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THE PHILOSOPHY OF HUMAN RIGHTS

The Philosophy of Human Rights

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Contemporary Controversies

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Introduction

Human rights are important. First and foremost they are relevant for those fighting for respect for their own or others' human rights and for the improvement of situations in which fundamental rights are violated. But human rights are also of interest for politicians, political theorists, international lawyers, jurisprudents, NGO activists, civil servants, and, of course, political and moral philosophers. Obviously, the interest in human rights is stirred by quite different reasons: some of them purely practical, some of them purely theoretical, most of them combining practical and theoretical concerns. Yet all those involved with human rights should share one fundamental concern: to know what is the nature of the subject they are talking about and in which way it has normative force. In other words, the clarification of the concept of human rights and the justification of these rights – the two core challenges of the contemporary philosophy of human rights – should matter to all who are interested, in one way or another, in human rights.

In offering such clarification and justification political and moral philosophy has something relevant to contribute to the general discussion of human rights. Being philosophers, we might be criticized for making such a strong claim as to the relevance of philosophy. But forgiveness might be granted in light of our willingness to admit that philosophical insights about human rights are not freestanding, nor do they, in general, enjoy priority. Rather they depend in turn on the political, juridical, etc. dimensions of the idea of human rights, that is, on the use of the concept in practice.

The main function of universal human rights seems to be to set a minimal standard for institutional and individual conduct on a global scale and to guarantee human beings protection from mistreatment through forms of universal legal rights. While an initial agreement about human rights may cover this general claim, it is disputed how to determine exactly the underlying moral idea of basic human rights – and whether it is a moral idea at all that generates the normative force of human rights. There are two primary ways to approach this problem. Some argue that human rights, by their very nature, are held by all human beings either simply because of their common humanity, their human dignity, or because a set of basic needs and interests

of all human beings is sufficiently important that their protection naturally has the status of a fundamental moral right. Others argue that human rights essentially perform a political function. According to these philosophers, the concept of a human right is dependent upon the concept of some political institution or other. In this vein, the violation of human rights is construed, e.g., as *pro tanto* justification for outside interventions on an international level such that the defining function of human rights is to set limits to state sovereignty.

In both cases – the moral and the political view – further questions loom. Some of them are concerned with the nature of human rights as rights. Can human rights be justified? If so, how? And what, if anything, is special about human rights as rights?

Then again, with respect to human rights, it often remains underdetermined what the corresponding duties are. After all, it seems implausible to grant someone a right without offering some idea about how this right can be honored, that is to determine, who exactly shall have which obligation to account for the right in question. On one political conception human rights only obligate official agents such as governments or institutions. Others argue, however, that not only official agents but also individual agents can be said to be holders of human rights-corresponding duties. Following the debate about identifying the holder of rights corresponding duties it becomes important to determine the exact content of these duties.

Human rights are often taken to be essentially universal. But how can there be universal rights in view of the fact that there is such a variety of different, often competing moralities in the world? Is it plausible to assume that many moralities just get it wrong? Obviously, the question of whether or not human rights are universal is not only important from a philosophical point of view. It is also one of the most pressing challenges to the politics of human rights when it comes to promoting human rights as a standard of conduct in regions dominated by different moral standards.

The articles collected in this volume examine in detail these important and much disputed issues in the contemporary philosophical debate about human rights: (I.) the *clarification* of the concept of human rights, (II.) the analysis of human rights as *rights* along with the question of rights-corresponding *duties*, and (III.) the *universality* of human rights.

Moreover, the question of a *justification* of human rights is pertinent to each of these issues.[1]

The *first part* of our volume is mainly concerned with the two conceptions of human rights already mentioned: the moral and the political conception of human rights. Our authors approach this issue from different angles.

In the first paper, "Human rights: questions of aim and approach", *James Griffin* does two things: He argues that to determine its approach in a principled way, every theory of human rights needs to have a clear aim, and he bases his own approach on the aim of giving more determinateness to the concept of human rights as it figures in our ongoing public human rights discourse. The concept of human rights must be better specified, according to Griffin, as a precondition for rational debate about existence conditions of human rights, the content of particular human rights, and potential conflicts of rights. The theory this aim leads to is characterized and defended as piecemeal (as opposed to systematic like Kant's, Mill's or Wellman's approach to human rights), monist (not pluralist) concerning the basic values human rights are grounded in, and evaluative (not functional, as e.g., the approaches of Dworkin, Nozick, Rawls, Raz and Beitz). The basic evaluative concept in Griffin's approach is the concept of normative agency. But since Griffin wants to determine a concept of human rights that meets the practical constraints of uptake (it should actually be used in public discourse) and durability (it should be stable in this use) he also takes these "practicalities" into account.

In "On the nature of human rights" *John Tasioulas* sketches three broad families of answers to the question of what is the essential nature of a human right: (1) the Reductive View, according to which human rights are best understood without essential reference to the notion of a (moral) right, e.g. as universal human interests, (2) the Orthodox View, according to which human rights are universal moral rights possessed by all human beings simply in virtue of their humanity, and (3) the Political View, which makes some political role, or set of roles, an essential aspect of the nature of human rights. Tasioulas argues that a suitably interpreted version of the Orthodox View is preferable to both of its rivals: unlike the Reductive View, it is able to capture the distinctive moral significance of human rights as normative standards, whereas unlike the

1 The following summaries are in many cases based on abstracts provided by the authors.

Political View it does not make the discourse of human rights beholden to extraneous institutional considerations.

In opposition to the moral conception of human rights held by Griffin, Tasioulas and others, different authors argue in favor of what is sometimes called a political conception of human rights. They think that the essence of human rights is determined by their having a specific political function, e. g. to limit the sovereignty of states. This political conception, it is often argued, is closer to the contemporary human rights practice than the traditional view of human rights, and this is seen as a reason to accept it. However, *Peter Schaber* argues in his paper "Human rights without foundations" that the political view of human rights should not be accepted. He attempts to show that this conception does not pass the adequacy test that the political view itself proposes for a satisfactory theory of human rights, nor does this view give us the justification of human rights that is needed. Instead, Schaber provides his own defense of a moral view of human rights in which the concept of human dignity plays a pivotal role.

In "The moral and political conception of human rights – a mixed account" *Erasmus Mayr* also focuses on the dispute between adherents of the political and moral conceptions of human rights, which turns on the question of whether human rights are essentially distinguished as such by their specific political function. Some adherents of the political conception, like Joseph Raz, combine the view that human rights have an essentially political role with the claim that they are a sub-class of moral rights. This, according to Mayr, makes a combination of both approaches appear attractive, where, so it seems, the political conception of human rights answers the conceptual question of what human rights essentially are, while the moral conception offers the most attractive answer to the question of how human rights claims are justified. However, Mayr argues that we cannot expect both conceptions to be capable of the sort of "convergence" that this combination would require. Instead, one should follow a moderate version of the political conception, regarding both the question of what distinguishes human rights from other individual rights and the question how human right-claims can be justified. It turns out, however, that this does not make human rights dependent on the actual existence of states, and that a convincing political account of human rights even requires that human rights are, by and large, universal rights that human beings possess qua human beings – just as the moral conception claims. The resulting account of human rights which Mayr advocates can therefore aptly be called a "mixed" account.

The *second part* of this volume focuses on issues related to the notion of "rights" in the term "human rights". Is it possible to justify rights on a consequentialist basis? What's special about human rights as rights? What are the duties corresponding to human rights and what is their scope?

Utilitarianism and other forms of consequentialism are frequently criticized on grounds that the impersonal pursuit of maximum aggregate goodness fails to provide adequate room for fair distributions and individual rights. In his paper "Problems with some consequentialist arguments for basic rights" *Samuel Freeman* examines three kinds of arguments consequentialists have made for moral, human, or basic individual rights that respond to these criticisms. First, there is the indirect consequentialist framework provided by J.S. Mill; second, there are distribution sensitive accounts of well-being and other goods; and third, there are accounts that directly incorporate rights and other moral concepts into the good that is to be maximized. In response to Mill, even granting he has shown that basic rights and liberties are necessary for individual well-being, Freeman argues that this does not warrant the conclusion that *equal* rights and *equal* freedoms are always or even ever necessary to maximizing the *sum total* of individual well-being. He thinks that similar problems apply to the second position, which incorporates equality of goods (of welfare, autonomy, etc.) or other distribution-sensitive values into the consequentialist maximand (argued for by T.M Scanlon, Larry Temkin, Bill Talbott, and Philip Pettit). According to Freeman, equal distribution of one or more goods does not imply equal rights of the kinds advocated by liberal and social democrats or human rights advocates. Finally, the third position, best represented by Amaryta Sen, argues that equal rights and fair distributions are themselves intrinsic goods to be promoted for their own sake. Freeman contends that this position is not really consequentialist but rather is a pluralist intuitionist conception that requires balancing aggregate goodness against antecedent moral principles of fairness and individual rights.

Rowan Cruft's essay "Human rights as rights" defends the thesis that individualistic justification is one of the hallmarks of human rights. Combining this conception of human rights with standard worries about socioeconomic and other "expensive" rights can tempt one to take the phrase "human rights" to refer to any individualistically justified weighty normative consideration – including considerations that are not rights in Hohfeld's sense. Cruft maintains that abandoning a Hohfeldian conception of rights is problematic in several ways: for in-

stance, it makes it difficult to distinguish rights from their grounding values, and can make it unclear in what sense rights-violations genuinely wrong right-holders. But the essay ends with the suggestion that – due to the nature of individualistic justification – these problems are less worrying for human rights than for other rights.

The aim of *Corinna Mieth*'s paper "On human rights and the strength of corresponding duties" is to determine the strength of individual duties corresponding to human rights. While Onora O'Neill claimed that the existence of social human rights depends on the allocation of corresponding duties, Elizabeth Ashford holds that it is not the existence but the realization of social human rights that depends on their institutionalization. From this she concludes that there are individual duties to institutionalize human rights under non-ideal circumstances. Mieth focuses on the strength of these duties. She suggests a reconstruction of the strength of duties according to three criteria. The first criterion is the significance of the good that is protected by a right and the corresponding duty. This leads to a differentiation of the strength of duties according to the theory of goods that diverges from the differentiation of negative and positive duties found in the theory of action. Furthermore, Mieth defends the idea that reasonable demandingness can be considered a second criterion for the strength of duties. Thirdly, the specificity of the content of the duty has relevance for its strength. If this is correct, then the duties of an average person to institutionalize human rights are only weak. Therefore, Mieth proposes a shift from duties to responsibilities. Even if duties of institutionalization are underdetermined in general and therefore only weak, it may be possible to assign responsibilities to improve human rights standards.

The last contribution to the second part of this volume also addresses the question of the demandingness of rights-corresponding duties but focuses on individuals as duty bearers. In his paper "The moral demandingness of socioeconomic human rights", *Jan-Christoph Heilinger* asks whether excessive demands for moral agents speak against a moral framework such as socioeconomic human rights. In other words, is an account of human rights that embraces welfare rights unsound if it turns out to be extremely burdensome for moral agents? After an analysis of the relationship between human rights and the corresponding, potentially overdemanding duties, Heilinger argues that not only institutions but also individual agents are addressed by these duties. Next, he introduces the "moral demandingness objection" as a meta-theoretical criterion to judge the soundness of a moral theory and shows different

ways in which a moral theory might demand more than agents can do or can be reasonably expected to do, particularly in the context of human rights. His paradigm case is the alleged human right to adequate food and its corresponding duties. Heilinger argues that excessive demands mirror the current circumstances of extreme but in principle preventable world poverty. Hence, extremely burdensome demands should be taken neither as an argument against the moral theory of human welfare rights nor as a pre-emptive exculpation of agents failing to live up to the duties corresponding to these rights. However, obligations corresponding to welfare rights are not the only type of obligations for moral agents; therefore, they should not always and exclusively strive to fulfill these obligations.

Whatever the nature of human rights might be, and whatever their status as rights exactly involves, one feature seems to be essential in any case: Human rights are universal rights. Nevertheless, anyone claiming that human rights are universal is confronted with the fact that there are quite different moralities to be found in the world – present and past. So, are human rights really universal? Is there enough common ground between all moralities for a justification of human rights? Do we even need such a common ground? The papers of the *third part* of this volume try to answer questions like these.

In his paper "Common humanity as a justification for human rights claims" *Simon Hope* argues for two related conclusions. His primary concern is to investigate the standard justification for human rights in the modern human rights culture: That *human rights are held in virtue of our common humanity*. Hope argues that the depth and breadth of moral diversity raises serious questions about whether the features of common humanity standardly appealed to can stand as intelligible moral reasons to the bearers of different forms of life. At the same time, he does not think a retreat to a Rawlsian-inspired "political" conception of human rights is justified. Ordinary moral reasoning does not break down completely when addressed to an unbounded domain of agents. Although necessarily constrained, ordinary moral reasoning about the human condition can justify human rights claims. But that reasoning must appeal to vulnerabilities inherent in the human condition, rather than features of personhood, if intelligible reasons are to be advanced.

On the one hand, the universality of human rights is, as it seems, part of their very nature. On the other hand, when we look at the mor-

alities actually endorsed by different persons/cultures etc., we find a great variety, including quite different views on the nature and importance of human rights. From a philosophical point of view, there seem to be two different options, one as unsatisfactory as the other: Either we must assume that many people/cultures etc. are deeply wrong about fundamental moral matters, or we have to admit that human rights are not universal after all. In his paper "Human rights and moral diversity" *Gerhard Ernst* tries to find a solution to this problem by outlining a morally decent form of moral relativism. He is convinced that there is a deeply contingent element in morality as such which allows for some variation concerning a morally acceptable stance towards human rights.

The present volume presents new philosophical papers, written by leading philosophers in the field, inquiring into crucial aspects of the current philosophical debate about human rights. It includes selected papers from a workshop on the philosophy of human rights held in 2009 at the Venice International University as well as invited papers. The Venice workshop was part of a project on human rights established by the *Junge Akademie* and the *Berlin-Brandenburg Academy of Sciences and Humanities*. First and foremost we thank the authors for their contributions to this volume. We also owe our gratitude for generous financial support to the Udo Keller Stiftung–Forum Humanum. Furthermore, special thanks go to Erich Ammereller for pulling most of the weight in organizing the workshop just mentioned, and to him, Konrad Petrovszky, Tobias Pulver, and Karsten Schoellner for their help in preparing this volume.

Stuttgart and Zurich, August 2011 The editors

I.
Human Rights: Moral or Political?

Human rights: questions of aim and approach

James Griffin

1. The question of aim and approach

I shall step back from the discussion of human rights going on now in philosophy, political theory, and jurisprudence and ask a question about it – the discussion. What are we philosophers, political theorists, and jurisprudents trying to do? One might think that the answer is obvious: we are trying to understand better what human rights are. But that answer is most unclear. 'Human rights' as used in ethics? Or in the law? Or in political life? If in ethics, rights derived from over-arching ethical principles, as Kant derives his account of 'natural rights' from his Doctrine of the Right, or John Stuart Mill derives his account of 'rights' from the Principle of Utility? Or 'rights' as used now in evaluating particular societies? If in the law, the law as it is? Or as it should be? And the law where? If in politics, in its history? Or in an empirical account of political institutions? Or in setting standards? All of these different aims themselves require different approaches.[1]

2. Systematic and piecemeal approaches

One might think that the most rational approach is what I shall call 'systematic'. One starts, ideally, by developing a general theory of value, then one develops a theory of ethics in general, then a theory of rights in general, followed by theories of *legal* rights and *moral* rights, and finally by a theory of *human* rights, either *moral* or *legal*. In our day, Carl Wellman provides a distinguished example of this approach (Wellmann 1985, ch. 1 and 1997, ch. 1).

A different approach is what I shall call 'piecemeal'. One starts with a particular notion of human rights, say, the notion that emerged from the long natural rights/human rights tradition starting in the Late Mid-

1 This paper is a substantially revised version of Griffin 2010.

dle Ages, modified substantially in the seventeenth and eighteenth centuries, and greatly articulated and mobilized in national and international life by the United Nations following the Second World War. This notion of 'human rights' is now used widely – in law and political life and ethics. Then one must further focus one's concern: one is interested, one may decide, in how this notion of human rights figures in the most plausible ethics that one can find. Its role in ethics would make demands on the notion that would lead to the filling out of its sense, in particular to the provision of much needed existence conditions for a human right. This filling out would invariably involve appeal to more abstract ethical considerations, but perhaps nothing as abstract as Wellman's 'general theory of value' or Kant's Doctrine of the Right or Mill's Principle of Utility. One could wait to see how abstract one's explanation has to get. One would start, piecemeal fashion, to make the ethical notion of a 'human right' clearer. An example of this approach would be a book I recently published (Griffin 2008, ch. 2).

