

# Justifying Universal Human Rights and Responsibilities

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*Brooke Ackerly, March 25, 2009*

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## **Abstract**

In this article I set out a method of justification for a universal theory of human rights that is able to identify human rights and responsibilities in patterns of human rights violations that are experienced by individuals and by classes or categories of people. I conclude with an outline of the responsibilities for human rights that would correspond to this view. The theory justifies a view of responsibilities and duty-bearers that is enlarged beyond those anticipated by an entitlement-based theory of human rights.

## **Introduction**

For decades, women’s human rights advocates have struggled to make women’s rights violations visible to national and international systems of accountability. They have worked to transform the global understanding of moral human rights so that they are understood to include rights as they are enjoyed and violated differently by ethnicity, class, gender, and all manner of political categorizations that have been used to treat some rights claimants or their claims as illegitimate subjects of human rights. Specifically, women’s human rights activists have worked for the recognition of women’s universal moral rights in international, national, and local law.<sup>1</sup> Given this

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<sup>1</sup> Pogge (2005a: 717) makes the distinction between legal human rights which are articulated in law and

struggle and the mixed success they have had in transforming local, national, and global legal and moral human rights, it may be odd to use women's human rights considerations to reveal the theoretical underpinnings of our present human rights legal struggles. Although not the most obvious lens to those who approach human rights theory deductively, because women's human rights violations are revealed through patterns, often only through patterns, and because many people experience human rights violations in patterns that are visible only over time or with empirical study, women's human rights activism is a good landscape in which to theorize inductively about a theory of human rights that can help us address systematic forms of human rights violations that may be hard to discern from perspectives of privilege (even with the best intentions).

Let's look at two illustrations of women's human rights violations in patterns. Both reveal the linkages between poverty, environment, and mortality. The first has been studied empirically. Too much research to cite demonstrates the gender dimensions of poverty, environment, and natural disaster and their disparate impact on women and men. For example, survival in the face of environmental degradation and natural disaster is gendered. In a 2007 study of 141 countries from 1981-2002, Neumayer and Plümper find that natural disasters lower the life expectancy of women more than that of men, and that the effect is particularly visible in the lower socio-economic categories. They conclude, "it is the socially constructed gender-specific vulnerability of females build into everyday socio-economic patterns that lead to the relatively higher female disaster mortality rates compared to men" (Neumayer and Plümper 2007: abstract).

These patterns are complex, making it very difficult to see let alone measure them, making the Neumayer and Plümper study an important contribution to the understanding of the ways in which complex processes can create human rights

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moral human rights which may or may not be articulated in law. Moral rights are universal whereas legal rights are contextual.

violations and render the sources of those violations diffuse to the point of being inappropriate loci of responsibility. Although a natural disaster is not a political cause of human rights violations, if survival is systematically a function of factors that are created by human institutions, can we say that these institutions are rights violating? Thomas Pogge, treating the human rights violations of people in poverty as paradigmatic of the systematic form of human rights violations, argues that a human rights theory must be able to guide our response and responsibilities to such systematic causes of human rights violations. His view leads to “the moral assertion that every human being is entitled to a national and global institutional order in which social, economic, and cultural human rights can be fully recognized.”<sup>2</sup> Responsible agents in this view are those most able to affect the global order. In *Universal Human Rights in a World of Difference*, Ackerly comes to a similar conclusion in the sense that she holds us responsible for structurally sustained human rights violations. In this article I argue that the justificatory scheme of her theory of human rights does so in a way that indicates at once broader and more concrete responsibilities for all of us for patterned forms of violations.

Since the 2004 Indian Ocean Tsunami, the 2005 Atlantic hurricane Katrina, and the increasingly discussions of global warming and the challenges of climate adaptation facing the poor, the first example may be unsurprising. A second example illustrates an insidious link that may help focus our attention on the kinds of analysis that are necessary to notice the human rights violations at the nexus of poverty and environment. Consider the familiar image of women carrying fuel on their heads (head-loading). These may be refugee women, displaced by conflict. They may be women living in areas in which drought and other economic pressures – from forestry, mining and agriculture – have contributed to deforestation. With such changes, women walk further and carry more weight on their heads for longer distances. The increased caloric demand of such strain and the physical threat may be obvious. The threat to

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<sup>2</sup> (Pogge 2005a: 29).

physical security facing women and girls in refugee camps and areas of conflict and violence on their search for fuel may also be obvious. Less obvious is the increased likelihood of maternal mortality caused by this practice. Head-loading causes prolapsed uterus which causes increases in maternal mortality in childbirth, particularly in unattended births. All are patterned forms of human rights violations that are attributable to local norms and national and global institutions of governance. Like gendered mortality in natural disaster, this example illustrates the political import of knowledge of *whose* rights are violated and *how* they are affected not only by global and national institutions, but also by global, national, and local *norms*. Women's human rights activist considerations suggest that a theory of human rights puts under scrutiny not only those institutions of governance whose authors can be named and held to account for the human rights conditions they create and from which they benefit, but also those norms that come into existence and are sustained through a combination of institutional, individual, and aggregated behaviour. This last may be of the form of the invisible hand (as Nozick describes it) or more coordinated around shared values guided by political or moral authorities (as the cultural relativism debate often raises).

