How Social Attitudes Can Create Human Rights Violations

Bradley Woloz

Abstract

The structure of this paper is, as I see it, in three sections. In the first section, I will explain and briefly defend a standard threats approach to thinking about the concept of human rights. Broadly, such an approach will monitor and declare human rights violations on the basis of an appropriately conceived, unacceptable risk of danger to rights, as opposed to on the basis of rights-relevant outcomes themselves. In the second section, I will motivate the claim that law and politics can have a meaningfully expressive function, which bear out real-world consequences, in particular with respect to social attitudes. Here, research in social science is helpful in bolstering what I take to be an intuitively plausible claim. In the third section, I will argue that social attitudes, thus altered, represent a real risk to some sets of protected interests which might plausibly be called human rights. I will present research here, as well, which demonstrates this effect. Given a standard threats approach to human rights, then, it might be fair to say that social attitudes create human rights violation, and that a plausible causal link can be drawn between an institution's laws, politics, and the genesis or exacerbation of relevant social attitudes.

Introduction

The United States had not successfully fulfilled its human rights responsibilities with respect to black Americans at the ratification of the 13th amendment. Black Americans remained a legally and

of Education, the Civil Rights Act, the Voting Rights Act, and the Fair Housing Act all served to correct institutional features that had contributed to the human rights abuses suffered by black Americans. Of course, elevated levels of violence against black Americans did not cease.

The approach to thinking about human rights in the way that I will be defending, call it the standard threats approach, identifies a human rights violation by the relationship of outcomes to their severity of harmfulness and probability of occurrence. If there exists an unaddressed, unacceptably high level of background risk for a rights-relevant outcome to occur, the institution can be said to have violated the human rights of the parties affected by the failure to attempt to mitigate the unacceptably high level of risk. In discharging their human rights responsibilities, then, an institution must attempt to mitigate said risk to an appropriate level. In most cases, as in the aforementioned Jim Crow reforms, there are obvious institutional changes that need to be made. Legally enforced differential access to public resources created unacceptable levels of risk to dignity interests for black Americans, and so in discharging their responsibility for this risk, the United States government targeted the obvious cause, and reformed discriminatory policy and segregation. If a bridge has an unacceptably high risk of failing, in discharging responsibility for that elevated safety concern a state would need to fortify the bridge to an acceptable level.

My claim, though, is that this is not the end of the story in some important cases. Specifically, sometimes an institution can eliminate it's immediately causally responsible features (like the levels of risk created by a policy of segregation being mitigated by ending a policy of segregation) and unacceptable levels of background risk remain. I contend that laws and policies which work directly to alter the landscape of background risk to protected interest, and the operative background political culture, have a simultaneously expressive function, and that this expressive function independently and additionally contributes to levels of background risk.[3] I cite several pieces of research in making this contention. Research out of the Labor Institute of Economics and The Center for Global Development demonstrates that statistically significant changes in social attitudes occur *after* the adoption of a relevantly expressive policy, limited to the social issue addressed by the policy at hand. Similarly,

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research out of the University of Kansas and the Wharton School of the University of Pennsylvania demonstrate the effect that political cultures, not policies or laws specifically, might have on social attitudes. Finally, research out of the National Institute of Health which examines the elevated suicide rates among LGBTQ youth, and isolates its incidence from potentially causal factors other than social attitudes.

Demonstrating that unacceptable levels of background risk to protected interests exist is, on its face, satisfactory to trigger a states correlative responsibility[4], and identifying social attitudes as causally responsible provides the state with direction to aim reform. I will argue, though, that a link can be drawn, in some cases, establishing a plausible claim of causality between an institutions features and the prevalence of relevant social attitudes, and that establishing this link makes more plausible, to a wider audience, the argument that a state can have a responsibility, generated by a correlative human right, to try and affect attitudinal change in its populous. My two main claims in this paper, then, amount to: (1) Law and politics can have a meaningfully expressive function, which alters social attitudes and (2) social attitudes can alter levels of background risk to protected interest in a way that constitutes a human rights violation. In the first section, I will define the concept of rights I am working with, and both explain and defend a standard threats approach to thinking about them. In the second section, I will motivate the claim that law and politics can have a meaningfully expressive function, and attempt to demonstrate how they alter social attitudes. In the third section, I will argue for the claim that social attitudes alter levels of background risk to protected interests. In concluding, I will elaborate on my attempt to establish this link, and why I believe it is valuable.