Why not adopt the systematic – and apparently much more rational – approach to human rights? For two reasons. First, the few explanations of the term 'rights', on its own, that we have been given so far seem to me failures. The most influential one in the last few decades is that of Joseph Raz, and I have explained in my book why I think it fails (ibid., 54–56; 261–5). In addition to that, there is Wittgenstein's case for the impossibility of a verbal definition of many terms (Wittgenstein 1953, sects. 64 ff). The example he uses is the noun 'game', but the noun 'right' is no more promising a subject for verbal definition than the noun 'game'. I know that a *definition* and an *explanation* are different things (Raz, for example, was not attempting a verbal *definition),* but they are still close enough for Wittgenstein's skepticism about verbal definitions to be a worry about certain attempts at a quite full explanation. And think of the extraordinarily varied ground now covered by the noun 'right': 'the right has triumphed', 'by rights she should have it', 'he upholds the right' (i. e. righteousness), 'put it to rights', 'the rights of customers/patients/depositors' (as announced by a shop/a hospital/a bank), and so on. The lexicography of the English noun 'right', for example as one finds it in the Oxford English Dictionary, leaves one a long way short of identifying the sort of 'right' that we are after.

My second reason for not choosing the systematic approach is that it is not needed. When the Glossators in Bologna in the twelfth or thirteenth centuries first used the noun 'right' ('ius') in our modern sense, it was already understood as a natural right and was later explicitly

called that. And, as we know, the adjective 'natural' later gave way to the adjective 'human'. The Glossators did not first have the notion of the *genus* 'right' and afterwards introduce a *differentia* to produce the species 'natural right'. They *started* with the class 'natural right'. What is faulty with the meaning of the term 'natural right' as they used it? It is true that there were several vaguenesses in it: 'natural laws', which were seen as the grounds of natural rights, were not at all easy to identify. And there was even greater indeterminacy in the sense of the successor term 'human right', after the philosophers of the seventeenth and eighteenth centuries got finished secularizing it – secularizing it because of their enhanced views of the powers of human reason. But what more would we need to make the term 'human right' satisfactorily determinate in sense (merely 'satisfactorily', not 'fully')? Nothing, I should say. So why not be content with the piecemeal approach?

So my two thoughts come down to this: (1) I doubt that we can make a success of the systematic approach, and (2) in any case, I doubt that we need it to understand human rights.

There is also the danger that the systematic approach will carry one off in a direction in which one does not want to go. My aim is to understand the notion of 'human rights' that comes out of the tradition that I sketched a moment ago. It is at the center of an on-going public discourse of human rights now used in ethics, law, and politics. Kant and Mill have theories of value in general and single highest-level moral principles – Kant has his Doctrine of the Right and Mill his Principle of Utility. But in these two philosophers' hands the terms 'natural right' (Kant) and 'right' simpliciter (Mill) come to have markedly larger extensions than the term out of the tradition has – substantially larger in Kant's case and even larger in Mill's. Indeed, the extensions are so much larger that Kant's and Mills' notions of a 'right' turn out to be different from the notion that emerged from the tradition. Kant and Mill have, in effect, changed the subject. What they have done is to commandeer the language of 'rights' and put it to use in spelling out their own accounts of morality. There is nothing wrong with that, though it may cause confusion. But anyone who adopts the systematic approach is at risk of finding that this approach, like Kant's and Mill's, produces a markedly different-sized extension than the extension yielded by the tradition. To which, then, would the systematizer concede greater authority: to the implications of this systematic approach or to the outcome of the tradition? Would the systematizer react by revising this approach or by making major revisions to the extension that emerges from the tradition?

This question, of course, takes us back to that series of questions about the particular aim of an account of human rights. What is the systematizer's *aim?* It is not yet clear.

3. How problems can determine approaches

Nearly everyone who thinks deeply about human rights acknowledges that there is a problem with the notion: we need to understand better what human rights are. We differ about the nature of the problem and about its solution. So let me explain how *I* diagnose the problem.

I believe that the sense of the term 'human right' suffers from a high degree of indeterminateness. It may not be uniquely indeterminate among ethical terms, but it is considerably more indeterminate than most of them. We have too few agreed criteria for determining when the term is used correctly and when incorrectly for the discourse of human rights to be satisfactorily reason-guided. When the term 'natural right' was secularized in stages, the background notion of 'natural law' along with its context in Christian metaphysics was dropped as unnecessary, and nothing was put in its place. The term 'natural law' continued in fairly wide use, but by then it usually meant no more than a moral principle independent of law, custom, or convention. It is not that there were *no* criteria for correct and incorrect use; the idea of a right still had some intension: a human right was a right that we had simply in virtue of being human. And we do not need to have a *fully* determinate sense of the term; practically all terms have some indeterminateness, if only at the edges. What we need is, rather, a sense that will at least give us existence conditions for a 'human right', and will supply grounds for deciding the content of particular 'human rights', and will indicate how in general to go about trying to resolve conflicts of human rights. In short, we need a sense determinate enough to allow us to make these quite basic rational moves with the term – moves that we are unable to make at present.

But the term 'human right' used where? I think that the most important use of the term is that in the on-going public discourse of human rights that emerged from the tradition that I sketched. It is the term 'human right' used today by most philosophers, political theorists, international lawyers, jurisprudents, civil servants, politicians, and human rights activists. In any case, that is the use that I am concerned about. It is a use in which ethics plays a basic role, as it did in the tra-

dition, though nowadays, as I shall come to, that basic role for ethics is sometimes denied by international lawyers. And it is a use of the term in a fairly wide and diverse community, at the heart of which are those especially concerned with human rights, whom I listed a moment ago: philosophers, political theorists, international lawyers, and so on.

My point here is that one's particular *aim* in clarifying the term 'human right' can determine how one is to approach the subject. It can determine the constraints on what one tries to do. Given what *I* want to do, one major constraint clearly is ethical. I want to clarify the idea of a human right that would appear in the most plausible ethics that one can find. So there are the constraints imposed by its having to fit into that demanding context. But the idea that I am interested in also appears in an on-going public discourse used by a certain heterogeneous linguistic community, and that role generates certain *practical* constraints. These practical constraints are less well-known than the ethical constraints that I just mentioned, so let me briefly explain them.

My ultimate aim is to make the sense of the term 'human right' satisfactorily determinate. There have been strong inflationary pressures on the term in the past, and they are still at work. The belief is widespread, but mistaken, that human rights mark what is most important in morality; so whatever any group in society regards as most important, it will be strongly tempted to declare to be a human right. The group will be out to annex the rhetorical force of the term 'human right' for its own keenest concerns. It is now also a common, and not unjustified, belief that getting something widely accepted as a human right is a good first step to getting it made a legal right; so there is a great temptation to assert that anything to which one wants to have a legal guarantee is a human right. And getting something accepted as a human right transforms one's case. One is transformed from beggar ('you ought to help me') to chooser ('it is mine by right'). If one can claim by right, one is not dependent upon the grace or kindness or charity of others. These features of the discourse of human rights are responsible both for great good and great bad, the bad being the ballooning of the discourse itself during the second half of the twentieth century.

My belief is that we have a better chance of improving the discourse of human rights if we stipulate that only normative agents bear human rights – *no exceptions:* not infants, not the seriously mentally disabled, not those in a permanent vegetative state, and so on – though we have weighty moral obligations to all of them of a different kind. For the discourse to be improved, the criteria for correct and incorrect use of the

term must be fairly widely agreed upon. They would not have to be anything like universally agreed upon, but there would have to be fairly wide agreement among those central to the discourse: philosophers, international lawyers, etc. If a good number of the members of those groups came to agree on the criteria, the rest of the members would be likely in time to follow, and the general public would themselves to some extent eventually fall in line.

That sequence of events is what we should need for an appreciable improvement in the discourse. What, then, should we need to set off that favorable sequence of events? The start would be the appearance of a substantive account of human rights – some not too complicated, fairly sharp-edged normative intension for the term – which commended itself to a growing number of those central to the discourse. There is no mechanism available that would be likely to lead us to agree to a very few, but not more, exceptions to the proposed new intension. Even if there were, the inflationary pressures are all still with us and all still very strong; there would soon be too many exceptions for the criteria for correct and incorrect use to remain sharp-edged enough to produce the needed improvement.

I should stress that what moves me is not the wish to reverse what is called the 'proliferation' of rights. I have no views about how many human rights there are. Nor, given the different levels of abstraction in their formulation, do I know how to enumerate them. We speak of 'proliferation', in a pejorative sense, only because we suspect that some of the declared rights are not true rights. What moves me is the wish to end the damaging indeterminateness of sense of the term 'human right'.

Once one thus admits elements of stipulation into the grounds of human rights, does one not then abandon a central claim of the natural rights/human rights tradition: namely, that human rights are grounded in human nature? I think not. On the contrary, the decision embodied in the stipulation is the decision to derive human rights solely from certain values constitutive of human nature. That element of stipulation does not make the constituent values of normative agency, namely autonomy and liberty, any less able to be considered 'objective' or 'natural' or even in a sense 'real'. Still, one cannot deny that there are several feasible alternatives to adopting the restriction to normative agency that I recommend. For example, there is the personhood account expanded to include certain potential persons such as infants; there is the basic need account; there is a more pluralist account than mine that includes

other goods in addition to the goods of normative agency; and so on. Any of these competing accounts could be adopted, though, I am claiming, with less benefit. I may not simply insist that human rights *are* derived solely from normative agency; that belief would need a great deal in the way of justification, which I have not given. Although some of the alternative accounts (e.g. the need account) can be faulted for not adequately explaining human rights, others of them (the account that includes certain potential persons or the more pluralist account) cannot be. The objection to them is practical: they do not give us the beneficial determinateness of sense we need. That is why the sort of stipulation I am making is not arbitrary. It has to be justified.

There are different kinds of stipulation. Many, of course, are arbitrary, but some are part of a disciplined project. My project is to make 'human right' – this very widely used term, this term used by many different sorts of people – more determinate in sense. So my aim is, in part, a certain practical outcome: change in a public discourse. One, but only one, of the practical constraints on my project is that my proposed more determinate sense for the term 'human right' have a fighting chance of being adopted by the members of the many groups who make up its central linguistic community. Another constraint is that the proposed more determinate sense have a reasonable chance of enduring, that any proposed more determinate sense not be so complicated that the criteria for correct and incorrect use would in time become muddled and confused and eventually slack and the greater determinateness of sense would thereby be undone.

And that is not a far-fetched fear: the inflationary pressures on the term are all with us still. Call these, respectively, the constraints of uptake and of durability. Not all who write about human rights share my project, so their work may well not be subject to these constraints. But very many writers do share my project.

Suppose a writer who shares exactly my project adopts a much more systematic approach to it than I do. The writer starts, let us say, not with anything quite so abstract as a general theory of value, but with a general account of ethics. The writer, let us say, explains what a human right is by explaining what moral obligations are, especially the categorical moral obligations correlative to rights simpliciter and to moral rights in particular, then by using those resources to explain the special peremptory obligation characteristic of human rights.[2] But this approach

2 For an example, see Tasioulas 2002 and 2010.

would require working out a general account of the nature of moral obligation. That is no small job; it is not even clear that it is possible. What is more, we know that the account that the writer would eventually develop would come nowhere near commanding widespread agreement; the history of philosophy, alas, shows that. The account would be too teleological for some, or too deontological, or would make the virtues too basic in the ethical structure, or not basic enough, and so on. I am not saying that no one particular account of obligation would have more *rational support* than another, or that a person could never decide which account the *most rational* one was. My claim is, rather, that there would not be general *agreement* on what the most rational account is, and that a term with a satisfactorily determinate sense, which is my aim, requires fairly general agreement. The proposed more determinate sense must be graspable by and acceptable to members of the various groups central to the public discourse of human rights: that is, certain national and international civil servants, legislators, international lawyers, human rights activists, as well as philosophers, political theorists, and other academics. To arrive at a satisfactorily determinate sense there must be fairly wide convergence on criteria for correct and incorrect use of the term. The more systematic approach that I just sketched would fail to meet the constraint of *uptake*.

4. Monist and pluralist approaches

Let me quickly give one more example of practical constraints at work. The most promising accounts of human rights ground human rights partly in certain basic human interests. An interest account suggests that we make the sense of the term 'human right' more determinate by spelling out the particular interests that we should see human rights as protecting. Although the theological content of the term 'human rights' was gradually abandoned over the span of the seventeenth and eighteenth centuries, the ethical content was not. From time to time in the course of the human rights tradition one encounters the idea that human rights are protections of our human status and that the human status in question is our rational or, more specifically, normative agency. The two basic human interests grounding human rights, I have proposed in my book, are the two constituents of normative agency: autonomy and liberty. My proposal is not a *derivation* of human rights from normative agency; it is a *suggestion* based on a hunch that this par-

ticular way of remedying the indeterminateness of the term will turn out to suit best its role in ethics and society. I try to bolster this suggestion in my book by looking at how it works out when applied to several important cases.

The most plausible alternative to my account, I should say, incorporates my interest account, but maintains that further, perhaps many further, human interests can ground human rights, not just the two that I propose, and perhaps also moral considerations that are not entirely human interests, namely justice, fairness, and equality. For example, on this view our keen interest in avoiding great pain can ground a human right not to be tortured; the ground for that right does not have to be limited, as I propose, to torture's assault on our autonomy or liberty. And our keen interest in understanding human life and its duties and rewards can ground a human right to basic education; the ground for that right does not have to be limited, as I propose, to education's promotion of autonomy and liberty. And the ground of a human right against certain forms of discrimination may not be human interests at all, but fairness and equality. I shall call these two competing accounts 'monist' and 'pluralist'. The monism and pluralism involved have to do with values. So my account is not, strictly speaking, monist but dualist; human rights, I say, are grounded in *two* distinct values, autonomy and liberty. But since I also use a single term to cover them both, 'normative agency', let me accept the label 'monist'.

How can we assess these two competing accounts? In several different ways, I should say. There are difficulties simply in formulating the pluralist claim. Where do the further grounds for human rights added by pluralists *end?* Why do they end *there?* And if the term 'basic' in the expression 'basic human interests' is brought in to help answer those questions, what would 'basic' mean here? And if a ground that a pluralist adds comes in degrees, then we have to know how much is needed to make it a matter of a human *right. And which* matters of justice, fairness, and equality are integral to human rights, and which are not, and *why?*

But I am interested now in only one kind of assessment: meeting the practical constraints of uptake and durability. If it is the term 'human right' as used in the on-going public discourse that interests us, then those constraints will have to be met. There are forms of pluralism that would clearly fail to meet them. Perhaps even *most* forms of pluralism would fail. I am not going to try to decide this. My point is different: if one's concern is the term 'human right' as used in the public dis-

course, as it probably is for most of us, then the ability to meet these constraints is an important, but ignored, form of assessment. In most present-day philosophical writing about human rights, the *aim* of the work is unspecified. A reader who wants to know what the aim is will no doubt be left in the dark, and the author will probably be in the dark too. The answer cannot be: the *truth* about what human rights are. There is no one truth to arrive at.

5. Evaluative and functional approaches

Many writers approach human rights largely under the influence of the tradition. They see human rights in the context of a theory of what is especially valuable in, and special to, human nature. They see the present intension of the term 'human right' as having been largely settled by the end of the Enlightenment. It is not that they need think that nothing important has happened to the idea since then. After something of a hiatus in the nineteenth century, the discourse of human rights went through a period of astonishing development during the twentieth century – developments, for example, in international law – that helped to settle the extension, and to some extent also influenced the intension, of the term. But the intension remained substantially as the Enlightenment had left it: rights that we have simply in virtue of being human, on an ethical conception of what it is to be 'human'. Call this the 'evaluative' approach.

My own account of human rights, since it bears all the features so far mentioned, is an 'evaluative' account. It proposes that we take the word *'human'* in the term 'human right' to refer to our valuable status as human persons – that is, as normative agents.