Many human rights are violated in these two examples, but let's focus on the insecurity of life. Generally, security of life is in the "core" that even those who view human rights minimally treat as universal. Both those who privilege political over social and economic rights and those who privilege social and economic over political rights treat *life* as a universal right. By focusing on *life* I choose a right that is uncontroversially universal, because the dilemma in this article is not *which* rights are universal but rather on what basis do we know their universality and our responsibilities in reference to them.

I want to use these examples to illustrate a challenge for human rights legal and moral theories of responsibility. The features of these examples that are interesting for the challenge of responsibility include:

- These human rights violations are known only retrospectively with certainty not as a matter of revealing concealed information (as in the disappeared of Latin America) but as a matter of analysis. We need to study the problem to know it constitutes a rights violation and of whom.
- These human rights violations can be anticipated with probability calculations. We generally don't think of rights violations as being predictable, in fact, in the international law they are expected to be anomalous acts of omission or commission by state actors generally, and non-state actors through lapses in governance. In these examples, that is not the case; thinking about these examples makes us revisit other contexts in which we knew or should have known human rights violations were likely.<sup>3</sup>
- Individual actors play substantive roles not only in individual acts of human rights violations, like torture, but also for rights violations that happen as a result of the institutions of the global political economy. As Pogge argues, "Human rights impose on us a negative duty not to contribute to the imposition of an institutional order that foreseeably gives rise to an avoidable human rights deficit without making compensating protection and reform efforts for its victims."<sup>4</sup> Correspondingly, "a person's human rights are then not only moral claims on any institutional order imposed upon her, but also moral claims *against* those (especially more influential and privileged) persons who collaborate in its imposition."<sup>5</sup>
- Additionally, individuals create human rights violating conditions through their aggregated behavior. Behavior can be aggregated through cultural

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<sup>3</sup> (cf. Power 2002).

<sup>4</sup> (Pogge 2005b: 742).

<sup>5</sup> (Pogge 2005a: 15).

norms – such as cultural norms about mobility that keep women from public places where information and resources are distributed and where needs are determined and cultural norms that determine women’s role in collecting fuel despite their disproportionate risks (of attack or maternal mortality) in doing so.<sup>6</sup> They may be coordinated by political and cultural authorities or seemingly uncoordinated.

- Finally, the institutions that govern the global economy (World Bank, International Monetary Fund, WTO, states and their trade agreements) and the institutions that govern the impact of humans on global climate change (United Nations Framework Convention on Climate Change (UNFCCC), states’ domestic policies and states’ participation in international agreements) are interimbricated. We may be able to identify some actors with disproportionate authority in the design of the “institutional order” of global governance, actors who perpetuate it despite our having learned of its harms, and actors who benefit from it. And yet, the complexity of these institutions and their interconnections will make much of how they work transparent to relatively few. Moreover, since these institutions have an impact through the impact of their disparate (not reliably coordinated) policies, working in concert (likely with no conductor), an approach to responsibility for human rights violations that focuses on the duty-bearer model will find itself clear about the contours of responsibility and yet often empty-handed in the search for a duty-bearer with the authority to bear the duty.

My examples – gender-based likelihood of mortality in disaster and maternal mortality – are gender-specific, but many human rights violations are experienced in patterns. Many of these are associated with poverty, environment and gender as in my

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<sup>6</sup> (Nelson et al. 2002).

examples; often, race and ethnicity also figure in such patterned violations.<sup>7</sup> My interest in this project is to justify the legitimacy of human rights claims related to patterned universal human rights claims as a first step toward charting a path for securing their legal recognition and recognizing the corresponding moral and legal responsibilities and duty-bearers of these responsibilities.

Although this has long been a problem for theories of human rights, the project is imperative today as we are at a new founding moment in the global political economy. The ways in which we decide to deal with global climate change today will create the institutions that will have a stunning effect on the global political economy and therefore conditions of human rights violations of much of the world's poor. This is a foundational moment in the global political economy that will affect those who become poor and those who get out over poverty in the next generation. The World Bank itself argues that much of the gains against poverty in the last decade have likely been undone by recent changes in biofuels policies in Europe and the United States which had a devastating effect on food security for many of those in and near poverty.<sup>8</sup> These uncoordinated actions and the coordinated actions currently being planned through the UNFCCC will shape the global political economy of this and generations to come.