Section 1

Even though I am avoiding deep moral questions about the justifications for human rights, I will need to briefly elucidate the concept of rights to lay the foundation of our recommendation for their

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4 Assuming that the state has actions available to it which might potentially mitigate risk, and that these actions don't violate larger moral considerations. I discuss later, though, that it is difficult to conceive of a risk to protected interests that the state is entirely and forever powerless to aid in mitigating.

implementation. I am w *Basic Rights*

For Shue, a right provides the rational basis for a justified demand that the actual enjoyment of a

(Shue 1980) It will be helpful to unpack that statement, as I see it in three parts.

ought to be able to insist on their right being fulfilled without being in a position of deference to the party that fulfills it. If a person's demand is both justified and rationally based, then they are under no obligation to feel embarrassment or sheepishness about making it. This feature of a right ought to effectively motivate demand in appropriate circumstances. The recent Bangladesh traffic protests are a good example[5]; risk of traffic injury was too high, and demands were made by the populous in response. Excesses of public violence aside, a hypothetical detractor ought to have no room to insist that the affected population *negotiate* with traffic authorities instead of *demand* from them. This is inherent in the nature of the right, and what distinguishes it in its relationship with duties. Without a

What it means empirically for a right to be socially guaranteed, and for a threat to be standard, is a large and complex topic, mostly outside the scope of this paper.[7] Briefly though, it is not plausible, or useful, to say that my right to something has been violated in every case that I lack it, or that my

X. For example, part of my social guarantee to a right to public demonstration must include a social guarantee against assault, otherwise I could be beaten and dragged

Ideally, that I'm making demands on the basis of my human rights is a unique component of my situation politically; it ought, as Joseph Raz points to, mobilize state action in a way that a demand lacking the moral component of a human right might not. It doesn't put me in the same position as a neighbor who may have already been harmed in traffic. A victim of traffic harm in this instance is experiencing a human rights violation, but may also separately qualify for moral or legal concern, triggering compensatory measures. The value, again, is that a state can have a morally normative reason, in the form of a human rights concern, to prevent harms before they occur, and a populous can have a politically grounded way of demanding this of them. There is a real world difference, subjectively, in living day to day with no acceptable social guarantee of traffic safety and living with that guarantee fulfilled, even if in both cases one happens never to experience traffic related harm.

In the case that there is truly *nothing* an institution can do to rectify an unacceptable level of background risk to a protected interest, I contend that state responsibility falls away, largely concurrent

[10] Here certain theories about assigning responsibility might conclude that responsibility now falls elsewhere, but that issue is outside the scope of this paper. Central to the concept of human rights discussed in this paper is not just the requirement that the rights protect dignity interests, but also the requirement that the concept be a *useful* concept. If it is actually the case that some level of background risk is entirely immutable, then declaring a human rights violation might serve only to confuse the landscape of human rights at large; it's worth noting, though, that it is hard to conceive of a type of unacceptable background risk to a protected interest that would be permanently unresponsive to institutional intervention. An interesting potential response to override

ase of standard threats human rights can be made; if it is the case that nothing can be done *right now,* but there is no reason to think that the impossibility of rectification is

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10 *Moral Failure: On the Impossible Demands of Morality,* (Oxford Scholarship Online, 2014) Discussion of the conflict of non-negotiable moral requirements is particularly relevant here; basic rights are, in a sense, non-negotiable and often in conflict. I contend, though, that the bulk of my argument in this paper is malleable to either position; particularly, establishing the causal link between institutional features and social attitudes, and the causal link between social attitudes and increased level of rights-relevant background risk.