But an account of human rights cannot stop there. On its own, the consideration of normative agency is often not up to fixing anything approaching a determinate enough line for practice. We have also to take into account practical considerations: to be effective, the line has to be clear and so not take too many complicated bends; given our proneness to stretch a point, we should probably have to leave a generous safety margin. So to make the content of, say, the right to security of person determinate enough in sense to be an effective guide to behaviour, we need a further ground – call it 'practicalities'. So in my account I propose two grounds for human rights: normative agency and practicalities. The existence conditions for a human right would, on this account, be

these. One establishes the existence of such a right by showing, first, that it protects an essential feature of normative agency and, second, that its determinate content results from the sorts of practical considerations that I just roughly sketched.

There is, in contrast to this 'evaluative' approach, what I shall call the 'functional' approach. Those who adopt the functional approach attach great importance to what, in modern times, we have come to *do* with the language of human rights. Indeed, in recent times in the anglophone world this has been the most common approach. Ronald Dworkin has explained legal rights in terms of their function as *trumps* over appeals to the general good. Robert Nozick explained human rights in terms of their function as *side-constraints* on other justifications of action. John Rawls explained human rights as grounds for the rules of war and for intervention in the internal affairs of another country.[3] All of these are functional accounts of rights.

Writers who adopt the functional approach concentrate on how the developments of the twentieth century, especially in international law, have shaped the idea of a 'human right'. They say that there is a *modern* conception of human rights, mainly the creature of the United Nations, the function of which is to do a certain kind of work in global politics. If one looks at the real world of legal and political practice, they claim, one finds that the term 'human rights' either relies on their legal recognition as limiting state sovereignty or constitutes a claim that they should be so recognized. Two recent advocates of the 'functional' approach, much influenced by Rawls but modifying him, are Joseph Raz and Charles Beitz.[4]

This sharp contrast between 'evaluative' and 'functional' approaches, if it were defensible, would be of great importance. But the claim that the function, even merely the predominant function, of human rights nowadays is to limit sovereignty is a factual claim and, I should think, surely false. These days human rights discourse is still commonly used in our national as well as our international life: for example, in the European Union's fairly recent bill of rights and its more recent incorporation in the legal systems of several member states, in current campaigns against violations of liberty (for example, in Guantánamo), and in similar campaigns against torture.

3 See Dworkin 1977, xi–xv; 188–191; Nozick 1974, 28–33; Rawls 1999.
4 See Raz 2010; Beitz 2009.

This contrast between 'modern' and 'traditional' is much too sharp. If one looks closely at how the United Nations conceives of human rights, one finds both *new* features and *old*. The new feature is that they are now mobilized to serve in the regulation of the global order. But it is also the case that the Commission on Human Rights, which drafted the Universal Declaration of Human Rights, started from a compendium of all examples of human rights taken from historical documents. They started their deliberation with the historical *extension* of the term. And, like all sensible law-makers or standard-setters, they did not want to go too deeply into matters of *justification* because there is generally more ready agreement on examples than on their rationale. Despite this, they *did* commit themselves to one ethical claim: that human rights were to be seen as deriving from 'the inherent dignity of the human person'. This phrase, which appears in the Preambles of the foundational human rights instruments, namely the two Covenants of 1966, would inevitably call to the mind of a lawyer or jurisprudent or a political thinker Pico della Mirandola's classic tract *The Dignity of Man*. And the phrase 'the dignity of the human person' refers to a value, not spelt out by the United Nations but, none the less, a value that the drafters installed as the foundation of human rights. It is true that the United Nations put the term 'human right' to new uses, but they did not just *amputate* its history. They combined new elements with old, both of which must be kept in mind in order to properly understand current thought about human rights.

In any case, a particularly salient feature of our present notion of a 'human right' is its indeterminateness of sense. What are we to do about that? This question manifests itself whenever we need to know the *existence conditions* of human rights, or when we need to settle the *content* of a particular human right, or when we must resolve *conflicts* of rights. And we need to do all of these things sometimes; adopting the functional approach does not save us from that. It is at these times, I say, that substantive ethical input is necessary – not sufficient (the law must play a role too) but necessary. We have a human right to *health*. But what is that a right *to?* The United Nations answers: it is a right to the highest attainable standard of physical and mental health. But even some officials in the World Health Organization reject that as too lavish. How are we to tell if it is? And a judge on an international bench cannot resolve conflicts involving human rights by fiat. The resolution must be reasoned. But what will count as good reasons? And if ethical input is necessary, what is it to be?

The 'functional' approach may seem appealing because it is grounded in something reassuringly real: actual practice. But the problems with this ground are also stubbornly real, and the 'functional' approach has no solutions to them.

One can offer a solution to them by supplying an interpretation of the United Nations' use of the word 'dignity'. The word 'dignity' is used in ordinary speech to refer to much more than just a person's status as a normative agent. A person in advanced dementia must be treated with dignity. Even the corpse of a beloved parent must be treated with dignity. My case for adopting my interpretation of the United Nations' phrase 'the dignity of the human person' is the project of my book, but I should like just to observe here that there is something obvious about that interpretation. When Pico wrote about 'the dignity of man' he meant our being normative agents. And, to take a modern example, when in 1965 the Ecumenical Council called by Pope John XXIII (Vatican II) issued its declaration Dignitatis Humanae, it too meant our status as moral agents.

6. Coda

When nowadays we write about human rights, we usually leave entirely unspecified what our particular aim and approach is. We should state them. And we should be prepared to justify them.

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On the nature of human rights

John Tasioulas

I. In search of the normative core

What are we talking about, when we talk about human rights? No doubt various senses attach to the phrase "human rights". Some are purely descriptive, characterizing human rights as features of psychological, social or institutional reality. In inquiries conducted by historians, sociologists, political scientists or lawyers, "human rights" may refer to a belief-system prevalent in certain Western cultural circles or to the rights ascribed by a positive legal order to all under its jurisdiction. But there is another, and arguably explanatorily prior, way of conceptualizing human rights, according to which they are normative, or reason-giving, standards of a certain kind. So understood, human rights need be neither widely-credited nor actually embodied in any social practice or legal institution. But even when construed normatively, might there not still be a multiplicity of concepts of human rights, each with a respectable foothold in ordinary usage? It would seem so. However, this does not render futile the enterprise of seeking to identify the core or focal concept, the basic normative idea that enables us to make the best sense of what we pre-reflectively identify as the discourse and practice human rights – or the human rights culture, as I will sometimes call it.[1] This is the core concept insofar as it constitutes the underlying normative idea that animates this culture in its diverse manifestations, with many other prominent concepts of human rights being profitably interpretable as modifications of it or otherwise dependent upon it.

The desiderata to which we should attend in seeking to identify the core normative concept of a human right are a function of what it is for a philosophical theory to make sense of the culture of human rights. In the sort of philosophical project I wish to pursue, this consists in giving an account of the nature, grounds and practical significance of human

1 On focal concepts, see Finnis 2011, ch.1.

rights that both jibes with that culture and presents human rights as a defensible species of reason-giving standard, one that earns a place in our general repertoire of normative considerations. Under this general heading, three more specific desiderata have particular salience.

First, a theory of human rights must capture the *distinctive importance* of this class of normative standards. Not every reason-giving consideration, or even moral consideration, is important; nor is every important normative consideration a human right. Distinctiveness militates against equating the concept of human rights with some pre-existing normative concept, while importance excludes interpretations of human rights that make them readily defeasible by normative considerations of other kinds. The second desideratum is *fidelity* to the human rights culture that has emerged post-1945, especially as it is crystallized in the International Bill of Human Rights: the Universal Declaration of Human Rights of 1948 (UDHR) along with the International Covenants on Economic, Social and Cultural Rights (ICESCR) and Civil and Political Rights (ICCPR) that came into force in 1976. Fidelity is a complex desideratum, not least because the culture of human rights is multi-faceted and harbors rival self-understandings, let alone outright deficiencies. So its satisfaction had better be compatible with criticism of that culture. But if criticism is to get a grip on its intended object, it must reflect a grasp of the central normative idea that underlies the culture. It is important to stress, however, that fidelity does not simply reduce to the quantitative matter of maximizing the number of items gleaned from the key human rights instruments that can be interpreted as broadly matching (or claiming to match) the content of norms properly regarded as "human rights" by the theory's lights. Still, one would expect that norms roughly corresponding in content with the paradigmatic items in such instruments – for example, the human rights against torture and enslavement – will be interpretable as (claiming to be) "human rights" according to a theory that displays the requisite level of fidelity. Any discrepancies between the theory and the instruments are to be explained in ways consistent with the hypothesis that the former captures the normative idea behind the familiar instruments. Finally, a successful, non-sceptical, theory of human rights will present such rights as standards with genuine reason-giving force. Moreover, because of the claim to universality inherent in the discourse of human rights, a cogent response must be offered to the widespread anxiety that the discourse simply imposes "Western" or "liberal" values in a way that unjustifiably

marginalizes or overrides the claims of non-Western and non-liberal traditions. Call this desideratum that of *non-parochialism*.

Success in this philosophical project is by no means assured: the human rights culture might be found, in the end, not to be plausibly interpretable as reflecting any cogent underlying normative idea. However, a theory that satisfied these desiderata would generate not only an enhanced understanding of the discourse and practice of human rights, but also a framework in terms of which to evaluate and improve it, in light of its own underlying ideal.

This chapter addresses only one question that arises within a philosophy of human rights: the specification of the *nature* of such rights, identifying what it is that distinguishes the concept of human rights among other normative concepts. Another important question, not addressed here, concerns their *grounds*: given what a human right is, under which conditions does a would-be human right genuinely merit that title? Taking either of these questions seriously does not commit one to the existence of any human rights. Even a sceptic about human rights, like a sceptic about the existence of unicorns, needs a tolerably clear idea of the nature of the thing whose existence he is sceptical about, before explaining his reasons for doubting that anything satisfies the conditions for being a thing of that sort. Disentangling the two questions, at least initially, promises two benefits. First, it enables us to characterize human rights in a way attuned to how the phrase "human right" is employed and understood in the wider human rights culture. By respecting that characterization, we can avoid simply changing the subject, as philosophers are sometimes prone to do when they speak about human rights, thereby diminishing the wider relevance of their investigations. Second, philosophers should aim to ensure that their disagreements about human rights, however apparently deep-going, are nonetheless genuine disagreements about a common subject-matter. Of course, the situation is complicated by the fact that the twin aims of broader relevance and genuine philosophical engagement may pull in opposite directions, especially when philosophical controversies acquire a direction and momentum independent of the human rights culture. In any such conflict relevance should tend to prevail, at least in a philosophical investigation that takes fidelity seriously.

An additional complication is that our answers to the questions of the nature and grounds of human rights cannot be entirely sealed off from one another. One's estimate of the best prospects for grounding human rights may properly bear on how one conceives of them, if

only because there is good reason to avoid the sceptical conclusion that hardly any sound moral principle is aptly characterized as a "human right". Conversely, one's conception of human rights may influence one's views as to their grounds. For example, a religious grounding of human rights is arguably more attractive if we conceive of such rights as inhering in all members of the human species, rather than just those of its members that possess certain valuable qualities, such as the capacity for rational self-determination. This is because human rights might be thought to track the value bestowed on all human beings by God's special love for them, irrespective of variations in their capacities (see e.g. Wolterstorff 2008 and Perry 2009). Moreover, one's conception of the nature of human rights might directly constrain the kind of grounding appropriate to them. Still, we should resist building into the nature of human rights anything like a complete account of their grounds. This maneuver risks obtaining victory over one's philosophical opponents on the question of grounds by means of the dubious expedient of treating them as addressing a different subject.

It would be a mistake to infer from what has just been said that the nature of human rights is a relatively uncontested terrain on which other philosophical disputes about human rights – their grounds, the specification of their holders and the bearers of their corresponding duties, the appropriateness of giving them legal force, and so forth – are played out. Even philosophers who agree on the importance of fidelity to the human rights culture often subscribe to widely differing views about their nature. This chapter outlines three broad families of approach to the nature of human rights – the Reductive, Orthodox and Political Views – and defends a version of the Orthodox View, according to which human rights are moral rights possessed by all human beings simply in virtue of their humanity. Orthodoxy stakes out a conceptual terrain intermediate between its two rivals. Against the Reductive View, it insists that human rights belong to the more general category of moral rights. Against the Political View, it resists incorporating some specific political function – such as operating as benchmarks of political legitimacy or triggers for international intervention – into the concept of human rights. Human rights may be properly invoked to perform myriad political functions, but whether and to what extent they should do so is a substantive matter, not something constitutive of an adequate grasp of their nature.

II. The Reductive View

On the Reductive View, to say that there is a human right to X ultimately amounts to asserting that in the case of all human beings enjoying or having access to X serves some value that can be more perspicuously specified independently of the notion of a right. On this view, no illumination about the nature of human rights is to be derived from conceiving of them as belonging to a more general class of rights. Perhaps the most familiar versions of reductivism construe human rights as human goods of some sort. But non-teleological versions are also possible, for example, theories to the effect that assertions of human rights amount to claims about equality or respect, where the latter are not even partly understood in terms of the idea of a right. In this section, I shall only discuss teleological reductivism.

Consider the human right to health. On a simple version of the Reductive View, asserting such a human right is tantamount to the claim that health is a universal human interest (or that access to certain forms of health care serves everyone's interest in health).[2] Elaborating somewhat, the claim is that in the case of each and every human being: (a) health is an intrinsically valuable component of their lives, i.e. being healthy in itself makes one's life better than it otherwise would be, or (b) health is instrumentally valuable in a person's life, facilitating their realization of other intrinsic goods, e.g. enabling them to develop friendships, acquire knowledge, pursue worthwhile individual and social goals, and so on. Since health is a universal good, we have reasons to promote health, both our own and that of others, and we have reasons to devise laws, institutions and social arrangements that will deliver health care to those liable to benefit from it.

An important consideration in favor of this form of reductivism is that it offers a benign explanation of the tendency for human rights claims to proliferate seemingly without end. Whenever we encounter a universal human interest, or something that serves such an interest in the case of everyone, we may assert the existence of a human right. In this way we can make sense of the idea that there is a right to "the enjoyment of the highest attainable standard of physical and mental health" (ICESCR, Art 12), and also to "rest and leisure, includ-

2 The thought that major contemporary human rights documents might be best interpreted as setting out *universal human interests* has been advanced in Finnis 2011, 214.

ing reasonable limitation of working hours and periodic holidays with pay" (UDHR, Art. 24; ICESCR, Art 7).

But this simple form of reductivism faces at least two objections. First, it makes the language of "human rights" redundant, since we already have a vocabulary of human interests. No distinctive significance is accorded to the notion of a human right over and above that possessed by the notion of a universal human interest. The second problem has a dual aspect: a lack of fidelity to the human rights culture which is also a failure to capture the importance of human rights. Although reductivism chimes with the tendency of human rights claims to proliferate, this is just one strand in contemporary human rights culture. Moreover, it is a strand that arouses disquiet even among that culture's most passionate adherents. But to speak about human interests is to remain at the level of human well-being and what furthers it. It does not yet reach the level of morality – in particular, the level of obligations and their violation, and the reactive attitudes and conduct that such violations make appropriate: attitudes such as guilt and blame, conduct such as the infliction of punishment. And yet, we ordinarily conceive of human rights as prohibiting some of the gravest moral wrongs: torture, enslavement, or persecution on the grounds of religion, race or sex. With the language of human rights we embark on a distinctively moral discourse, one that does not simply reduce to talk of universal human interests. For such interests can be imperiled in all sorts of ways without moral wrong-doing of any kind being in the offing.

A natural reply is that I have only considered a crude version of the Reductive View. The reductivist might instead draw on one or other of two philosophical theories to overcome the problems examined so far: the theory of basic human capabilities, advanced in different ways by Amartya Sen and Martha Nussbaum, and the personhood theory of human rights, elaborated recently by James Griffin (Nussbaum 2000 and 2002; Sen 2004 and 2009, ch.17; Griffin 2008). One strand in capabilities theory, associated with Nussbaum, presents the language of "basic human capabilities" as a more perspicuous way of talking about what normally goes under the heading of "human rights". Some such claim is at least implicit in the following remark by Bernard Williams:

> The notion of a basic human right seems to me obscure enough, and I would rather come at it from the perspective of basic human capabilities. I would prefer capabilities to do the work, and if we are going to have a language or rhetoric of rights, to have it delivered from them, rather than the other way round (Williams 1987, 100).