The article is organized in five parts. First, I put a feminist lens on the implications of patterned forms of human rights violations for a theory of human rights. These are that it must be an immanent and non-ideal theory of human rights because these are dimensions of a theory of justices that enable us to wrestle *within* the theory with the power of difference, diversity, and epistemology. Second and third, I give a brief account of an approach that relies on an internal principle as a counterpoint to the immanent approach I describe following that developed by Ackerly in *Universal*

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<sup>7</sup> (e.g. Kuper 2005).

<sup>8</sup> (World Bank 2010).

*Human Rights in a World of Difference*. Fourth, I outline the implications of the theory of the theory for responsibility and the bearers of responsibility.

### **1. The landscape of the human rights puzzle through a feminist lens**

The two examples above are chosen to illustrate the more problematic dimensions of human rights responsibilities knowable through a feminist lens and through gender analysis of institutions and norms. More generally, the challenge for identifying the responsibilities for women's human rights violations is not that some women's human rights violations are not on accepted lists of (moral and legal) rights. Rather it is that the *concept* of human rights is conceived in a way such that some patterns of rights violations are difficult to address. Women's human rights show us what a theory of human rights needs to be and to which conceptual challenges it needs to be useful. First, it should add clarity to the universality of both individual rights violations *and* patterns of rights violations. The theory needs to be attentive to violations related both to insecurity (which on some readings might justify only a minimal list of universal human rights) *and* capabilities (which on some readings might justify an endlessly long and particularized list of universal human rights). The theory needs to recognize rights not as entitlements, but as rights of way with no geo-political, geographic, economic, or moral boundaries, no *a priori* conceptual limits on responsibility and no *a priori* assumptions about the relationship of duty-bearer to the processes and institutions that contribute to rights violations. It is a theory that makes all of us see differently so that we become aware of our responsibilities though rights violations may be remote, concealed as a byproduct of individual choice, or masked by social, political, and economic habits and conventions. Not knowing is not an excuse for inaction in a feminist theory of universal human rights, even though it is often the assumed explanation for inaction.<sup>9</sup>

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<sup>9</sup> (Power 2002).

The theory of human rights that Ackerly constructs from women's human rights activism outlines the justificatory scheme, the roles or function of human rights, the scope (list or content) of human rights, and the responsibilities these rights engender. The theory begins by destabilizing the entitlement-based approach to human rights in which the rights-bearer is entitled to an outcome and a duty-bearer is responsible for security it.<sup>10</sup> It ends with a diffuse understanding of responsibility for human rights violations according to which all of humanity is responsible. By contrast, Pogge shows us that such destabilization is not necessary for identifying human rights violations in institutional causes of rights violations.<sup>11</sup> Nor does attention to institutional causes of human rights violations logically require diffusing human rights responsibilities around the world. As cited above, Pogge holds specifically responsible those "(especially more influential and privileged) persons who collaborate in [the] imposition" of the institutional order. This article offers a theory of human rights that requires us to understand responsibility (and bearers of responsibility) more broadly.

By contrast, Pogge conceivably lets many of us off the hook or holds us all accountable to the extent that we are able to take political action that might affect the design of the global "institutional order." The characterization of human rights violations as entitlements is an epistemology that inclines us to look for agents acting in conscious coordination. Whereas the examples of natural disaster and head-loading illustrate rights violations as a result of aggregated but not necessarily coordinated even though institutions are often involved in affecting individual and collective action.

As the two examples from the introduction suggest, the mass of human rights violations are experienced systematically by categories (or classes) of people, such as people in poverty, populations made vulnerable by climate change, populations made vulnerable to food price fluctuations, and poor women in their reproductive years. In

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<sup>10</sup> (Ackerly 2008).

<sup>11</sup> (see also contributions to Kuper 2005).

behooves us to use a theory of human rights whose epistemological metaphor – right of way – is more able to work through these patterns of human rights violations. Ackerly’s approach is promising for this reason. Does this approach lead only to diffuse responsibility for human rights patterns as is possible on one reading of *Universal Human Rights in a World of Difference*? If so its merits in undermining the cultural authority basis on which some political leaders justify human rights violations or justify ignoring human rights violations, may be outweighed by the diffusion of responsibility to the point of not being able to guide social action for the promotion of the legal recognition of moral universal human rights in all institutions, including those responsible for governing the world economy. I return to this question in the conclusion.