permanent, then it might make sense to talk about a human rights violation taking place that the responsible state is powerless to address, insofar as the declaration of a human rights violation speeds up progress towards the set of conditions that would make state attempts at rectification possible. I remain ambivalent on the question of whether or not potential future mutability qualifies as fulfilling

Importantly though, my belief is that it will not always be obvious, in practice, whether or not a task set to an institution is impossible. In particular for the kinds of risks to protected interests that I'm concerned with in this paper, those created by social attitudes, identifying an efficacious approach to

aws or policies. I believe that subjective norms and social attitudes are epistemically accessible components of a society that play a role in risk levels for protected interests, and are distinct from institutional laws and policies, 'on the books.' If policy X is responsible for unacceptable levels of background risk, then we identify that we need to eliminate policy X, which, obviously, can be done by eliminating policy X. If social attitude Y, though, is responsible for unacceptable levels of background risk, then we identify that we need to eliminate social attitude Y, which can be done, hopefully, by institutional processes P, Q, or R. (For example, educational reform aimed at social attitude Y, or the introduction of additional policy with an expressive function relevant to social attitude Y) We will know immediately after taking the action which triggers the elimination of policy X that we were successful in eliminating policy X, but we will not know immediately after taking the action which eliminates (or mitigates to an acceptable level) social attitude Y whether or not we were successful.

The indefinite nature of discharging responsibility for background risks that result from social attitudes means that an institution might be responsible for making more than one attempt, but be appropriately lauded for addressing their human rights responsibilities in every instance in which they do make an attempt (successful or not). As the dust settles, so to speak, we can again evaluate whether the background risk which was being addressed has been appropriately mitigated. If, when surveyed, it

this link is an attempt to expand the utility of a standard threats approach to human rights considerations beyond those who buy into its premises, especially with respect to the link between rights and responsibilities. To this hypothetical objector, my claim is that a link can be established in the following way, in two parts: one, that some institutional features, generally taking the form of laws and policies, but also the culture of a political scheme at large, have an expressive effect that alters social attitudes, and two, that in some cases these social attitudes thus altered increase levels of background risk to protected interests.

It will be helpful to motivate the claim that there exists an expressive function of law and an expressive function of politics. The system of law and its relevant institutions makes claims of authority, and surely it is the case that they have a sort of de facto authority. The definition of a state is made, in places, with reference to its comparative advantage in violence, and so it is, at least by that mechanism, successful in commanding obedience, and demonstrating a sort of authority. The claim of its expressive nature goes further though; solely by the visible presence of some sorts of laws and political actors, normative attitudes are successfully propagated. Reference to research below attempts to make this argument by demonstrating that changes in social attitudes occurred after the introduction of some law or political event, where the changes in social attitudes were epistemically relevant to the nature of the law or political event being introduced. The claim can also be made without reference to its effects, though, by observing the nature of law and politics. A thorough examination of the way in which the nature of politics and law successfully claim authority is a separate project outside the scope of this paper[11], but my claim is that their de facto authority can position them as sort of normative road maps, for some people, for making judgments about the social sphere.

My argument is that, when a state has historically endorsed a discriminatory law or policy, even after it is eliminated, the message that it communicated to its populous does not disappear with it, and

11 For a more thorough discussion of the nature of the authority of law and its relevant institutions, see Joseph Raz, *Authority, Law and Morality,* (The Monist, Volume 68, No. 3, Pages 300-305)

the message has real, tangible effect. Law has normative force. If I see someone doing something, and

am communicating an implicit normative

judgment, beyond just a simple warning that they might face punishment. Similarly, if I am engaging in an action that might be morally questionable, and when confronted about it I declare, truthfully or with confiden

my action, not just a reassurance that I won't be punished. Picture the religious invocation, which I think is analogous in relevant places: If I declare that someoneh

of Wharton was not initially aimed at identifying attitudinal changes caused by the 2016 election, but its research spanned pre-election to post-election, and they noticed a profound change in results immediately following the election. (Low, Huang 2017) They observed negotiations between men and women and monitored them for levels of aggression and cooperation, and noted a statistically significant increase in levels of aggression, by men, towards women, immediately following the

something terrible, deranged, or unthinkable.