Capabilities are individuals' effective opportunities to choose to realize a range of valuable states of being and doing (in the jargon, "human functionings"). One open-ended and revisable list of basic human capabilities compiled by Nussbaum includes the following elements: life; bodily health; bodily integrity; senses, imagination, and thought; emotions; practical reason; affiliation; play; and control over one's environment (Nussbaum 2002, 129–31). Capabilities are fulfilled interests at one remove, as it were: just as an interest of mine is fulfilled by engaging in valuable work (a mode of exercising valuable control over my environment), I have an interest in having the capability, or effective opportunity, to engage in such work. To this extent, capability theorists have some sort of answer to the problem of redundancy, since capabilities are not equivalent to the familiar, unrestricted notion of universal human interests. The same is true of Griffin's personhood theory of human rights. Officially, Griffin adheres to the Orthodox View. But his argumentation exhibits a pronounced tendency to identify human rights with a sub-set of universal human interests: our interests in normative agency or personhood, i.e. autonomy, liberty and the material goods needed to make both of the former a reality in our lives. Moreover, he finds virtually nothing informative to say about why human rights count as *moral rights* in the first place, and only slightly more about the way in which the considerations he calls "practicalities" help shape personhood values into human rights.[3]

But these responses to the problem of redundancy come at a price. To begin with, both theories have serious difficulties making sense of the attribution of human rights to those who lack the ability to choose or the capacity to acquire it, such as newborn infants or those suffering from severe psychological disabilities. Moreover, even in the case of competent adults, the multifarious concerns that animate the human rights culture cannot be readily shoehorned into either the "capability" or "personhood" rubrics, with their emphasis on being able to make and effectively pursue one's own choices. As I have argued elsewhere, we should prefer a more pluralistic account of the interests served by human rights (Tasioulas 2010, 658–666). In any case, the deeper problem with both theories, conceived reductively as we are now doing, is that they do not adequately track the moral dimension of human rights. For if you impair my capability to engage in valuable work – for exam-

3 For a criticism of Griffin's theory for neglecting the character of human rights as *rights*, see Tasioulas 2010.

ple, by beating me in a fair competition for the last remaining decent job – it does not follow that I have been wronged.[4] The same is true if you fail to advance my personhood interest in staying alive by offering me your spare healthy kidney when I am in dire need of a transplant. By contrast, in virtue of having counterpart duties, rights give salience to a form of moral wrong-doing through which they may be violated. These problems are exacerbated when we consider the issue of practical conflicts involving human rights. In this context, Griffin formulates an eminently plausible maxim: "Human rights are resistant to trade-offs, but not completely so" (Griffin 2008, 76). This resistance captures one vital dimension of the importance of human rights. However, the reductivist tendency of his theory leads him to disrespect his own maxim. Consider, for example, a murderer who is justly sentenced to imprisonment for a period of years. Does this sentence violate his human right to liberty? Griffin concludes that it does, but that the violation is all-things-considered justified because his right to liberty is trumped by the demands of retributive justice (ibid., 68 f.). What leads Griffin to this strained interpretation of the human right to liberty is precisely his tendency to blur the distinction between human rights and the personhood interests that underlie them. This renders human rights excessively liable to "trade-offs", in contravention of Griffin's maxim (see, for further development of these points, Tasioulas 2010, 672–678).

Against the preceding argument, some might respond that effacing the moral dimension of human rights talk is an *advantage* of reductive accounts of the teleological variety. Critics have argued that human rights encourage the infiltration of potentially destructive and oppressive moral emotions and responses – such as blame, guilt, resentment, regulation, discipline, punishment, etc. – into more and more domains of human life. And the risks of doing so are notably enhanced in the case of human rights because their supposed universality affords a basis for condemning individuals and societies that are remote from us both culturally and geographically, rendering them especially vulnerable

4 Hence Amartya Sen's acknowledgement that capabilities theory cannot deal adequately with the "process" (as opposed to the "opportunity") aspect of freedom, including the fairness of processes that bear on decisions affecting people's ability to realize functionings. This prevents capability theory from furnishing a *complete* basis for human rights; see Sen 2004, 336 f.

to demonization.[5] But unless we go as far as Bernard Williams towards a radical Nietzschean scepticism about the claims of morality as such, we should not abandon the distinctive *moral* dimension of human rights. Instead, an appreciation of the genuine risks inherent in moral discourse of a universalist cast should discipline our judgments about the existence and content of human rights, and about the societal processes to be employed for preventing and responding to their violation.

A less drastic response to the problem is to build into one's conception of basic human capabilities or personhood values some kind of claim as to their moral significance. In this vein, Martha Nussbaum regards her schedule of basic capabilities

> as a list of urgent items that should be secured to people no matter what else we pursue. In this way, we both conceive of capabilities as a set of goals (a subset of total social goals) and say that they have an urgent claim to be promoted, whatever else we also promote […] We are doing wrong to people when we do not secure to them the capabilities on this list. The traditional function of a notion of rights as side constraints is to make this sort of anti-utilitarian point, and I see no reason why rights construed as capabilities (or analyzed in terms of capabilities) should not continue to play this role.[6]

But rather than dispensing with the notion of a moral right, this maneuver may effectively end up presupposing it. For how are we to understand the type of "urgent claim" that basic capabilities involve, or the "wrong" that is done to people in not securing them, if not in terms of the idea that people have a *right* that certain capabilities be secured and that failure to comply with its counterpart duties is wrongful? Anything short of this threatens to land us with a merely aspirational reading of human rights on which they are among the innumerable goals there is good reason – even good moral reason, given their other-regarding character – for us to achieve. But assimilating human rights to the amorphous category of valuable social goals obscures their distinctiveness, while countenancing the existence of human rights without corresponding obligations compromises their importance.[7] In the end, Nuss-

5 See, e. g., Schmitt 1996, 54 f., 78 f. For a much more moderate and plausible version of this objection, pressed against human rights to "welfare", see O'Neill 2005, 438 f.

6 Nussbaum 2002, 143. Similarly, Griffin 2008, 17 asserts that a human right is "a claim we have on others simply in virtue of being human", where presumably some *moral* claim is at issue.

7 For similar reservations about merely aspirational interpretations of human rights discourse, see O'Neill 2005, 436–439. However, I differ from O'Neill

baum herself apparently does not abandon the language of rights; on the contrary, she elsewhere states that it is essential to invoke it in specifying the most important capabilities.[8]

Everything in the foregoing discussion is perfectly consistent with capabilities or personhood values doing important work within a theory of human rights. But neither notion is the conceptual kernel of human rights. Instead, we must go beyond the domain of interests and capabilities in order to capture the distinctive *moral* character of human rights. Of course, this might yet be achieved under the aegis of a less radical version of the Reductive View that identifies the concept of human rights with some independent moral notion that is not itself elucidated in terms of the idea of a moral right. Like all reductive views, such accounts will face the challenge of securing the distinctiveness of human rights. In any case, the argument so far gives us reason enough to advance to the Orthodox View, which is a non-reductive moral account of the nature of human rights.

III. The Orthodox View

The Orthodox View is encapsulated by a deceptively familiar thesis, one open to divergent interpretations:

> *(N) Human rights are moral rights possessed by all human beings simply in virtue of their humanity.*

Orthodoxy does not obviously entail any helpfully determinate position as to the grounds of human rights. However, the following methodological thesis regarding their grounding is plausibly regarded as part of human rights orthodoxy:

> *(O) The existence and content of human rights is to be determined primarily by ordinary moral reasoning, assisted and supplemented as may be necessary by empirical, philosophical or legal reasoning.*

O constitutes one historically pertinent sense in which human rights are *natural* moral rights. They are rights discoverable primarily through the

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regarding what the requirement that human rights have counterpart obligations involves; see Tasioulas 2007.

8 Nussbaum 2002, 120. And, as I mentioned earlier, Griffin himself is officially an adherent of the Orthodox View, for all the reductivist tendencies of his actual argumentation.

workings of ordinary 'natural' moral reasoning, as opposed to both divine revelation on the one hand and the myriad forms of 'artificial' reasoning generated by social conventions and institutions on the other. In this section, I will leave *O* to one side and offer an elaboration of *N*'s three constituent elements.

(a) "Moral rights …"

One sceptical response to *N*, to which an undeterred reductivist might be drawn, goes as follows: "The culture of human rights employs the notion of a 'human right' in an extremely elastic way, one that cannot without violence be regimented by any philosophically motivated understanding of the general nature of moral rights. By elaborating on the character of human rights as moral rights we risk being drawn into philosophical controversies about rights in general that are alien to the concerns of the human rights culture". Given the importance I have assigned to the desideratum of fidelity, this objection deserves to be taken seriously. My conjecture is that much is to be gained by elaborating on at least three important features of moral rights. These are largely neutral as regards divergent philosophical theories, but capture the significance, in ordinary, non-philosophical discourse, of referring to human *rights*, as opposed to human *values, goals, interests,* etc.

Counterpart duties. Moral rights – or the paradigmatic manifestation of them, usually referred to as "claim rights" – involve counterpart moral duties or obligations (I use these two expressions interchangeably).[9] The existence of a right to *x*, on the part of A, entails moral duties on the part of others variously to protect, respect, etc. A's possession, access, etc. to *x*. Moral duties are reasons for action of a special kind. First, they are *categorical*, i.e. their application to the duty-bearer, and their weight or stringency, is independent of the latter's motivation. One cannot evade an obligation, or reduce its stringency, just by altering one's preferences or desires. Second, they are *exclusionary* in their normative force, i.e. they are not only to be weighed against competing

9 I therefore regard human rights as paradigmatically what, under a Hohfeldian analysis, are called "claim rights". This is not to deny that human rights may be associated with various other Hohfeldian incidents, such as powers, immunities and liabilities. For a Hohfeldian analysis of human rights, see Wellman 2011.

reasons but also exclude at least some of the latter from bearing on what all-things-considered the duty-bearer should do (see Raz 1999). So, for example, a society might serve reasons of wealth-creation by depriving its most able members of the right to occupational choice. But the reasons to do so are for the most part not to be weighed against the duties arising from that right; instead, they are neutralized by them. Finally, the transgression of duties by a duty-bearer who can be properly held morally responsible, and who lacks any justification or excuse for their conduct, typically justifies a distinctive range of *moral responses*, e.g. blame on the part of onlookers, resentment on the part of the victim, self-blame (guilt), reparation and repentance on the part of the rights-violator, and in some cases punishment on the part of the relevant political community.

I have given an implicitly pluralistic elucidation of the types of duties that may correspond to moral rights: they potentially include not only "negative" duties of forbearance, but also "positive" duties to undertake a course of conduct. By contrast, there is a prominent tradition according to which the primary duties associated with natural or human rights – that is, those duties which do not concern the fulfillment of other duties associated with such a right, e.g. the duty to make amends for a previous violation – are exclusively (or overwhelmingly) negative in content. This feature is presented as crucial in demarcating the rights-involving part of morality, often designated as the domain of justice, from the rest of morality. Its acceptance can be motivated by the thought that the violation of a negative duty is, *ceteris paribus*, morally worse than the violation of a positive duty, because of the active character of the wrong-doer's will in the first case. To this extent, the restriction of human rights to negative primary duties ministers to the idea that they are especially important norms. All we need say here is that we have compelling reasons of fidelity not to endorse this as a conceptual restriction on what can count as a right, since it is a notable feature of the contemporary human rights culture that it acknowledges many "positive" human rights. Whether we should ultimately accept deontic negativism about human rights is a substantive question, one not profitably addressed here.[10]

10 One important argument for the claim that human rights have exclusively negative duties, defended by O'Neill 1996, turns on the premises that the primary duties corresponding to such rights must be claimable independently of any social or institutional embodiment. For criticism see Tasioulas 2007.

Contrary to a popular misconception then, a morality of rights is not fundamentally opposed to a morality of duties. Instead, the notion of duty is conceptually prior to that of a right. This leaves open the substantive question whether there are any moral duties without corresponding rights. My own view is that one perfectly legitimate sense given to the notion of "imperfect duties" properly caters to just this possibility: for example, duties of charity – such as the duty to show mercy in sentencing – do not have corresponding right-holders. On the other hand, it is also worth noting that the significance accorded to duties here is perfectly compatible with acknowledging the important supererogatory dimensions of the human rights culture. Those who make heroic sacrifices for the sake of human rights typically do not thereby simply comply with duties associated with human rights, since they would not be blameable for refraining from their heroic conduct. Still, they are properly admired as defenders of human rights because not all of the reasons we have to promote compliance with human rights duties are themselves duty-imposing.

Individualistic grounding. Individual moral rights, of which human moral rights are a sub-species, are not only rights *of* individuals, they are also grounded in some normatively salient characteristic of the individual right-holder.[11] According to some theorists, it is some interest(s) of the right-holder that is capable of generating duties variously to protect, respect, etc. that interest (Raz 1986, ch.7). For other theorists, the proposal to ground moral rights in interests misconstrues their distinctive normative role. The appropriate response to interests, they claim, is fully determined by agent-neutral reasons to promote or maximize those interests, which leaves considerable scope for inter-personal trade-offs of interests. Moral rights, by contrast, constitute agent-relative limitations on what anyone may do to others in the name of promoting the general welfare or even enhanced overall compliance with rights themselves. Many of those impressed by this line of thought contend that moral rights are not grounded in the *interests* of the right-holder but in a special normative *status* they enjoy, such as that of being an equal and inviolable member of the moral community (Nagel 2004,

11 A consequence of this individualistic characterization of human rights is that supposed collective rights, such as the right to (national) self-determination, do not count as human rights proper. I do not think this constitutes a serious defect of fidelity. Such rights do not, in any case, fit the specification given by *N*.

ch. 3). For yet others, *both* considerations pertaining to interests and status need to be invoked to justify claims about moral rights. Which account should be adopted for human rights cannot be decided at the conceptual level of specifying their nature.

The individualistic character of rights offers one strand of explanation for the belief, popular among Marxists, conservatives, feminists and non-Western critics that the morality of rights rests on a flawed "atomistic" conception of human life, one that cuts us adrift from meaningful personal and social bonds with others and imposes a narrowly "egoistic" construal of human ends. But the individualistic grounding of moral rights does not justify this negative portrayal. As we have seen, the discourse of rights is inseparable from that of moral duties, and the latter set stringent moral limits on the pursuit of self-interested ends. Moreover, these duties may require positive action, as opposed to mere non-interference with others. Many rights, such as the right to marry and have a family or to membership of a nation, serve interests in valuable forms of solidarity or altruistic endeavor. They are not rights to goods which a person can enjoy in isolation from others also enjoying them. Beyond this, philosophers who regard rights as grounded in interests may appeal to interests – for example, in friendship or making a valuable contribution to one's community, and so on – that are not straightforwardly "egoistic" but, rather, involve self-fulfillment through an appropriate engagement with the welfare of others. And lastly, of course, advocates of moral rights are ill-advised to regard them as exhausting the whole of morality or as occupying a foundational place within it, so that all moral considerations ultimately trace back to them. In addition to moral rights, a sane, pluralistic construal of morality will incorporate imperfect duties, virtues, ideals, and other considerations, many of which do not share the individualistic character of moral rights, their content sometimes reflecting the value of forms of solidarity whose moral significance cannot be fully captured by the language of individual rights. These other moral considerations create space for the possibility that it may be wrong – because, for example, it would be heartless or disloyal – for me to do that which I nonetheless have a moral right to do; and also for the possibility that conflicting, non-rights-based considerations might defeat the reasons for respecting rights in particular cases.

All of the foregoing observations are compatible with acknowledging that many extant philosophical accounts of moral rights are defective in the ways suggested. And of course there is the more general point

that, like all forms of moral discourse, the morality of rights is liable to distortion and abuse, its individualistic character rendering it susceptible to rhetorical appropriation by ideologies that further atomistic or egoistic forms of personal life and social organization.

Directed character duties corresponding to rights. Individual moral rights are held by identifiable individuals; violations of the duties corresponding to those rights entail the wronging of the right-holder. This contrasts with violations of imperfect duties (those with no corresponding right-holder, such as a generalized duty of charity), which do not constitute the wronging of any particular individual. The directed character of wrong-doings that are rights-violations can be seen as following from the first two features of individual moral rights: that they are sources of obligations grounded in some special feature of the individual who possesses the right. It explains the personal sense of grievance, victimization or resentment that is associated with violations of rights as compared with imperfect duties or other moral considerations.