## 2. Internal principle approach

Other approaches develop a justificatory scheme based on a universalizing principle on which to base universal human rights. They share with post-colonial, post-modern, and feminist theories a rejection of the politics of universalizing transcendentally or procedurally defined *external* principle and seek to develop an immanent principle. For some political theorists the rights that are human rights are a set of rights that can be enumerated and delineated. For them, the central challenge of a theory of human rights is to identify a justificatory scheme that can defend the legitimacy of a particular list of human rights.<sup>12</sup> For others, a founding principle establishes the relationship among rights claimants; for example, “membership” for Cohen or “reciprocity” for Benhabib.<sup>13</sup> Other political theorists of human rights work through the problems of delineation and delimitation of human rights using a principle

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<sup>12</sup> (Beitz 2001; Cohen 2004; Ignatieff and Gutmann 2001; Lukes 1993; Rawls 1999b; Talbott 2005; Taylor 1999).

<sup>13</sup> (Cohen 2004; Benhabib 2004b: 130).

that calls not for a finite list, but rather for an expansive list: positive freedom<sup>14</sup> or emancipation,<sup>15</sup> for example.

These principles can guide our thinking about the indivisible content of human rights, but do not provide an immanent justification for that content. Let's use the positive freedom principle – the most conceivably immanent of these approaches – to illustrate the point. According to Carol Gould

...the common foundation that normatively grounds the conceptions of both justice and democracy is freedom, understood as the critical or distinguishing feature of human action. *Freedom* has a complex sense here: It is, on the one hand, a bare capacity for choice among alternatives; on the other, it is the exercise of this capacity – individually or together with others – in the realization of long-term projects and the development of abilities. In this sense, freedom is an activity of self-development or self-transformation as a process over time, and I interpret this as the characteristic mode of human agency or life activity.<sup>16</sup> *Emphasis in original.*

Gould goes on to describe the notion of human rights that this theory of freedom gives rise to:

The particular theory of positive freedom and justice delineated here gives rise to a conception of certain rights that need to be recognized as *human rights* – that is, as rights that people possess simply by virtue of being human and, therefore, equally and universally.<sup>17</sup> *Emphasis in original.*

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<sup>14</sup> (Gould 2004; Nussbaum 1997; cf. “capability” Sen 2004).

<sup>15</sup> (Goodhart 2005).

<sup>16</sup> (Gould 2004: 33).

<sup>17</sup> (Gould 2004: 37).

This positive freedom-based theory of human rights makes us regard human rights as unable to be enumerated. How could we distinguish between *economic* rights that enable us to develop our abilities and *political* rights that enable us to develop those abilities? We cannot. Guided by this principle, what is the normative basis for distinguishing among reasons why someone cannot participate in politics? There is none. How secure is any *one* of the rights not to be tortured, to assemble and associate, to vote, of expression, and to work *for people who do not have all* of these rights? Not very. On this view, human rights are indivisible, and all institutional and normative sources of their violation could be within the scope of condemnation implied by the theory.

And yet, this designation does not give adequate recognition to the historically recurring political phenomenon of humans' making distinctions about the humanity of different humans. In different cultural and political contexts, certain groups not all humans are treated as deserving of equal treatment. Convicted criminals, suspected terrorists, people with severe disabilities, and survivors of sexual violence, for example, receive treatment that constitutes evidence that not all humans are treated as if they have the same humanity. While I share Gould's normative commitment to universal humanity, that commitment is not universal. Activists may share it, but their interlocutors do not. A theory of human rights cannot offer support for setting aside the rights of a certain class of people. If the rights of any class of people can be set aside – for whatever reason, the public interest in economic development or political security have both been used – then no rights of any class of people is secure. The universality of human rights depends not only on the imbrications of rights-enabling political, social, and economic structures, which Gould's theory defends with a freedom-based approach to rights, but also on the ability of the theory of human rights to respond critically to the human impulse to classify which Gould's freedom-based approach cannot require. For political, social, economic, physiological, and particular reasons, convicted criminals, suspected terrorists, people with severe disabilities, and survivors

of sexual violence do not have the same agency as other humans. A theory of human rights should respect the rights of people without freedom too.

Arguments based on a foundational principle either 1) argue that it should be shared and offer an argument for why their chosen principle is *the* universal shared principle<sup>18</sup> or 2) ask if it *were* shared, what universal human rights would look like.<sup>19</sup> Is it possible to theorize about universal human rights without relying on an *a priori* assumption of a shared foundational principle – membership, freedom or other?

### 3. An immanent approach

Ackerly's theory of universal human rights shares many of the commitments of many other human rights theorists. The contribution is the justificatory scheme. The justificatory scheme for immanent universal human rights does not rely on everyone communicating (because epistemological power, diversity, and disagreement characterize communication).<sup>20</sup> Nor does it rely on everyone being a member (because membership is determined through social, political, and economic values and institutions that are terrains of epistemological power, diversity and disagreement).<sup>21</sup> Nor (ironically for a philosopher) does it rely on its effectiveness as an argument. In this section I outline the key features of the justification of an immanent theory of human rights: 1) the methodology for identifying the roles or function of human rights, the scope (list or content) of human rights, and the responsibilities these rights engender, 2) a device for adjudicating the politically contested dimensions of the theory, the "terrain of difficulty"), and 3) a tool for engaging in terrains of difficulty, listening.