Imagine being an LGBTQ youth, on the couch, watching television, absorbing probably daily the sentiments that comedy television shows are communicating. Gay is bad. Gay is gross. Gay is embarrassing. Gay is wrong. Calling someone gay is not a statement, it is an accusation, and one that requires unequivocal denial. What would it take for these expressive attitudes not to affect the way you internalize feelings about your sexuality? The television is communicating to you that the world disapproves of the way you were born, and discriminatory laws are expressing something similar. Double that if a political figurehead, in a role with some sort of normative authority, is either by speech or action expressing something similar. Popular media is reflecting a social endorsement of its content by virtue of its popularity, and its popularity is in turn propagating the social attitudes that its content is relevant to.

Lesbian, gay, and bisexual youth were

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One potential response, side-stepping a call to repair social attitudes, is a call for additional policy reinforcing the mandate for equal legal treatment as it exists on the books. The problem is that enforcement and discretion are often individual-level phenomena, and any given individual is some percentage

importantly, the suggestion is not that a state ban speech that is reflective of social attitudes that are responsible for background risk to protected interests, but it's not an unreasonable concern given our conclusions. If one were to argue that risks amounted to harms, and identified a sufficiently large degree of harm imposed by some social attitude, and identified some types of speech as contributing to the perpetration of that attitude, one might conclude that the government restrict that speech in the way it restricts some other speech, namely, from *Brandenburg v. Ohio,* 1969, speech that "is directed to inciting or producing imminent lawless action and There are several considerations that I believe bar this as a potential government response. Firstly, the backlash

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about being *forced* to alter speech in a way that reflects negative social attitudes. Secondly, an important element of legitimately legally restricted speech that protects against harm is the immediacy and obviousness of it; the process of the effect that social attitudes have on background risk is anything but immediate or obvious. Third, the restriction of speech to discharge responsibility for some other right would be trading off, in degree, one right for another. With consideration to Henry Shue's qualification of a basic right earlier, a right to free speech is not basic, but an important moral consideration regardless. My socially guaranteed right to security does not depend on, as I see it, a socially guaranteed right to free speech, but even if the right to free speech is not *more* basic than the right to security, the question of whether two basic rights can be traded off is morally dubious at best.

Finally, establishing the link that assigns causal responsibility to an institution for risk to protected interest generated by negative social attitudes insulates the original claim from accusations of excessive state interference. An institution seeking to fix social attitudes that *it caused* seems less objectionable from this standpoint than an institution simply seeking to address social attitudes because it identifies them as a problem from the standpoint of rights. One might imagine a hypothetical objector, concerned with the governments role in our private lives, viewing actions aimed at rectifying

social attitudes as an overreach of governmental power. While a sufficiently concerned objector might not be convinced by this argument, others might. It seems less objectionable, broadly, that the state have a responsibility to fix harms that it caused than it does that it have a responsibility to fix harms simply because they are harms. Specifically, this argument has attempted to convince a hypothetical objector that some social attitudes do in fact amount to harms (or, at least, harms to rights, on the basis of their creating unacceptable levels of risk), and that an institution can properly be held responsible for some severity or degree of these social attitudes on the basis of laws or policies they instituted. For example, with respect to rights, the United States government was not only responsible for institutionally endorsed, legal levels of unacceptable risk for black Americans pre-1965, they were, in part, also responsible for the increased risk of extralegal violence that black Americans lived with day to day, post-1965, insofar as that elevated risk was, in some proportion, attributable to social attitudes and the expressive effect of previous institutional features.

Conclusion

not the appropriate course of action in discharging their responsibility, but remained ambivalent about what might be an optimal approach.