These three features underline the fact that human rights belong first and foremost to the domain of *moral* principles. They do not simply consist in a schedule of interests or valuable goals, however important, since merely failing to protect, or even acting against, another's interest or a valuable goal are not *per se* grounds for moral condemnation. From a third-person perspective, the mere fact that another's interests will be impacted by a course of action does not entail that there is a duty in the offing; from a first-person perspective, we are largely passive with respect to the honoring of our rights whereas the fulfillment of our interests typically requires our active engagement.

(b) "… possessed by all human beings …"

All human rights, at least paradigmatically, are possessed by all human beings. For the purpose of articulating a serviceable concept of human rights, I shall take it that the human beings who possess human rights must *at least* include rationally competent adult members of the human species.

Does asserting that human rights are "possessed by all human beings" *necessarily* commit one to the claim that they are an invariant set of rights possessed by all human beings throughout history? On this view, whatever the relevant schedule of human rights is, it must be just as imputable to Stone Age cavemen as to denizens of advanced,

twenty-first century societies. Human rights are, therefore, "natural rights", understood as rights genuinely attributable to humans even in a state of nature, one in which there is not only no state claiming a monopoly on the legitimate use of coercion but also nothing beyond the most rudimentary forms of social organization. Call this the "state of nature dogma", in line with Charles Beitz's complaint that "the tendency to identify human rights with natural rights represents a kind of unwitting philosophical dogmatism".[12] Perhaps we can intelligibly impute to cavemen a right not to be tortured, but how can we reasonably ascribe to them rights that refer to activities that are barely conceivable, let alone feasible, in their historical epoch, such as rights to a fair trial or to political participation? Orthodoxy, on this view, is deeply unfaithful to the ambitions of the human rights culture, especially in the post-Universal Declaration period.

Orthodox theorists who wish to preserve a trans-historical interpretation of human rights whilst meeting the concern about fidelity can deploy at least two strategies: *abstraction* and *idealization*. The first identifies a comparatively small set of abstractly specified human rights that are trans-historical in scope and treats the great majority of the human rights familiar from international instruments as arising from the application of these abstract rights to specific historical circumstances. Deploying this approach, James Griffin contends that, at the highest level of generality, there are three human rights each of which is trans-historical in coverage: human rights to autonomy, welfare ("minimum provision"), and liberty.[13] Other, more specific human rights count as human rights because they are derivations from universal human rights in specific times and places (Griffin 2008, 149; see also Wellman 2011, 28 f.). On this view, not all human rights are "universal", although some of the universal human rights will include more specific rights than the three highest-level rights.

12 Beitz 2003, 38; the rest of the paragraph summarizes a line of attack on contemporary philosophy of human rights that is concisely developed in that article. For a persuasive argument to the effect that Beitz over-generalizes in attributing this dogma to contemporary philosophical theorists of human rights, see Buchanan 2008, 55 f.

13 The strategy of identifying a trinity of highest-level, universal rights has, of course, Lockean and Jeffersonian antecedents; see Haakonssen 1991, 50. Note, however, that Griffin officially eschews the state of nature dogma, insofar as he is prepared to conceive of human rights as "rights that we all have simply in virtue of being *human agents in society*" (Griffin 2008, 50).

The abstraction strategy, however, carries the unwelcome implication that almost all of the standard items in human rights documents are not *bona fide* human rights, since they lack the requisite kind of trans-historical universality. To counter this implication, one may develop, as Griffin does, an interpretation of thesis (b) that abandons the universality of the lower-level human rights. But then trans-historical universality will cease to be an essential feature of human rights. To this the reply may be that it remains essential, if only indirectly, because the lower-level rights are derived from higher-level rights that *are* universal in this sense. This is the strategy that Griffin pursues regarding freedom of expression, which he takes to be a trans-historically applicable human right, and freedom of the press, which is an implication of it in specific circumstances (Griffin 2008, 38). But even supposing that derivation from a universal human right is enough to allay the original concern about the status of non-universal lower-level rights as human rights, a problem remains. In order for the strategy to succeed on its own terms, the higher-level universal rights must be truly *rights* and not just universal human interests. Otherwise, the abstraction strategy would amount to a reversion to the Reductive View, with all the problems it faces. Yet it is hardly obvious that this condition can be met such that, in a sufficient number of cases, the lower-level rights are plausibly construed as derivations from the self-same universal basic right.

Presumably, humans throughout history have had an interest in autonomy, liberty, minimum material provision and perhaps even freedom of expression. But rights differ from the interests on which they are based because they involve counterpart duties. And we determine the identity of rights in key part by reference to these duties.[14] Is there a recognizably unitary *right* to freedom of expression that applies across the whole range of human history and, in the context of modernity, generates the specific rights Griffin supposes it does? If it existed, it would need to have broadly equivalent high-level deontic implications across human history. But it is a tall order to demonstrate that the free expression rights of a medieval serf, let alone a Stone Age caveman, involve more specific determinations of the very same high-level duties as the free expression rights of members of modern-day societies. Is it plausible, for instance, that roughly the equivalent *level* of expressive freedom is secured to humans in each epoch, only by different means?

14 Griffin 2008, 97 himself says that "[t]he content of a human right is also the content of the corresponding duty".

How can this be squared with the tremendous variation over time in conditions, such as those affecting the feasibility and cost of compliance with the counterpart duties, that shape the content of a right to expressive freedom? The overwhelming likelihood is that if there is a unitary high-level right to freedom of expression that applies across human history, its deontic content is more minimal than Griffin supposes, even in the context of modernity. If so, Beitz's objection still stands.

The other response to the Beitzian challenge – idealization – instructs us to specify the duties corresponding to a given right by reference to certain ideal, but in principle attainable, conditions. Even if these ideal conditions constitute a plurality of possible sets of circumstances, they may nonetheless yield the self-same schedule of human rights. All human beings, throughout human history, could then be ascribed those rights. The main normative upshot of so ascribing them would be that for each human being, there is a duty to provide them with the objects of those rights to the extent that the relevant ideal conditions materialize in their case. Even cavemen, the argument goes, meaningfully possess a right to a fair trial, because the existence and content of human rights is fixed by reference to the ideal conditions for furthering the interests (or whatever consideration is taken to justify human rights) that underlie them. It is just that the duties potentially associated with a given individual's right may never crystallize – may never give anyone reason to do anything – because the circumstances do not arise (for the reason that they cannot do so).

This idealizing ploy severely attenuates the connection between human rights and their corresponding duties. It is one thing to assert the existence of a human right even if the primary duties associated with it have not been allocated or their precise content fully specified at any given time (see Tasioulas 2007). It is quite another to say that a given kind of right can be meaningfully possessed by individuals even if there is no prospect of rights of this sort generating any primary duties for many centuries. Although there is certainly a strain of human rights discourse that exhibits this feature, its legitimization would purchase trans-historical universality at the price of losing its grip on the nature of human rights discourse as a discourse of *rights* that generate duties that guide the conduct of others in relation to the right-holder. More generally, the idealizing strategy's appeal to ideal conditions makes the existence and content of human rights potentially highly indeterminate, hostage to the play of utopian speculation about possible future devel-

opments in science and technology and in forms of social, economic and personal life.

The limitations of both the abstraction and idealization strategies, although not demonstrably fatal to either, nonetheless lead me to abandon the trans-historical interpretation of universality as a necessary condition on anything counting as a human right. After all, applicability to all human beings in all times and places was hardly a desideratum that exercised the framers of the *Universal Declaration of Human Rights*. Nor does this indifference to timelessness signal a break with the natural law tradition to which orthodoxy seeks to assimilate the contemporary human rights movement. On the contrary, a similar attitude marks the work of key figures in that tradition, including both the mediaeval canon lawyers, who initiated it in the twelfth century, and Kant, who gave it its most philosophically sophisticated modern formulation. As Brian Tierney observed in his classic study of the origins and development of the idea of natural rights, from its very inception mainstream thought on the subject did not cleave to the "state of nature dogma": "[T]he first rights theories were not derived from contemplation of the individual isolated from his fellows – isolé sur son île comme Robinson – but from reflection on the right ordering of human relationships in emerging societies" (Tierney 1997, 70).[15]

On the interpretation of *N* that I am advancing, when speaking about the rights possessed by all human beings *qua* humans, it is appropriate to specify, whether explicitly or implicitly, constraints on the historical period which they inhabit. In understanding the human rights referred to by the contemporary human rights culture, the relevant historical period should normally be taken to be that of modernity. Or, in the words of A.M. Newlands, the New Zealand delegate to the drafting committee for the Universal Declaration, "human rights were rooted in the nature of man himself, as well as in the structure and needs of the modern world" (cited in Morsink 2009, 29). This does not mean that slaves in the ancient world or medieval serfs are conceptually debarred from possessing human rights, since on a number of eligible and illuminating specifications of the relevant historical period they clearly do possess them. Nor does it preclude special moral significance attaching

15 Similarly, A.J. Simmons attributes to Kant a conception of natural rights "that could not possibly be possessed in a state of nature, that depend on the existence of quite contingent social arrangements, or that could only be secured in a civil (i.e., political) condition", Simmons 2001, 186.

to those human rights – "natural rights", in the Lockean sense – that do have trans-historical application. But it does enable us to make good, unforced sense of the thought that rights of the sort enumerated in the *Universal Declaration* are universal, in the sense of being possessed by all human beings.

Of course, the characterization of "modernity" is itself an endlessly contested matter. Still, what I have in mind is not especially nebulous. Conditions of modernity refer to a historical context in which features of the following kind either obtain in the life of each human being or are reasonably accessible: significant levels of scientific and technological expertise and capacity; heavy reliance on industrialized modes of production; the existence of a market-based economy of global reach; a developed legal system that is both efficacious and broad-ranging; the pervasive influence of individualism and secularism in shaping forms of life, and so on. One advantage of this view, in contrast with the idealizing approach, is that it yields a more determinate context within which to make the assessments of feasibility that most theories of human rights take to be necessary in grounding human rights. It is therefore less susceptible to the accusation of utopianism than the idealizing interpretation of (b). A further advantage is that it offers a charitable interpretation of at least some of the growth in the number of human rights that have been asserted from the seventeenth century until the present. This plausibly reflects the way in which changed socio-historical circumstances, such as rapid progress in technological innovations, bear on our assessments of the existence of human rights and their normative content.

(c) "… simply in virtue of their humanity"

It follows from what has been said under (b) that it is not essential to human rights that they are possessed in virtue of non-contingent facts about human beings. Accordingly, this cannot be what (c) is supposed to exclude. Instead, I take (c) to rule out (1) certain conditions for the existence of human rights: in particular, it is not necessary for human rights to exist that they be enforceable, or enshrined in law, or even socially recognized as such rights,and (2) certain kinds of conditions in the specification of both the conditions for possessing human rights and the normative content generated by such rights. Regarding (1), I have argued elsewhere against the claim that a right must be actually enforceable in order to count as a right, as well as against the

claim that it must actually be legally embodied (Tasioulas 2007). The conditions of legalization or social recognition overlook the fact that human rights are normative considerations whose existence is independent of law and social practice, considerations of a kind which even someone as sceptical about rights as Bentham must also recognize, to the extent that they believe that legal and social norms can be held up to critical scrutiny (for a helpful critique of the legalistic view of rights, see Sen 2006). I therefore turn to the negative thesis embodied in (2).

In consequence of (c), the possession of a human right cannot be conditional on some conduct or achievement of the right-holder, a relationship to which they belong, or their membership of a particular community or group. Instead, human rights are rights possessed by all human beings (however properly characterized) in all or certain generally specified socio-historical conditions simply in virtue of being human. The requirement that the conditions should be "generally specified" precludes the use of such devices as proper names or their adjectival modifications in their specification, e.g. "human inhabitants of modern Western societies", etc. The same requirement bears on the formulation of the duties corresponding to human rights.

It is important to note an asymmetry in the constraints bearing on the conditions for the possession of human rights and the specification of their content. Although the possession of human rights is not conditional on any special relationship of the right-holder, their membership of a community, or any action or achievement of theirs, it is entirely acceptable for the content of the counterpart duty to refer to such conditions. The duty to allow a person to participate in their community's political decision-making is conditional on their being a member of that community. The duty to provide a person with formal education is conditional on their being able to benefit from it. The duty to provide a person with fair pay is conditional on their engaging in remunerative work. The duty to provide someone with a fair trial is conditional on their being charged with a criminal offence.

Nicholas Wolterstorff has denied the admissibility of such conditions in formulating human rights; he speaks of conditions (over and above being human) for possessing a human right, but the argument works equally well if we take it to be directed at conditions in the specification of the duties associated with the right. The argument is that this would permit us to interpret *any* (genuine?) right as a human right, thereby

causing us to lose our grip on the idea that human rights are only a subset of the general class of moral rights:

> If there really were this conditional human right [e.g. the right to be formally educated if capable of being so educated], then presumably we could generalize to the conclusion that to every non-human right there is a corresponding human right. One simply tucks the status into a conditional clause within the right. Human rights would be everywhere. Corresponding to the right to receive a monthly Social Security check from the U.S. government, this being a right attached to the status of being a U.S. citizen age sixty-five or older, there is the right to receive a monthly Social Security check from the U.S. government if one is a U.S. citizen age sixty-five or older. This now is a right attached to the status of being a human being; it is a human right (Wolterstorff 2008, 314 f.).

Combined with his largely undefended assumption that human rights, if worthy of that name, must inhere in all members of the species *Homo sapiens*, this leads Wolterstorff to endorse a highly minimalist schedule of human rights. This is because many familiar human rights, especially many whose primary counterpart duties are 'positive', cannot be meaningfully possessed by some members of the species *Homo sapiens* if the content of the right is specified without the use of conditionals. Thus, it makes little sense to say that someone suffering from severe dementia, for example, has a right to formal education, political participation or an adequate standard of living. By contrast, it does make sense to say that they have a right to life or not to be tortured (for the sake of amusement).

Now, one might argue for a more expansive list of human rights by contesting Wolterstorff's assumption that all human rights must be possessed by all members of the species *Homo sapiens*. This is not something that seems obviously forced on us by considerations of fidelity. But this maneuver will not rescue some standardly invoked human rights the content of whose duties seems to be conditional, e.g. the right to a fair trial or to fair pay. So we need to ask whether Wolterstorff's prohibition of conditional content is really warranted. I believe it is not.

Rather than excluding such conditions in the specification of the duties corresponding to human rights, we should adopt the more moderate course of imposing restrictions on eligible types of conditions. Two constraints recommend themselves from the preceding discussion. The first excludes the use of proper names in specifying the content of the duty. This deals with Wolterstorff's example, which refers both to the United States and to the Social Security department of that nation's

government. Another is that the conditions specifying the duties must refer to circumstances that are not unduly remote for all human beings given the socio-historical conditions to which the existence of the right has been indexed. This constraint may be taken to follow from a more general one: that the conditions specified in the duties mirror the socio-historical conditions to which the existence of the right has been relativized. I do not present these constraints as foolproof against any ingenious argument for assimilating implausible candidate rights to the category of human rights. My point is simply that this is the way to begin in trying to address Wolterstorff's concern, especially if our interpretation of human rights is to stand a decent chance of satisfying the desideratum of fidelity.

With intuitively compelling constraints on the proper specification of a human right in hand, we can proceed to distinguish between human rights proper and more specific rights derived from them that need not themselves be human rights, but which we possess partly in virtue of our human rights.[16] They will fail to be human rights when their derivation from genuine human rights depends upon premises about factual circumstances that are not among those that apply to all human beings within the relevant socio-historical period. For example, my human right to political participation, combined with the fact that I am an Australian citizen, generates a moral right to vote in Australia's general elections. The latter is not strictly a human right – only a subset of human beings in the world have a right to vote in Australian general elections – but it is an implication of my human right to political participation. It follows that one way of violating my human right to political participation is to violate the non-human right to vote that it confers on me in light of my membership of a particular democratic society. Returning to Wolterstorff's original example, we can say that the convoluted right he describes is not a human right; it is, instead, a moral or at least a legal right one may have in virtue of U.S. citizenship. However, it may turn out to be central to the justification of the latter right that it helps secure a right that is a genuine human right, the right to an adequate standard of living.

16 This is a specific instance of the general distinction between "core" and "derivative" rights; see Raz 1986, 168–170.

(d) Refining *N*?