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<sup>18</sup> (Cohen 2004).

<sup>19</sup> (Gould 2004).

<sup>20</sup> Consider by contrast Benhabib's discourse ethics of human rights (2004b).

<sup>21</sup> (Cohen 2004). Benhabib sees this point, arguing that membership is a human right, certainly not the basis of rights claims (2004b).

## *Methodology*

Constructing an immanent universal theory does not mean replacing a privileged *external* position with a privileged *internal* position. This would be a particularistic justification, whose basis for universality would rest in the initial claim that a certain position should be privileged. The range of views exhibited by women's human rights activists demonstrates why such a foundation would be as problematic as relying on a foundational principle.<sup>22</sup> Nor do I mean to build the argument on commitments that "we" or at least some of "us" already share (such as a commitment to freedom and equality, autonomy, membership etc.). Again, this would be a particularistic argument that would require political commitment to prior shared values, and it would require ignoring differences and disagreement. Such an approach would put the exercise of power – however democratic – prior to the construction of the theory.<sup>23</sup>

Rather, Ackerly grounds this non-ideal, immanent theory of universal human rights in a critical methodological *practice*, one that is practiced by a wide range of activists who have a broad range of experiential perspectives, a broad range of commitments, and share profound disagreements with one another.<sup>24</sup> Using feminism at every step of theoretical reflection – from "what is a theory of human rights?" to "how does one research human rights practice?" to "how does one make visible invisible practices?" to "what is the best form of exposition of a theory of human rights?" – the approach requires the theorist to lay bare the potential exercise of power, stay attentive to diversity, and am aware of disagreement in every step in the

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<sup>22</sup> (Ackerly and Attanasi forthcoming) and (Dietz 2003).

<sup>23</sup> Special thanks to Michael Goodhart for offering a good example of this kind of theory and for pushing me to clarify how and why my approach differs from it. (See Goodhart 2005). Jennifer Nedelsky's constitutional approach also has this structure (Nedelsky 2008).

<sup>24</sup> (Cf. Habermas 1984).

theoretical argument. And, following the self-reflective methodology of feminism, the theorist asks and attends to these questions imperfectly.

### *Terrain of difficulty*

The methodology is but one level of the justificatory scheme for Ackerly's immanent universal theory of human rights. The second level is within the theory itself, as the justification for any *immanent* theory must be. The theory itself contains a political space where exercises of power are made visible and mitigated, disagreements are acknowledged, and differences are worked through – likely not to the satisfaction of all, but – publicly. By making the terrain of difficulty public, the theory asks theorists and activists to take responsibility for working through political disputes about the meaning of human rights, recognizing diversity, looking out for disagreement masked as consent, and to be attentive to the many ways in which epistemological power can be legitimated and abused.

Though different from familiar forms of theorizing about universal human rights, Ackerly's approach is not unprecedented. The universal justification for human rights in Amartya Sen's "Elements of a Theory of Human Rights" comes closest to the justificatory process in the terrain of difficulty.

The universality of human rights relates to the idea of survivability in unobstructed discussion – open to participation by persons across national boundaries. Partisanship is avoided not so much by taking either a *conjunction*, or an *intersection*, of the views respectively held by dominant voices in different societies across the world (including very repressive ones), but through an *interactive* process, in particular by examining what would survive in public discussion, given a reasonably free flow of information and uncurbed opportunity to discuss differing points of view. Adam Smith's insistence that ethical scrutiny requires examining moral beliefs from, inter alia, "a certain distance" has a direct bearing on the

connection of human rights to global public reasoning.<sup>25</sup> *Emphasis in original.*

A non-ideal theory of human rights needs what Sen calls a “terrain of continued dispute.”<sup>26</sup> These spaces are both imaginary (one can go there alone as a Rawlsian representative man going behind the veil of ignorance)<sup>27</sup> and actual (they get created when people with different views talk). Making use of the latter for empirical inquiry, anthropologist and ethnographer, Anna Lownhaupt Tsing focuses her study of global connections on

“zones of awkward engagement, where words mean something different across a divide even as people agree to speak. These zones of cultural friction are transient; they arise out of encounters and interactions.”<sup>28</sup>

Such terrains of difficulty can be institutionalized through international institutions like the UN conferences and corresponding NGO fora were (for women activists particularly in the decade from 1985 to 1995), or they can be assembled through transnational networking as the World Social Forums (WSFs) have been in the first part of the 21<sup>st</sup> century. It can be a large space with numerous participants (like the NGO fora that accompany UN international conferences or the WSFs), or an invitation-only small space (like a small workshop or conference), or a virtual space (like a blog or on-line working groups sponsored by UNIFEM). Further, what gets disputed in these spaces will change over time, place, medium, size, and agenda setting. Attention to these terrains – and attentiveness to power dynamics in defining them and working

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<sup>25</sup> (Habermas 1990: chapter 3; Habermas 1994: chapter 2; see also Habermas 1998: chapter 2; Sen 2004: 320).

