against the state', is quite a negative conception, aimed at ensuring freedom from unwarranted interference by the state with an individual's property, privacy, conscience or liberty. However, in more recent times, particularly since the emergence of the welfare state, residents of liberal democracies have come to expect that governments will intervene more actively on their behalf to promote their security and wellbeing. This has led to a more positive conception of human rights as an agenda of individual entitlements to receive support from the state in relation to health, education and employment, as well as the protection of the classic civil liberties mentioned above. However, since considerable state intervention is needed, including the establishment of a criminal justice system, to ensure that individuals are protected from breaches of their civil liberties, the distinction between positive and negative rights may not be particularly meaningful.

Adherence to particular political ideologies may influence which of these aspects of human rights is emphasized or supported in practice. Forms of liberalism that advocate minimal intervention by government in social and/or economic affairs tend to favour (negative) civil liberties over (positive) welfare rights. The right to work, for example, has little meaning within capitalist systems, where full employment is not considered an objective of government. Welfare liberalism or socialist philosophies advocate state responsibility for meeting human needs, and therefore focus on positive rights such as the provision of housing, jobs and education. In practice, this has sometimes occurred at the expense of civil liberties. It is possible to steer a middle course through these positive and negative conceptions of the role of government with respect to human rights. Former US president, Franklin D. Roosevelt, who was – unusually within the American political context – a strong supporter of social and economic rights, expressed this position as follows: 'The only sure bulwark of continuing liberty is a government strong enough to protect the interests of the people, and a people strong enough and well enough informed to maintain its sovereign control over its government.'

1.3 The philosophical foundations of human rights

Despite the endurance and widespread acceptance of the idea of human rights, it is not an easy matter to establish beyond doubt that we have them. Locke relied on the idea of *natural rights* given to individuals by God, to support his assertion that all human beings possess human rights. This was part of a radical agenda aimed at refuting the doctrine of the Divine Right of Kings in favour of a more democratic form of government that recognized the sovereignty of individuals. The utilitarian philosopher, Jeremy Bentham, famously referred to the idea of human rights as ‘rhetorical nonsense – nonsense upon stilts’. Bentham argued instead that laws should be devised by governments to maximize *utility*, an elusive concept that roughly equates to the common good. Critics of Bentham’s utilitarianism argue that governance directed single-mindedly at achieving the common good may sacrifice the wellbeing of some individuals for the benefit of others. For example, governments might subject individuals to harsh punishment in order to deter others from committing crimes, regardless of the guilt or innocence of those punished.

German philosopher, Immanuel Kant, argued that individuals must be treated as autonomous moral agents, and therefore as ends in themselves, not as a means to achieve utilitarian objectives. He also claimed that identifying universal moral rules (which he called ‘categorical imperatives’) that can be derived from pure reason is the best way to provide this protection. This style of moral reasoning is described as *deontological*, meaning that it is based on moral obligations and duties, rather than on a consideration of consequences. While he did not refer to human rights explicitly, our understanding of contemporary human rights owes a large debt to the philosophy of Kant (see Caranti 2012). Liberal theorist, Ronald Dworkin, famously described rights as moral duties that normally ‘trump’ other considerations, unless a very strong argument can be made that breaching an individual right is necessary to achieve some greater social good (Dworkin 1984). As we shall see in Chapter 2, the drafting of international human rights law often leaves a generous space for consideration of the common good, in recognition of the continued relevance of consequentialist forms of moral reasoning in contemporary governance.

Even after making a convincing case in favour of human rights, it is not a straightforward matter to find a philosophical foundation for them. There is ongoing debate over how the idea of universal human rights might be derived through philosophical reasoning from other concepts such as ‘duties’, ‘needs’, ‘human nature’, ‘essential interests’, ‘shared capacity for suffering’, ‘human agency’ or the goal of securing ‘equal individual liberty’ (see Fagan 2012). In the face of these conceptual difficulties, postmodern philosophers such as

Richard Rorty have concluded that human rights need not be rationally 'grounded' at all, but can instead be embraced in the spirit of human solidarity (Rorty 1993). Other political philosophers have objected to this 'anti-foundationalism', arguing that a 'quasi-foundational' justification for rights can be established by adopting a 'pragmatic' perspective, accepting that human rights are social constructions, but are none the less real rather than imaginary (Bufacchi 2008). The array of philosophical justifications for the existence and content of human rights is somewhat bewildering to the non-philosopher. Some of these positions delve deeply into what it means to be human, while others reject these considerations as essentialist. Some explanations attempt to sidestep these issues by defining human rights in terms of the functions they perform. Despite the inconclusive nature of these debates, human rights continue to have widespread appeal as practical vehicles for making moral claims. As Conor Gearty notes, 'we have a paradox: the idea of human rights has been reaching dizzying heights in the world of politics and law whilst its philosophical base has been increasingly called into question' (Gearty 2006: 11).