Some find *N* wanting on the grounds that it is unduly permissive. Within its extension, they believe, fall norms that are plainly not moral rights or, at least, not human rights. Let us focus on the second version of the complaint. According to this objection, some of the universal moral rights that comply with *N* lack the distinctive importance that typifies human rights. This may be because they are thought comparatively "trivial", such as the rights not to be insulted or pinched. Or it may be because, although important, they belong to a "private" sphere and so are not appropriately enforced by social or state action, such as the right not to be betrayed in one's personal relations. Relatedly, rights of both categories are notably absent from the key human rights instruments, so that *N*'s deficiency with respect to the desideratum of distinctive importance is compounded by infidelity.

However, this objection is hardly decisive. One may question whether the rights touted as "trivial", assuming they are indeed rights, really are trivial as opposed to being simply not as important as other rights. In this connection it is worth reflecting on the far from negligible significance of the right not to be pinched, or otherwise man-handled, in the struggle to ensure a non-oppressive work environment for women. In any case, many of the supposedly "trivial" rights can be readily interpreted as specific implications of more general rights which are clearly important and find a place in human rights instruments. So, for example, the right not to be pinched is a specific implication of the more general right of bodily security, just as the right to wear eccentric clothes is a specific implication of the more general right of freedom of expression. The right not to be personally betrayed cannot be dealt with quite so easily, although an orthodox theorist might begin by pointing out that it is a mistake to construe human rights documents as seeking to furnish an exhaustive list of human rights. Instead, they understandably tend to include only those human rights that are genuinely under threat and regarding which preventative and remedial action by the state is both legitimate and potentially effective.

A more conciliatory response, in the face of these supposed counter-examples, is to append a further condition to *N*, according to which there are always *pro tanto* – and, hence, defeasible – reasons for according human rights social protection.[17] This gives us a revised form of *N:*

17 This is a condition strongly in keeping with the natural rights tradition and is

(N★): Human rights are moral rights, possessed by all human beings simply in virtue of their humanity, and regarding which there are always pro tanto reasons to accord them social protection.

The idea of social protection embraces an exceptionally broad array of measures for giving effect to rights, ranging from informal, non-coercive channels such as public opinion at one extreme to coercive legal mechanisms for punishing human rights violators and compensating their victims at the other. Indeed, it is not even obvious that, on such a broad understanding, the right not to be personally betrayed is entirely winnowed out of the category of human rights. Arguably, this right may be appropriately protected not only through informal public censure, but also through certain limited, and indirectly coercive, legal means, such as compulsory classes for school-children regarding the ethics of personal relations or judicial awards in divorce settlements.

Partly because it doesn't obviously correct the supposed problem of over-inclusiveness, some might go further in revising *N*. They contend that universal moral rights are properly characterized as human rights only to the extent that there is a *pro tanto* reason to enact them as enforceable legal rights with matching content.[18] Hence:

(N★★): Human rights are moral rights, possessed by all human beings simply in virtue of their humanity, and regarding which there are always pro tanto reasons to enact them as legally enforceable rights.

Of course, much will depend here on the explanations sponsors of *N★★* give of how to determine the existence of a *pro tanto* case for legal enforcement. If such a case exists whenever making it a legally enforceable right would enhance in some respect the right's prospects of fulfillment, then it will be fairly easy to meet the concern about undue restrictiveness. On the other hand, the efficacy of *N★★* as a filter will be correspondingly diminished. However that may be, *N★★* seems more likely to filter out the general right against personal betrayal than *N★*. Assum-

given a lucid formulation by Mill: "When we call anything a person's right, we mean that he has a valid claim on society to protect him in the possession of it, either by the force of law, or by that of education and opinion" (Mill 1998, 97). More recently, Amartya Sen has written in a similar vein that a human right must meet a condition of "social influenceability", (Sen 2004, 329), which can be understood as a corollary of Mill's condition.

18 "[H]uman rights have an inherently juridical nature and are conceptually oriented toward positive enactment by legislative bodies", Habermas 2001, 122; Raz 2010b, 43–44.

ing that many or most personal betrayals fall outside the scope of legitimate state intervention, the state arguably lacks even a *pro tanto* reason for enacting a legally enforceable right against personal betrayal. Moreover, *N*** also has antecedents in the natural rights tradition, especially its Kantian variant. And it resonates with the intentions of the drafters of the UDHR, such as Eleanor Roosevelt, who regarded that document as a template for the incorporation of enforceable rights into the domestic legal and constitutional orders of individual states.

Still, I believe we should resist injecting a juris-generative dimension into the very concept of a human right. Firstly, *N*** is *unduly restrictive*. The language of human rights is often used in ways that do not obviously carry the implication that there is even a *pro tanto* case for the legalization of the human right whose existence the speaker asserts. Invocations of human rights by those who are sceptics about coercive legal orders generally (e. g. anarchists) are perhaps the most dramatic counter-examples to *N***. Another way in which *N*** is unduly restrictive is in counter-intuitively excluding certain norms from the category of human rights because, on closer inspection, it emerges that a *pro tanto* case for enacting them as coercive legal rights does not exist. This point is not confined to rights that operate within the "private" sphere, such as the right not to be betrayed. Consider, for example, the right to rebel against a tyrannical government. Although this is plausibly regarded as a human right, it is hardly obvious that there is a reason to enact it as an enforceable legal right. It would seem pointless to do so, since the right concerns a situation in which the legal system itself has become the chief threat to human rights.

Second, *N*** generates *artificial* distinctions. Grant, for example, that the right to free speech includes a right to have a say regarding certain decisions that significantly affect one's interests. Assume further that the duties generated by that right with respect to governmental, but not familial, decision-making are eligible for enforcement as legal rights. It seems artificial to hive off the first set of deontic implications, and to refer to them as "human rights", while the non-enforceable implications are ascribed to a "universal right". After all, both sets of deontic implications are justified by the self-same considerations. Why should a difference in the eligible modes of implementing different components of the self-same right warrant this conceptual dualism? Note that this problem threatens to arise with respect to all human rights, since they all presumably generate some duties that are not eligible for legal enforcement. The human right not to be tortured, for example, arguably places a duty

on parents not to encourage in their children a permissive attitude towards torture, but this is a duty that for the most part seems ineligible for legal enforcement.

Finally, even if we focus on the category of rights that satisfy $N^{\star\star}$, it seems *misleading* to accord this kind of conceptual centrality to the criterion of enforceability as legal rights. In a series of important writings, Amartya Sen has emphasized the diversity of ways of implementing human rights, of which the legislative route is only one, with the creation of legally enforceable rights being itself just one pathway on that route (Sen 2004, 343–345; 2006, 2919–2921; 2009, ch. 17; 2010). Other forms of implementation include official and unofficial modes of recognizing the existence and implications of human rights, for example, through non-binding declarations such as the UDHR. They also include the kind of grass roots agitation pursued by non-governmental organizations that monitor human rights violations, publicize their findings, and seek to mobilize public opinion against the perpetrators of the violations. Moreover, as Sen has also observed, there is no compelling reason to believe that the enactment of enforceable legal rights with matching normative content is always the ideal way of giving force even to those rights that satisfy $N^{\star\star}$.[19] Why then privilege enforceability as legal rights by building it into the very nature of human rights, when other modes of implementation may be preferable in a significant range of cases? The orthodox theorist, I conclude, does best to adhere to N or $N^{\star}$. For the sake of convenience, I will henceforth continue to refer to N as representing the Orthodox View.

IV. The Political View

However one judges the respective merits of N, $N^{\star}$ and $N^{\star\star}$, all remain firmly within the orbit of the Orthodox View. In recent years, however, a significant number of philosophers have argued that orthodoxy ne-

19 Sen offers the following nice example: "[T]he moral or political entitlement, which can easily be seen as a human right, of a somewhat slow speaker not to be snubbed in an open public meeting by a rudely articulate sprinter may well be important both for the self-respect of the leisurely speaker and for public good, but it is not likely to be a good subject for punitive legislation. The protection of that human right would have to be sought elsewhere. The effectiveness of the human rights perspective does not rest on seeing them invariably as putative proposals for legislation" (Sen 2004, 345).

glects the essentially *political* character of human rights. Advocates of this Political View advance one or both of the following broad theses. First, that human rights perform a distinctive political function or set of functions, and that it is the omission of any reference to this political role in the specification of the core concept of a human right that undermines the Orthodox View. This claim is primarily motivated by considerations relating to the distinctive importance of human rights as opposed to other standards, including the rights that properly feature in a liberal democratic constitution, and by considerations of fidelity to the wider human rights culture. Moreover, since this view is likely to result in a more parsimonious list of human rights than *N* or its variants, it is also presented as comparatively non-parochial. Second, human rights stand in need of a special kind of justification. It is neither necessary nor sufficient that they be grounded by ordinary moral reasoning, as required by *O*; instead they must have a basis in an autonomous form of "public reason". Only in this way, it is claimed, can the global advocacy of human rights escape the charge of parochialism. Some advocates of the Political View endorse both claims (e.g. Rawls), others only one (e.g. Raz). In the rest of this chapter, I limit myself to addressing the first claim.

The labels I have used risk conveying the mistaken impression that the Orthodox View is "apolitical". However, *N* is certainly compatible with the proposition that, as a contingent matter, human rights have serious political implications in particular circumstances, e.g. they may require us to create and maintain powerful and costly political institutions, such as the state. Indeed, a proponent of *N* can even accept certain necessary truths concerning the political significance of human rights. Thus, *N* together with the arguably necessary truth that states should respect principles of justice leads to the conclusion that they should respect human rights, assuming the latter constitute a sub-set of the principles of justice. The dispute between Orthodox and Political accounts of human rights pivots, instead, on whether a political role belongs to the essence of a human right, so that an adequate understanding of what a human right *is* involves conceiving of it as a right that plays the specified political role.

We can distinguish two importantly different versions of the Political View: the *sub-set* and the *sui generis* approaches. Proponents of the sub-set approach reject *N*-type accounts as seriously *incomplete* specifications of the nature of human rights; instead, they regard human rights as a sub-set of the general class of universal moral rights picked out by *N* or

its variants, a sub-set distinguished by the political role such rights perform. Because they presuppose a conception of universal moral rights that broadly conforms to an *N*-like specification, sub-set approaches are not root-and-branch deviations from orthodoxy. Advocates of the *sui generis* approach, by contrast, do not presuppose a conception of universal moral rights that broadly conforms to *N*; instead, they either reject, or are non-committal towards, the thesis that human rights are to be understood in terms of an underlying layer of universal moral rights. This is because they wish to avoid encumbering the concept of human rights with various commitments that *N*-type rights supposedly bring with them, commitments they regard as alien to the contemporary human rights culture. Some proponents of the *sui generis* approach go even further, being sceptical or agnostic about the idea that human rights are helpfully understood as falling under the general concept of an individual moral right. *Sui generis* theories of this latter sort can be conceived as building a political element into a reductive account of human rights, whereas standards sub-set theories inject such an element into an Orthodox account.

What, then, are the political role(s) that various advocates of Political Views have attributed to the very nature of human rights? One focuses on the addressees of human rights norms:

PV1. It belongs to the very nature of human rights that the primary responsibility for compliance with them rests – on some versions, rests exclusively – with the officials of states, or state-like entities, or at least coercive institutional schemes. By "primary responsibility" is meant a responsibility associated with the human right that does not have as its subject-matter some other responsibility associated with that right. The state's primary responsibilities under human rights can therefore include the responsibility to prevent, make reparation for, punish, etc. certain types of misconduct on the part of its subjects, provided that the misconduct is not itself characterized as a human rights violation. If the relevant political entity bearing the primary responsibility fails to discharge it, other agents – citizens of the relevant state, other states, international institutions, etc. – may incur secondary responsibilities to respond to this initial breach in various ways.

Some variant of PV1 appears to be accepted by Charles Beitz (2009) and, prior to a change of heart, by Thomas Pogge (Pogge 2002, ch. 7, subsequently recanted in the 2007 edition). On Pogge's version

of PV1, a "human rights" violation only exists when some failure on the part of officials of a coercive institutional scheme is present. Hence, we cannot automatically infer from the fact that *A* has tortured *B* simply for the pleasure the former derives from doing so that *B*'s human rights have been violated. *A* may well have violated a right of *B*'s not to be tortured, even an *N*-type right. But the act of torture will only be a *human rights* violation if *A* is an official of the state or his conduct is suitably connected to a coercive institutional order inhabited by *A* and *B*. One form of connection, stressed by Pogge, emerges from an affirmative answer to the question of whether the act of torture is a foreseeable and reasonably avoidable upshot of the imposition of that order. However, it is doubtful that we have sufficient reason to countenance a dualism of human rights and universal moral rights of this sort unless the former notion is given some additional, and more specific, political dimension.

We should therefore turn to two other political functions in terms of which the Political View has been framed. Internally, human rights are interpreted as bearing on the legitimacy of a state or comparable institution, constraining its right to rule (PV2); externally, they operate as standards whose violation is capable of triggering a case for international action (PV3):

PV2. It belongs to the very nature of human rights that they bear on the legitimacy of states or state-like entities, or at least political institutions of some more generally specified kind. "Legitimacy" is to be understood as justified authority, such that a political institution is legitimate to the extent that its laws (and other official acts) generate a *pro tanto* obligation of compliance on the part of its putative subjects that is additional to whatever obligation they have to do what the law requires independently of the existence of the law in question.

PV3. It belongs to the very nature of human rights that their violation is capable of generating a *pro tanto* justification for some form of international response on the part of outside agents, such as other states, international and regional institutions, non-governmental organizations, and so on. The nature of the international response that is the distinguishing mark of human rights is variously understood by different theorists: for some it is specifically military intervention, or sovereignty-limiting intervention more broadly construed, whereas for others it constitutes

an even more diverse group of responses, some of which are not aptly assimilated to the category of "intervention".

Now, there is a general objection to the Political View in all three of its guises: it construes human rights as conceptually parasitic on the idea of some kind of political institution, whether it be the state (Beitz 1999; Raz 2010a; 2010b), state-like entities (Rawls' "peoples"), or coercive institutional schemes (Pogge).[20] PV3 goes beyond this by building into the notion of human rights the idea that they regulate certain activities within a *system* of states, or at least a system of political institutions of a specified kind – hence Beitz's strikingly deflationary characterization of human rights as "revisionist appurtenances of a global political order composed of independent states" (Beitz 2009, 197). But the language of human rights is often employed by people who do not accept the desirability of states (e.g. anarchists), or who reject any global order that is a system of states or state-like entities (e.g. cosmopolitans who favor a unitary world government). What is more, they often appeal to human rights principles in order to defend their views about the state and the state system. Why should we interpret their invocation of human rights standards in terms of institutions they reject, and reject precisely on human rights grounds? Of course, it is true that use of the concept of human rights, on a Political View, does not necessarily involve *endorsing* either states or state systems. It may be that even though the distinctive nature of human rights is given by reference to their bearing on states in the ways specified by PV1-PV3, one can invoke them as standards of assessment without endorsing either states or the state system within at least ideal theory. But it would be peculiar, to say the least, to defend a version of PV if one did not believe that the language of human rights achieves its fullest expression in the context of assessments of states or relations within the state system.

Reflecting on anarchists and cosmopolitans who believe in human rights throws into sharp relief the difficulties arising from the statist character of Political Views. But it would be misleading to present those difficulties as stemming from the need to accommodate eccentric or minority ethical and political opinions. Even those who endorse the institution of the state may intelligibly see themselves as doing so on the basis of human rights principles that do not essentially incorporate any reference to that institution. Hence the ease with which they are pre-

20 To save words, I shall mainly refer to "states" in characterizing PVs.

pared to make judgments involving human rights in situations in which a state dimension is totally absent or extremely tenuous. Orthodoxy better enables us to accommodate these possibilities by giving us a purer, moral concept of human rights, free of any such specific institutional entanglements. Insofar as an (additional) institutional dimension potentially enters into human rights discourse, it does so in a non-conceptual, flexible and context-dependent ways, for example: as part of the specification of the socio-historical conditions over which particular human rights claims are supposed to hold,[21] and in deliberation concerning the concrete specification and practical implementation of human rights. This is a preferable way of registering the human rights significance of the state or other political institutions, as opposed to the tight conceptual linkage between human rights language and the state or state system enjoined by PV1–3. It maintains an important distinction between moral principles and the political structures that embody them, thereby respecting the great diversity of ways in which the language of human rights operates in ordinary discourse.