<sup>26</sup> Sen refers to this space as a “domain of continued dispute” (2004: 323); compare this to Cohen’s “terrain of deliberation” (2004: 195).

<sup>27</sup> (Rawls [1971]1999).

<sup>28</sup> (Tsing 2005: xi).

within them – is a fundamental feature of the theory itself, not just of the practice of human rights. It is an element of the theory that is observed in practice.

The ideas that survive must be critically examined for the means by which they survive and the role that they may play in rendering other ideas invisible. The unobstructed discussion is scrutinized for the ways in which agenda setting and other consensus building tools create unanimity without obstructing discussion or including diverse and divergent views. Participation cannot just be open, but must be solicitous of the full range of divergent views. Partisanship is not avoided but engaged. Dominant voices within different societies are obscured by the cacophony of the range of views and their disagreements.

### *Listening*

The process of learning from this cacophony is an iterative process, as Sen argues, but his focus on the free flow of information, the opportunity to discuss a range of views, the ethical scrutiny of moral beliefs, and the aspiration to global public reason is only half of the picture of this global iterative process.

The other half is listening. Globally, women’s human rights activists practice what Susan Bickford theorized for national democratic process and citizenship: listening. According to Bickford,

political interaction *between* subjects in a *common* world...does not necessarily take its meaning from, or its purpose to be, consensus. I suggest instead a different normative goal that can better guide political action in an inegalitarian pluralistic social order.<sup>29</sup> *Emphasis in original.*

For Bickford the different normative goal is listening. She knits together Anzaldúa, Arendt, Merleau-Ponty, Aristotle, and Socrates to show us the normative function of

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<sup>29</sup> (Bickford 1996: 141).

listening in and for political action. Listening draws us together by creating paths between participants through which they share what each “knows.” Such listening does not take consensus as its necessary objective and requires commitment and a willingness to face one’s fears.<sup>30</sup>

Fear may, in fact, be what allows us to question our convictions. Fear of being “wrong” (of having an opinion that is incomplete or mistaken in some way) can contribute to our ability to listen...Someone who never feels the possibility of incompleteness will have difficulty genuinely hearing someone else, but someone who is overly frightened by it will be silent when she should speak. ...Courageous listening in the face of fear means avoiding two extremes: one in which I simply, defensively, do not hear, and one in which I simply exchange my opinion for yours.<sup>31</sup>

Courageous listening is essential for any terrain of difficulty to be a space of transformation and learning.<sup>32</sup> These are the contours of the normative responsibility of *theorists* engaged in human rights work, but the theory has implications for all of us based on the roles we have and can take in our global, national, and local institutional and normative regimes.

#### **4. Non-ideal theory and responsibility**

The *universality* of the immanent human rights theory rests on the universality of exploitable power, the ubiquitous ability of power to render its exercise invisible, and

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<sup>30</sup> (Bickford 1996: esp chapter 1 where she differentiates her view from Barber and Habermas).

<sup>31</sup> (Bickford 1996: 151, 153).

<sup>32</sup> On the role of learning in global deliberative democracy see (Ackerly 2006; Ackerly 2007a). Consider, however, the challenges to learning in post-modern contexts (Rosenberg 2002). Compare to Aung San Suu Kyi’s argument that freedom from fear is the basis of democracy (Suu Kyi 1991). See also Nedelsky’s “relational approach to rights” (Nedelsky 2008: 141) and the importance of “enlarged mentality within “communities of judgment (2003).

the ubiquitousness of people willing to face their fear of that power in order to build bridges (to follow Gloria Anzaldúa) and to create pathways (to follow Maurice Merleau-Ponty) for communication. The key tool of this global public is not “reason,” but rather “listening.” Argument without “attention” does not have the transformative potential that listening has on the pathways of communication and therefore on the pathways for learning. Our obligation is not to *simulate* imagined inclusive argument; it is to try to *bring it about*.