While we do not attempt to get to the bottom of these complex arguments in this book, the way we think about and justify human rights does matter in everyday life. For example, the idea of God-given natural rights sometimes makes an appearance in political debate. In the USA, the Bill of Rights enacted in 1789 after the violent overthrow of British rule is seen by many US citizens as the ultimate or only source of their individual rights. While there is no explicit reference to God in the US Constitution or Bill of Rights, some conservative groups still insist that these documents represent the will of God and therefore cannot be changed. In the political debate about arms control that followed the 2012 Newtown school massacre in the USA, the National Rifle Association has lobbied fervently against restrictions on gun ownership, largely on the basis of Americans' 'God-given rights' under the Second Amendment (see Box 1.1). This example alone illustrates that what we believe our rights to be, and how we justify them, has serious implications for governance and the types of societies we create.

Despite increasing scepticism about the idea of natural rights (but see Feser 2012), Locke's starting point – that universal human rights arise from recognition of the equal dignity and moral worth of all human beings – continues to underpin contemporary understanding of human rights. In practice, while it might fall short of providing a philosophical 'proof', for many human rights supporters it is sufficient to assert that human rights are the rights we have simply by virtue of being human. Whether founded on a belief in God or derived from reason, intuition or solidarity, it is the shared vulnerability to suffering and insecurity that marks the human condition, and renders human

Box 1.1 A God-given right to bear arms?

The Second Amendment of the US Constitution reads:

‘A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.’

Source: http://www.archives.gov/exhibits/charters/bill_of_rights_transcript.html.

Disparate interpretations from voices in the US gun control debate:

‘No government gave [these rights] to us and no government can take them away.’

(Wayne La Pierre, President of the National Rifle Association)

‘There are absolutes in our Bill of Rights. And they were put there on purpose by men who knew what words meant and meant their prohibitions to be absolute.’

(Supreme Court Justice Hugo Black, as cited by Wayne La Pierre)

‘Progress does not compel us to settle centuries-long debates about the role of government for all time — but it does require us to act in our time.’

(President Barak Obama in his inaugural swearing-in address)

Sources: <http://www.theblaze.com/stories/2013/01/22/nra-issues-major-response-to-obamas-inaugural-address-no-govt-can-ever-take-away-our-god-given-freedoms/>; and <http://www.breitbart.com/Big-Government/2013/01/22/Wayne-LaPierre-To-Obama-The-2nd-Amendment-Protects-God-Given-Rights>.

rights an important tool for addressing human need. On the other hand, human rights have come increasingly to be understood as being socially and legally constructed, with their particular content open to political debate and amendment as circumstances change.

Dembour (2012) has suggested that contemporary views on the nature of human rights can be divided into four ideal types: the *natural school*, which considers human rights to be ‘given’, derivable metaphysically either from God or reason; the *deliberative school*, which conceives of human rights as ‘agreed’ and as an important vehicle for expressing fundamental entitlements; the *protest school*, which sees human rights as ‘fought for’, stresses practical action to redress injustice, and is less concerned with their philosophical

underpinnings; and the *discourse school*, which views human rights as merely ‘talked about’, accepting that they represent a powerful language to express political claims, while lacking a deep belief in their authenticity. While many human rights thinkers will align themselves with several of these camps, Dembour identifies representative scholars from each school, including Jack Donnelly (natural), Jürgen Habermas (deliberative), Costas Douzinas (protest) and James Nickel (discourse). Key readings from each of these significant thinkers are listed at the end of this chapter.

1.4 Some criticisms of human rights

Several decades ago, feminist legal theorist Carol Smart (1989) observed that ‘[i]t’s almost as hard to be against rights as it is to be against virtue’. While ‘rights talk’ has become pervasive in many contemporary societies, this statement may not be as applicable now as it was at that time. Serious reactions against human rights approaches are now emerging in liberal democracies that once supported the idea of human rights, and many recent books on the subject conclude with speculations about whether human rights will, or should, survive (for example, Gearty 2006). In addition to these broad political and legal debates, there has always been a range of philosophical objections to the idea of human rights as a way of regulating the relationship between individuals, the state and other collectivities.

For communitarians, the relationship between individuals and communities is the essential building block of moral and political thought. Communitarians from a variety of political traditions, from conservative to Marxist, argue that human rights thinking encourages selfish *egoism*, by placing the concerns of isolated individuals above the collective good. Alasdair MacIntyre rejects the idea of human rights completely and, in a famous phrase that rivals Bentham’s reference to rights as ‘nonsense upon stilts’, has argued that human rights are ‘as real as unicorns’ (cited in Etzioni 2012). Other communitarians reject liberal individualism while retaining some commitment to the idea of human rights, advocating moral dialogue to resolve conflicts between individual rights and collective goods, which will lead to different emphases and outcomes in different socio-political contexts (Etzioni 2012).

It is true that individuals may sometimes use human rights instruments for reasons that others consider to be trivial or motivated by narrow self-interest. Rights talk is also frequently used in a disingenuous fashion by governments and other powerful groups to justify agendas that are exploitative or harmful. However, human rights advocates assert that most of the time human rights principles are used to defend members of vulnerable groups – such as refugees,

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