I have outlined PV1–3 in very broad terms. Individual theorists endorse more specific versions of them. Moreover, the three theses are logically independent. Some apparently endorse versions of all three (e.g. Beitz 1999; Cohen 2004 and 2006 and perhaps Rawls 1999), others are unambiguously committed to only two (e.g. Dworkin 2011 seems to combine PV1 and PV2) or just one (e.g. Raz 2010a and 2010b explicitly endorses PV3 and repudiates PV2, but may be committed to some weak version of PV1). The combination of PV2 and PV3, according to which human rights are characterized as both conditions of internal legitimacy and limitations on immunity from international *intervention* (e.g. Rawls and Cohen), presents special difficulties. There appears to be a discrepancy between the conditions of internal legitimacy and those of international intervention, such that the self-same list of rights is incapable of discharging both functions. Whether a state possesses legitimacy depends on the morality of its actions in relation to its putative subjects. But whether it is liable, even in principle, to external interference depends on other considerations, including the value of political self-determination and facts about the geo-political environ-

21 Thus, as I have already argued, most discussions of human rights claims today presuppose a context of modernity, and one of the facts of modernity is the existence (or at least the availability though not necessarily the ultimate desirability) of something like the state system, see II.(b), above.

ment, such as the incidence of predatory behavior among states. In consequence, the mere fact that a state oversteps the bounds of its legitimate authority does not give rise to a reason, in any circumstances, for interference by other states, just as not every personal wrong-doing gives others reason to prevent or punish it (Raz 2010a, 330). Subscribers to the combination of PV2 and PV3 might respond by specifying more precisely how human rights operate as *defeasible* triggers for external intervention, rather than all-things-considered justifications. However, leaving PV2 to one side, in the remainder of this chapter I offer some reasons for endorsing *N* over the versions of PV3 elaborated by John Rawls and Joseph Raz (sub-set theorists) and Charles Beitz (a *sui generis* theorist). I will focus in particular on the desideratum of fidelity, since in the case of Raz and Beitz at least it is a major motivation for their embrace of PV3.

Whether we accept PV3 will depend, in part, on the availability of a concrete and illuminating specification of the kind of "international response" the violation of human rights is said to justify. One such specification is Rawls' two-level view of political rights. To the extent that Rawls acknowledges rights possessed by all human beings simply in virtue of their humanity, they are the rights integral to a liberal conception of justice.[22] Let us call them *liberal constitutional rights*. The universality of these rights follows from the Rawlsian claim that the most reasonable political conception of justice is a liberal one. Even though he describes some non-liberal societies – decent hierarchical peoples – as well-ordered, and hence as equal members in good standing of the Society of Peoples, their deviation from political liberalism renders the conceptions of justice upheld by these societies only "not fully unreasonable" (Rawls 1999, 74). In terms of content, Rawls' liberal constitutional rights map fairly well onto the schedule of rights in the Universal Declaration of Human Rights. But they are not *human rights*, which for Rawls are only a sub-set of liberal constitutional rights (both a sub-set of the rights themselves and, in some cases, of the content of particular rights). They are those liberal constitutional rights capable of generating

22 A liberal conception of justice consists of three "characteristic principles" that: (a) enumerate "basic rights and liberties of the kind familiar from a constitutional regime", (b) assign these rights and liberties "a special priority, especially with respect to the claims of the general good and perfectionism values", and (c) guarantee to all citizens "the requisite primary goods to enable them to make intelligent and effective use of their freedoms" (Rawls 1999, 14).

a defeasible or *pro tanto* justification for forceful intervention by well-ordered societies against any society responsible for severe and widespread violations of those rights.

What is "forceful" intervention? Passing over the details of some exegetical controversies, I shall take Rawls to mean "military intervention".[23] Under the heading of the kinds of "intervention" that can be justified by human rights violations Rawls includes not only military intervention but also, for example, diplomatic and economic sanctions. Thus, a society that complies with human rights (and is non-aggressive) is immune from "justified and forceful intervention", whether this takes the form of diplomatic or economic sanctions or, at the limit, military force (Rawls 1999, 80). But on my interpretation, the coercive intervention account accords *criterial* status in characterizing human rights only to *military* intervention. On this view, what it is for a right to be a human right is partly that its violation can act as a defeasible trigger for military intervention against the society that perpetrates the violations. However, a society's compliance with the full schedule of human rights apparently has the effect of ruling out *all* forms of intervention against it, including the non-military variety (Tasioulas 2002, 380–390).[24]

Consider how Rawls' theory fares against our desiderata. As defeasible triggers of military intervention, human rights play an undeniably important role. Moreover, they are a proper sub-set of all rights – a "special class of urgent rights" (Rawls 1999, 79) – and therefore occupy a distinctive place among the principles of justice. The comparative minimalism of Rawls' schedule of human rights ministers to the non-parochialism requirement (Rawls 1999, 65). By admitting only a handful of urgent rights as human rights, he markedly enhances the prospects of their finding favor among non-liberal societies. However, an obvious problem with Rawls' view is a lack of fidelity to the wider human rights culture, since it results in a notoriously parsimonious schedule of human rights, limited to the following:

23 For a more detailed discussion of the interpretative issues, see Tasioulas 2009.

24 Rawls' view on this last issue is not entirely clear, since he does not adequately spell out what he means by "justified and forceful intervention". Thus, it is uncertain whether, according to Rawls, purely verbal criticism counts as a "diplomatic sanction". For a persuasive argument that it does, see Nickel 2006, 271 f.

> [the] right to life (to the means of subsistence and security); to liberty (to freedom from slavery, serfdom, and forced occupation, and to a sufficient measure of liberty of conscience to ensure freedom of religion and thought); to property (personal property); and to formal equality as expressed by the rules of natural justice (that is, that similar cases be treated similarly) (Rawls 1999, 65).

Rights absent from this list, but present in the standard international human rights documents, include: human rights to non-discrimination on the grounds of sex, race and religion; human rights to freedom of opinion, speech, movement and political participation; human rights to education, work and an adequate standard of living; and so on. These, says Rawls, are "liberal aspirations", not human rights properly so called.[25]

One reply is that the truncated list of human rights should be tolerated as it represents an appropriate compromise between the competing claims of fidelity and non-parochialism: a curbing of the traditional aspirations of the human rights movement (in terms of the number and content of human rights) in order to secure a non-parochial grounding of those fewer rights that remain. Insofar as this argument does not simply consist in a bare appeal to the virtues of parsimony in one's schedule of human rights, it might be thought to implicate Rawls' rejection of *O*. The claim would then be that the shorter list of human rights picked out by Rawls' version of PV3 receives independent support from the fact that only this list can be vindicated by the form of "public reason" that, he claims, is significantly non-parochial as compared with any *O*-compliant justification. Without going into details, it is doubtful that this line of argument can succeed. This is because, for Rawls, human rights are a sub-set of the wider set of liberal constitutional rights. These latter rights are derived by means of a process that takes the core ideas of liberal democratic culture as simply given; to this extent, it is scarcely a non-parochial justification. In any case, the narrowing down of these rights into a doctrine of human rights is largely achieved by Rawls' adoption of PV3 (and, presumably, PV2). Hence, Rawls' rejection of *O* seems to offer little by way of an independent grounding for PV3 based on the consideration of non-parochialism.

25 For Rawls' discussion of human rights instruments, see Rawls 1999, 80, n. 23. Among his contentions is that only Articles 3 to 18 of the Universal Declaration of Human Rights are human rights proper. For the discrepancy between Rawls' schedule and that extractable from leading human rights covenants, see Tasioulas 2002, 381–383.

A less dramatic response is adopted by two other proponents of PV3, Raz and Beitz. They preserve Rawls' insight that human rights are essentially triggers for an international response when violated, but have a broader understanding of the nature of the criterial response. For Raz, it is any form of intervention, not only military, that would normally be excluded as an infringement of state sovereignty. Human rights are those universal moral rights whose violation does not come within a state's sphere of sovereign immunity:

> I will take human rights to be rights which set limits to the sovereignty of states, in that their actual or anticipated violation is a (defeasible) reason for taking action against the violator in the international arena, even when – in cases not involving violation of either human rights or the commission of other offences – the action would not be permissible, or normatively available on the grounds that it would infringe the sovereignty of the state (Raz 2010a, 328).

Of course, much depends on how the sphere of sovereignty is delimited. If Raz's position is not to exclude too many rights that figure in human rights instruments, it will probably need to rely on the distinctly minority view – associated with China but very few other states – that even acts such as publicly expressed criticism by the government of one state against another come within the scope of sovereign immunity. Beitz goes even further than Raz, characterizing human rights as

> [T]he constitutive norms of a global practice whose aim is to protect individuals against threats to their most important interests arising from the acts and omissions of their governments (including failures to regulate the conduct of other agents). The practice seeks to achieve this aim by bringing these aspects of the domestic conduct of governments within the scope of legitimate international concern (Beitz 2009, 197).[26]

Beitz's notion of "legitimate international concern" is broader than Raz's focus on intervention in at least two ways. First, it is not elucidated by reference to any norm of state sovereignty. Second, it is not limited to forms of response that are aptly classified as interventionary, e.g., because they defy the will of the government of the target state or curb its freedom. Instead, "international concern" encompasses a diverse array of trans-national responses such as offers of assistance or adaptation

26 It seems a curious, but perhaps unintended, result of this characterization that states are not under any primary obligations arising from human rights to behave in certain ways in relation to people other than their own citizens, i.e. it results in an exclusivist version of PV1.

of a state's own behavior in the hope of improving conditions in another state.[27]

Views such as those of Raz and Beitz do not obviously suffer from the problem of infidelity that arises for Rawls in virtue of the latter's conceptual prioritization of military intervention. Indeed, Raz asserts that so far as fidelity is concerned, the boot is on the other foot. This is because he believes there are many universal moral rights, such as the right not to be personally betrayed and the right not to be pinched, which do not count as human rights – for example, they do not appear in standard human rights documents – but which are plausibly human rights on the Orthodox View. His take on PV3, by contrast, enables good sense to be made of the exclusion of such rights from human rights charters. The first is ruled out because betrayals within personal relations are not within the purview of legitimate state authority, and the second because pinching, even if a violation of a universal moral right, does not have the kind of importance necessary to justify international intervention.

Raz's attempt to throw the charge of infidelity back in the face of the orthodox theorist is not successful. He relies on an excessively rigid interpretation of the desideratum of fidelity, one that fetishizes the content of the key international human rights documents. Perhaps most adherents of the Orthodox View are committed to the existence of some, perhaps many, human rights that have never figured in the key human rights instruments. But this is a serious defect only if the orthodox theorist cannot offer plausible explanations for their absence that is compatible with their being human rights. Yet such explanations abound. One is that the statist focus of *international law and politics* – rather than of human rights discourse itself – tends to ensure that the rights enumerated in such documents fall within states' perceived domain of legitimate or effective action. Hence the absence from human rights documents of the right not to be personally betrayed. Another is that the documents do not purport to be exhaustive of all human rights, but to list some of the more important ones, especially those that appear most threatened in contemporary conditions. This is compatible with some less important human rights – such as the right not to be pinched

27 Beitz discusses six kinds of international concern in some detail: accountability; inducement; assistance; domestic contestation and engagement; compulsion; and external adaptation. See Beitz 2009, 33–42.

– being derivations from more important, but also more abstract human rights, such as the right to bodily security.

At this point, the orthodox theorist is well-placed to go on the offensive against sub-set theorists like Rawls and Raz. Given that they are committed to a concept of moral rights that fits the Orthodox View (I leave aside Rawls' endorsement of PV1 and PV2), and given also that the rights they believe are instantiated by this concept are a good enough match (with accompanying explanation) for the standard items in human rights documents, it seems reasonable to take *N* as an elucidation of the core concept. After all, it is not as if an orthodox theorist cannot consider the further question of which violations of human rights may properly qualify the doctrine of state sovereignty or justify various kinds of international response. But these will be a sub-set of the class of human rights, not the class of human rights themselves. At the very least, we may wonder whether there is more than a terminological dispute here, as opposed to some intellectually deep-going challenge to orthodoxy.

This counter-attack, however, is ineffective against *sui generis* theorists such as Beitz, since they are not committed to explicating human rights as parasitic on an underlying layer of universal moral rights that fit the Orthodox bill. But a *sui generis* approach remains open to two large objections, one of which is unique to it, the other of which also applies to sub-set versions of PV3.

Consider, first, Beitz's claim that human rights are not best interpreted as a sub-set of universal moral rights, but rather as norms validating international responses to protect individuals' "urgent interests" against standard threats posed to them by their own governments. One problem here is that Beitz rejects the sub-set approach because he encumbers the Orthodox View, what he calls a "naturalistic" approach to human rights, with a commitment to the sort of trans-historical universality that need form no part of it (see 2.III(b), above).[28] So Beitz's main reason for not conceiving human rights in terms of a background notion of *universal* moral rights is misplaced. But he apparently goes even further, following proponents of the Reductive View in offering an elucidation of the nature of human rights that attributes no independent significance to the notion of "rights" or "moral rights". But

28 Interestingly, Beitz himself notes that the naturalistic approach encompasses important strands that reject the requirement of "timelessness"; see Beitz 2009, 58, n. 20.

how is the "importance" or "urgency" of interests to be understood if we prescind from the thought that, in the case of each individual, a *right* is generated by the interest? Beitz's suggestion that such interests "have a kind of importance that it would be reasonable to recognize across a wide range of possible lives" is unhelpfully vague (Beitz 2009, 111). More generally, it is doubtful that a *sui generis* account of this sort can capture the widespread understanding of human rights as *moral* considerations and, moreover, moral considerations of a distinctive kind. Indeed, it is not even clear whether Beitz believes that the interests he identifies with human rights generate *duties* on the part of governments with respect to their own citizens. It is even less clear whether duties, as opposed to reasons, have to be in play when it comes to the rationale for international concern. As a result, something like the problems of the Reductive View re-emerge: the consequent notion of a "human right" seems lacking in the requisite moral significance.

The second objection applies to all three defenders of PV3 discussed in this section. It is a further elaboration of the charge of infidelity, but one aimed not at the congruence of the resultant list of human rights with the rights in standard human rights documents, but at the prioritization of international responses of intervention and concern in understanding the nature of human rights. Given the myriad roles performed by the discourse of human rights in ordinary life – roles such as guiding one's personal conduct, providing standards for criticizing one's own government, in addition to various international roles – what compelling rationale is there for conceptualizing human rights as triggers for an *international* response? The question is especially acute when the international response, as in Rawls' coercive intervention account, is military intervention. But the same complaint can be motivated with regard to the considerably softer version of the thesis advanced by Beitz, as reflection on some hypothetical cases brings out.

Suppose that studies reliably establish that efforts by external agents to encourage traditionalist, non-Western societies to comply with rights to be free from severe poverty or discrimination on the grounds of sex, for example, are almost invariably either unacceptably intrusive (e.g. inconsistent with the self-determination of the relevant societies) or else utterly ineffective where they are not counter-productive. Such a finding might plausibly prevent the violation of such norms from triggering "international concern", since the basis for international concern that Beitz has in mind is one that would be operative in the generality of

cases in which violations occur.[29] But the point here is not so much whether this or that putative human right would be vindicated. It is, instead, the deeper question of whether this *type* of consideration is really an appropriate basis for withholding the label "human right" from any such norms or treating them as at best marginal instantiations of the core concept. For the imagined empirical findings would leave intact the possibility that all human beings, simply in virtue of their humanity, possess a moral right to be free from severe poverty or discrimination on the grounds of sex. So even if Beitz's version of PV3 can accommodate most of the rights ordinarily labeled "human rights", it does so on the basis of apparently extraneous considerations.

To conclude: although ostensibly motivated by considerations of fidelity, versions of PV3 have their own problems on this score, not only in potentially failing to embrace a sufficiently broad range of human rights, but also in skewing our understanding of such rights by conceptually privileging one or two of the myriad roles they play in moral and political life. Aside from this problem, Political Views are impaled on the horns of a dilemma. The more plausible versions of the sub-set approach, such as Raz's, are readily construed as refinements of orthodoxy, leaving *N* in place as the core concept of a human right. *Sui generis* views, on the other hand, involve a radical break from *N* but, precisely for this reason, they encounter many of the difficulties that afflict reductivism in making sense of human rights.