A terrain of continued dispute is the theoretical and practical space in which we acknowledge the ways in which the power of epistemology, diversity, and disagreement can become part of the use of human rights. By acknowledging terrains of continued dispute as a part of the theory, we give theoretical importance to the activist practice of using human rights as a critical tool even though much of what is important to many activists – the inclusion of sexuality and reproductive rights, the critique of certain religious practices or authority – is in a terrain of continued dispute about the content of rights.

A terrain of continued dispute is integral to the theory in another way as well. The theory also understands human rights as interrelated, indivisible, and sustained through social, economic, and political structures.<sup>33</sup> Once we accept that the social and economic dimensions of rights are necessary for the realization of any rights, we have to acknowledge that the understanding of what it means to have, to violate, or to support human rights will have a wide range of forms. They will be sustained and violated by values and institutions that vary by context. In a terrain of continued dispute, we work through these differences in a manner attentive to wide-ranging views *and* to the human rights at stake in any resolution or failure to resolve issues in a terrain of continued dispute.

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<sup>33</sup> (Ackerly 2008: chapter).

In a non-ideal theory, power cannot be assumed away in the justificatory scheme of a universal theory of human rights. The justificatory scheme has to be explicit about where and when power will be exercised and mitigated and why we are obligated to foster a global public whose fundamental building blocks include, but do not privilege, reasoned argument, but rather, privilege attentiveness. Our understandings must be admittedly incomplete; our theory provisional. The justificatory scheme of this provisional non-ideal theory relies on the methodology of developing the theory and on the ways in which the immanent theory itself is attentive to power.

An ideal theory sets out the just conditions to which we strive to return should injustice occur. A non-ideal theory needs theoretical resources for guiding our construction of a just world, resources that do not include a blue print, or even an outline sketch of what the just conditions might be. In my view, this means that responsibility is the building block of a non-ideal theory of justice. If we are committed to building a just world, we must be committed to more than a God, a leader, or a principle we have to be committed to a process.

The implications of this non-ideal theory of universal human rights for responsibility can best be seen not by distinguishing it from ideal theory but rather by distinguishing it from a theory that follows rights-as-entitlements metaphor, which Pogge does in his theoretical approach to responsibility for institutionally sustained forms of injustice (see the table “Caricature of Pogge and Right of way”). The rights-as-entitlements metaphor for human rights anticipates that there is a one-to-one-to-one-to-one correspondence between right-bearer, right, responsibility, and duty-bearer. The non-ideal, immanent theory of human rights, which follows a right-of-way metaphor, does not have such correspondence. Individuals’ rights are realized or violated not only as individuals but also in classes of individuals who share a certain subject position in relation to certain patterns of violations. This latter sort of violation anticipates a very different form of human rights responsibility.

*Caricature of Pogge and Right of way*

	<b>Entitlement (Pogge)</b>	<b>Right of way</b>
<b>Human rights</b>	Enumerated as recognized in international law	Content that is dynamic, not necessarily a list, but rather a constellation of rights that includes those recognized in international law, without being confident that such recognition clarifies the substance of rights or the status of a rights claimant
<b>Right-bearer</b>	Individual (and though he doesn't say it, a class or collective category of individuals with a particular position in the global political economy)	Individual and a class or collective category of individuals
<b>Duty</b>	Not to violate human rights through acts of commission or omission including during institutional policy-making opportunities.	To reveal patterns; To create opportunities for human rights disagreements to be adjudicated; To make human rights considerations central to institutional policy-making opportunities.
<b>Duty-bearer</b>	Those who are in a privileged position to act on the duty; Those who benefit from the national and global institutional order	Everyone according to his or her role in global, national, local institutional and normative orders

The immanent non-ideal theory of universal human rights sets out the responsibilities of those who are committed to human rights, sure that they are interrelated, indivisible, and structurally sustained, but also sure that they are in dispute and sometimes invisible. These responsibilities include commitment to participating in an immanent and critical justificatory process at both the meta-theoretical level and the level of a terrain of continued dispute. These require a willingness to listen attentively, thus building bridges unconstrained by geographic or geopolitical boundaries between people. They include commitment to looking for the invisible, and a willingness to think differently. They include a commitment to reflect continually on the ways in which seemingly separable injustices are in fact interrelated, indivisible, and sustained through visible and invisible values and institutions.

Human rights responsibilities include attention to the politics of any settling of an issue in the terrain of difficulty.<sup>34</sup> Likewise human rights responsibility requires *not* capitulating to the difficulty of certain human rights dilemmas. This means human rights responsibilities include obligations to enlarge the discursive community around a complex topic. So, for example, in making predictions that inform policy around climate change, social scientists capable of gender analysis need to complement the contributions of social scientists capable of modeling economic impacts and of scientists capable of modeling physical impacts.

Further, human rights responsibilities implied by this non-ideal theory of human rights include creating a range of forums (in which to better understand complicated issues) whose formal structures vary in ways that make it easier for informants to include those affected by human rights violations rather than relying on the privilege of certain kinds of expertise to dominate the policy arenas where the terrains of difficulty are adjudicated. This is a broad list of human rights responsibilities. Who bears them?

Likewise, duty-bearers on this model do not act in reference to a duty defined by a particular right, but rather in reference to responsibilities defined by one's role in the global, national, and local normative and institutional order. So, following Pogge, a policy maker's role is to make policy that mitigates patterned human rights violations caused by the institutional order to which they contribute or from which they benefit. Or for example, a managing director of a development organization has a responsibility to use his role to mitigate human rights violations through funding choices.<sup>35</sup>

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<sup>34</sup> I am reminded of McClure's deconstruction of Locke's "toleration" in the *Second Treatise* as an exercise of political and epistemological authority about what is objectively best for society (1990).

<sup>35</sup> (See Kuper 2005: 268, and chapter 268). The systems of accountability deployed by funding organizations can also have an effect on how recipients do their work in ways that may or may not make transforming human rights violating institutions and normative structures central (Ackerly 2009).

The non-ideal theory of human rights is not about deflecting human rights responsibilities but rather taking them on wherever we are, in roles we inhabit or can assume. Let me illustrate by discussion how some women's human rights advocates exercise this responsibility. Following this understanding of responsibility and the bearing of responsibility, those activists who are well-networked in international policy circles have a responsibility to try to influence the rewriting international universal human rights such that violations of women's human rights are as visible as violations of men's.

Women's struggles for justice look different around the world. They focus on different issues and disagree about how to approach the same issues (within context and across contexts). Local diversity has been supported by global activism and documented in scholarship on women's activism. For example, consider the article heard around the world. In "Women's rights as human rights: Toward a re-vision of human rights," Charlotte Bunch offers activists in a range of issues from domestic violence to trafficking to reproductive health that the notion of human rights does apply to women, but can only do so well if the concept and its application are reconsidered.<sup>36</sup> Transnational and grassroots activists joined a shared dialogue using human rights framing. Women's human rights activists work within international human rights norms, to change the meaning of those norms so that they are understood recognize women's human rights.<sup>37</sup> Some may interpret this as a responsibility to change how the world *theorizes* human rights; others how we practice human rights. Though we may debate the impact of this re-theorization on women's lives, in the UN rights institutions, regional human rights conventions, ad hoc war crimes tribunals, international human

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<sup>36</sup> (Bunch 1990)

<sup>37</sup> (Keck and Sikkink 1998)

rights groups, refugee work, and even UN Security Council peacekeeping missions, women's human rights have become a principal concern.<sup>38</sup>

## Conclusion

The feminist lens on human rights reveals that listening and thinking differently as we engage with difference, diversity, and the power of epistemology are elemental parts of human rights theory and activism. Doing so while engaging in the terrain of continued dispute is essential to sustaining the legitimacy of human rights-based criticisms. The terrain of continued dispute is the space where we acknowledge that working through questions that draw out our differences is necessary for maintaining the legitimacy and critical worth of universal human rights.

In both the theoretical and the activist discussions, global public reason alone is an inadequate tool for adjudicating difficult issues. In practice, attempted adjudication needs to take place in ways that build trust, pathways and bridges that acknowledge and are open to continued dispute – no matter how frustrating that is. By building a global listening infrastructure as we theorize and engage in activism for human rights, we are expressing a belief in the power of humanity to live up to its human rights obligations: that is, to think differently, and then act differently. And here, I lay bare my own epistemology and transcendental commitment – a belief that exercises of power are the obstacles to our mutual learning. The better our spaces for continued dispute are at mitigating power inequalities in those spaces, the better we will be at building listening pathways as we think through and learn to think differently. To be attentive to the vulnerable or invisible, we need to listen attentively which means being open not only to changing what we think, but also to changing *how we think*. We need to be open to treating global public reason as an essentially contested concept, rather than a guide. Ironically, global public cacophony sounds better.

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<sup>38</sup> (Ali 2000; Amnesty International 2004; Anker 2002; Barsky 2000; Bunch 2003: 6-11; Campanaro 2001: 2557-2592; Cook 1994; Cooper 2002: 9-25; United Nations 2000; West 1997).

It is hard to hear our moral responsibilities through all that noise and yet, if we clear up the noise by eliminating voices, we make it harder to know the complexity of the ways in which political, economic, and cultural institutions and norms create the contexts for the rights violations experienced at the intersection of all of that complexity. The pressing political challenges associated with environment and poverty show us why a feminist lens on human rights is valuable for developing policy solutions regarding global climate change and global injustice that are informed by rich understandings of the complexity of forces contributing to human rights violations during these crises.

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