V. Conclusion

It is sometimes proposed that to make the philosophical treatment of certain key moral concepts engage with their use in everyday life, one must make a decisive break from the tradition of philosophical reflection on those concepts. The Reductive and the Political Views pursue this proposal in relation to the concept of a human right. I have argued that both attempts face serious problems, and that we should adopt a version of the Orthodox View. Unlike the Reductive View, the Orthodox View does not lose its grip on the all-important fact that human rights are rights: not just a moral category, but a distinctive one within

29 And Beitz himself clear-sightedly faces up to the possibility that such rights might not be defensible as triggers for international concern; see Beitz 2009, ch. 7.

the moral domain. Unlike the Political View, it does not conceptually bind human rights to particular institutional structures, such as the state system, or kinds of relations and interactions within them, such as intervention. Instead, the Orthodox View offers us a picture of human right as intermediate moral principles: mediating between the fundamental values (if any) that ground them, on the one hand, and the institutional and social structures that concretize and implement them, on the other. This does not mean that most of the concerns raised by proponents of the Reductive and Political views may be safely ignored; instead, their significance is re-located from the conceptual realm to that of substantive debate. In the case of the Reductive View, the debates are mostly about the grounds of human rights; in the case of the Political View, they concern the implementation of human rights, including their implications for the legitimacy of municipal and international legal orders and the varieties of international action in response to their violation.[30]

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Human rights without foundations?

Peter Schaber

Different authors such as Charles Beitz and Joseph Raz argue against what they call 'the traditional view' of human rights: the view that there are universal human rights based on essential features of human beings. Human rights, they think, are rights with a certain political function, namely to limit the sovereignty of states. In his paper "Human Rights without Foundations" Joseph Raz calls this "the political conception of human rights" (Raz 2010, 328). The political conception is, Raz argues, closer to contemporary human rights practice than the traditional views. According to Raz, the traditional views provide us with conceptions of human rights that are so remote from the current practice of human rights "as to be irrelevant to it" (ibid., 323). This, Raz thinks, speaks against the traditional view or what might also be called the moral view of human rights and in favor of the political view.

My paper will deal in the first part with this political conception of human rights; I will argue that we should not accept this view for different reasons: it does not pass the adequacy test it sets out for a satisfactory theory of human rights, and it does not provide us with the justification of human rights that we need. I will then, in the second part of the paper, try to show how the traditional or moral view of human rights could be defended.

1. The political conception of human rights

What does the political conception of human rights amount to? Its basic idea is that human rights should be seen as a class of rights that limit a state's internal autonomy. Human rights violations are reasons for outside intervention. As Raz puts it:

> "Sovereignity does not justify state actions, but it protects states from external interference. Violation of human rights disables this response […]." (ibid., 328)

These rights need not, Raz thinks, be based on certain essential, and one might add, important features of human beings. Some of them, it is argued, are based on contingent non-evaluative facts about humans, for instance the fact that the economic and social structure of a society leads people living in this society to value certain things. And as a consequence, they do not need to be universal. Human rights are not rights human beings have in virtue of their humanity. Rather they have these rights for political reasons: Human rights are taken to be of *international concern*, for whatever reasons people think they should be seen this way. People have reasons to see these rights as of international concern. But they are not human rights due to these reasons, but rather due to the fact that they are taken to be of international concern.

This account of human rights, Beitz and Raz think, gets us closer to the reality of the current human rights practice. And this is, they think, one of the reasons why this account should be accepted. A satisfactory theory of human rights has to account for the actual human rights practice. And this is exactly what the political conception does, they argue:

> "The dominant trend in human rights practice is to take the fact that a right is a human right as a defeasibly sufficient ground for taking action against violations in the international arena […]." (ibid., 328)

Intervention justified by human rights violations are taken by Raz in a wide sense, including not just military intervention, but milder forms such as "making conformity to rights a condition of aid, calling on states to report on their […] protection of human rights, condemning violation, refusing to provide landing or over-flight rights, trade boycotts, and others" (Raz 2007, n. 14).

2. Accounting for human rights practice?

One might question the idea that a theory of human rights has to account for the current human rights practice. But even if we accept this as an adequacy test for a satisfactory theory of human rights, we have no good reasons to accept the political conception of human rights.

Let me explain. If we take a closer look at the UN Declaration of Human Rights, we find a very long list of different human rights, a list that has been developed over the years, influenced by different political concerns as well (for example, to get the socialist countries on

board). The idea of outside intervention is a rather new development, still at an early stage, mainly based on the terrible experiences of the international community with non-intervention in the face of genocide, mass rape and other crimes against humanity, as it was the case, for instance, in Rwanda in 1994.

The list of human rights is indeed long. Nevertheless, very few violations of human rights are taken as reasons for intervention, even if 'intervention' is understood in a very wide sense. I am thinking not just of the famous right to have periodic holidays with pay, but also other and definitely more important rights such as the right to work, the right freely to participate in the cultural life of the community, the right to enjoy the arts, the right to political participation and the right of peoples to freely dispose of their natural resources, as stated in Article 1 of the International Covenant on Civil and Political Rights.

The violation of none of these rights is taken as a valid reason for any kind of intervention. Just take, for instance, the right of peoples to freely dispose of their natural resources. Corrupt and incompetent regimes violate this right without doubt in many different ways (see Wenar 2008). Nevertheless, the international community is not bothered about this. The way the regimes of these countries use the resource wealth is still considered a purely internal matter. And I think that this applies to all the rights I have just mentioned: to the right to work (which does not exist in our Western countries), the right to participate in the cultural life, the right to enjoy the arts. If at all, the international community intervenes – even if we take 'intervention' in a wide sense – only if basic human rights are violated on a massive scale. It is true that there has been more talk about outside intervention in recent years, but it normally refers to these basic rights. It does not seem to be the case that the political conception really gets us any closer to the contemporary human rights practice than the traditional view. It does not seem to pass its own adequacy test.

Still, one could hold the view that human rights *should* be understood as rights that serve a political function, namely to limit the sovereignty of states. One could argue that this is the way they should be taken in the future; and perhaps we are slowly moving in this direction. But then the question arises which rights violations should be seen as reasons for limiting state sovereignty. The UN report "The Responsibility to Protect" mentions genocide, ethnic cleansing, and exposure of the population to mass starvation as valid reasons for military intervention (International Commission 2001, 33). What, if anything, should

we add? Just all human rights we find in the UN Declaration? And just because they are found there? Is the reason the violations of these rights allow for intervention just that they are accepted as human rights, whatever their justification might be? But then we are faced with the question: Why should human rights be taken as rights that limit state sovereignty? What is it about them that makes them so important? I take it that this has to be justified, that we indeed need good reasons for limiting state sovereignty, the internal autonomy of a community. I cannot see what the political conception could tell us here.

Charles Beitz argues in his book "The Idea of Human Rights" that the current human rights practice has a certain normative authority: his approach "claims for the practice a certain authority in guiding our thinking about the nature of human rights" (Beitz 2009, 10).

But why should one accept this? Beitz gives us two reasons for accepting this: a) "the practice [...] consumes a considerable amount of human and other resources, and people tend to regard its norm with great seriousness" and (b) the second reason is "that we have prima facie reason to regard the practice of human rights as valuable" (ibid., 11).

I do not see why we should see the fact that people take the official human rights with great seriousness as a reason for the normative authority of the practice. It is not the fact that people regard things with great seriousness that provides them with a normative authority; it is rather that there are reasons why things should be taken with great seriousness which provide them with normative authority.

As regards the second point: Of course, the practice of human rights is valuable, but again I cannot see why this should be seen as a reason for assigning normative authority to the current practice. The practice is valuable, because or insofar as the right things are done. Preventing governments from torturing political opponents, from putting people in prison without a fair trail, from treating people in degrading and inhuman ways, is without a doubt valuable. That it is valuable means: It is what has to be done, it is about protecting rights that have to be protected. The human rights practice is valuable insofar as this is the case.

3. Non-evaluative facts

Raz doubts whether all human rights can be justified – as some philosophers think – only by non-contingent evaluative facts about human beings (Raz 2010, 335). And, he thinks, in so far as this is impossible, human rights are not universal rights, rights humans have in virtue of them being human. I guess that this is one of the central ideas of a political conception of human rights. Let me consider two reasons for doubting that all human rights are universal rights based on non-contingent evaluative facts about humans:

a) The first reason has to do with the fact that the human rights we have, as Charles Beitz puts it, "bear on nearly every dimension of a society's basic institutional structure, from protection against misuse of state power to requirements for the political process, health and welfare society and levels of compensation for work" (Beitz 2003). They are not best interpreted as securing the minimal conditions of any decent human life or, so one could add, they are not best interpreted by any other single comparable justificatory idea.

b) The second reason has to do with the fact that some human rights, it is argued, can only be established by contingent facts about people. The rights people are supposed to have depend, as Raz thinks, on the social and economic structure of a society, enabling people living in these societies to *value* these rights. Others living in societies with different social and economic structures are not able to value the same rights. And if this is the case, that is, if the same rights are not valued by people due to a given economic and social structure, it is wrong to assign to people living in these societies the same rights, Raz suggests. "Typically rights are established by arguments about the value of having them. Their existence depends on there being interests whose existence warrants holding others subject to duties to protect and to promote them" (Raz 2010, 335). Raz thinks that the right to education is a good example: "Whether education […] is needed to meet that individual interest is itself a contingent matter" (ibid., 336). It depends on the conditions in which people find themselves.

So the first problem has to do with the diversity of human rights, the second with the diversity of what is valued by people due to certain contingent facts.

As regards the first problem: The officially recognized human rights indeed touch on different matters. But it is not clear what follows from this for the justification of human rights. Even if they are concerned

with very different matters: why should they all be taken as human rights? They might not be based on just one basic non-contingent feature of human beings. But still, they need a justification different from just saying that certain rights are taken to be human rights or taken to be, as Beitz puts it, "standards appropriate to the institutions of modern […] societies coexisting in a global political economy in which human beings face a series of predictable threats" (Beitz 2003, 44).

Why should they be seen as standards appropriate to the institutions of modern societies? And why should they be seen as of international concern? We need an answer to these questions that goes beyond the reference to the common human rights practice. And this holds no matter whether such an answer refers to different justificatory ideas or just one.

As regards the second objection: Indeed, certain rights can only be implemented if certain social conditions are fulfilled. The realization of a right to education depends on the existence of certain institutions (schools, universities). Raz thinks that education is only of value to people if these institutions exist. It might indeed be the case that education is not actually valued by people living in such a society, but education might nevertheless be of value to them. If so, they have reason to set up those institutions. If education is an essential aspect of their life, it should be protected by rights, independently of whether it is actually valued by people or not.

In any case, the institutional background conditions for the realization of rights are not the reasons for ascribing the rights concerned: It is not that people have a right to basic education because there is an established educational system. They have such a right, provided that this protects an essential aspect of a human life. As I will argue below, rights protect people's normative authority over essential aspects of their lives. In a society where functioning educational institutions do not exist, this aspect of the normative authority over oneself might not be valued by people. But education could nevertheless be valuable to them, and if this is the case, people have reasons to build up educational institutions. And I think that people have a right to education, provided that this right protects people's ability to exercise their normative authority. I will come back to this point in section 6.

4. Universal acceptance?

Human rights are rights, Charles Beitz tells us, "of international concern" (Beitz 2009, 23). This is what he thinks human rights amount to. But then, as stated above, this claim needs to be justified: Why should human rights be of international concern? Defenders of the political conception of human rights have doubts whether such a justification of human rights can be given, that is, whether we can justify human rights in a way that is acceptable to all. And indeed, it is questionable whether a Kantian or a utilitarian or any other justification will ever be acceptable to all, given the different cultural environments people live in.

There is a unifying concept to be found in the official human rights documents. The final declaration of the second International Conference of Human Rights in Vienna, which has been signed by 197 states, says "that all human rights derive from the dignity and worth inherent in the human person" (see Clapham 2006, 539). But then, one could say, any interpretation of the term 'dignity', a term which is no doubt in need of interpretation, will definitely be contested.

This is taken by the defenders of the political conception as a reason not to be too worried about a justification of human rights. There are many different justifications of these rights; the essential thing is, they think, that we agree on a list of human rights that we take with great seriousness. But this idea mixes the political and the moral view of human rights. From a political point of view it is important that the official human rights, or at least the essential ones, are taken seriously and that they are accepted by the majority of states. From a political point of view we should not worry why a government respects the right not be tortured, for instance, whether they do this for certain religious or for Kantian or for utilitarian reasons. Who cares? The essential thing politically is that states respect this and other human rights.

But I think that things look different from a moral point of view. The fact that no justification will ever be acceptable for all cultures does not mean that there is no valid justification of human rights. Moral issues are not decided by democratic votes. A moral view is not wrong because it is not accepted by most people. If people have human rights, they have it for certain reasons. There are reasons for calling certain rights human rights and for giving them a special normative status. There are reasons why certain rights should be seen to be of international concern, as Beitz puts it. We need to find out what these

reasons are. We have to do this not just with regard to the intervention issue, but also in order to be able to determine which rights are human rights, that is, which rights are rights of international concern; why they are of international concern and why they are so important.

5. Humanity

But how could rights be established as human rights? A natural and widespread thought is that humans have these rights *in virtue of their humanity*. Human rights are those rights they have insofar as they are humans. But this needs to be explained. Why should being human be a reason for having rights? What is morally important about being human? The term 'humanity' might refer to some non-evaluative and at the same time non-contingent facts about human beings such as, for instance, that they are capable of acting for reasons. But could this fact provide us with a reason for assigning rights? The only right which could follow would be the right that protects the capacity to act for reasons. But how do we get from this to human rights such as the right not be tortured or not to be the object of degrading treatment or punishment or the right not be discriminated against? These rights do not protect the capacity to act for reasons. That is to say, people have a right not be tortured, but not because torture would threaten the capacity to act for reasons. Victims of torture are capable of acting for reasons, and the same is true of people who are subjected to degrading treatment as well as the victims of discrimination.

But probably the terms 'humanity' or just 'human' should be understood in a different way. James Griffin thinks quite rightly that the word 'human' refers to the concept of agency, and more precisely to the concept of "normative agency" (Griffin 2008, 45): He talks about "the view that normative agency is the typical human condition" (ibid., 45). Humans act for reasons against a background of what they see as a good life, that is, a conception of a worthwhile life. Hence it is suggested that human rights protect people's ability to pursue what they see as a worthwhile life. They do not protect a worthwhile life, but rather the ability to shape one's life according to one's own idea of a worthwhile life.

But again, how do we get from here to the right not to be tortured, the right not to be discriminated against? Victims of torture and discrimination still have the ability to pursue their conception of a

worthwhile life. It is obviously something else that is protected by the right not to be tortured as well as by the other rights mentioned, for instance, the right not to be discriminated against.

Griffin probably takes normative agency to mean not being dominated or controlled by others, as is certainly the case when a person is tortured. The right not to be tortured, one could argue, is based on the fact that we attach a high value to this essential aspect of agency. And it has been argued that this might be the point of human rights: to protect what we consider to be very valuable. But the fact that something is valued by people does not lead to a corresponding right protecting the valued object. I might value getting a higher salary, but this definitely does not establish a right to get one. It is also not a question of attaching a *high value* to something. Being able to get a certain position at the university might have a high value for me, but it does not establish a right to get the position.

One might say that rights are not based on the fact that certain things are valued by us, but rather on the fact that certain things *are* valuable for us. They protect, one might say, basic aspects of what is valuable to us. The normative fact is not that those things are valued by persons, but rather that they *are* valuable for them. But do such normative facts generate rights, human rights? Not everything that is valuable for us does: To get a certain job might be of high value to me, but this does not establish a right to get the job. The account of what is of value for us must be more specific in order to lead us to rights. We might have any kind of reason not to destroy, to protect and probably also to promote what is valuable for people. Values provide us with reasons, but rights do more, they provide us with duties. What generates the duties that correspond to human rights?

6. A basic right

It might be *a basic moral right* that generates universal human rights. First of all, the justification of human rights can only be done by normative facts. Reasons to ascribe rights are provided by things that are valuable, important or themselves rights. A basic right would be a normative property people have, and in addition a normative property that is able to provide us with reasons for rights. But which basic moral right could serve this role?

It might be helpful to have a look at official human rights documents. As I've already said, the declaration of the second World Conference on Human Rights 1993 in Vienna states "that all human rights derive from the dignity and worth inherent in the human person". The preamble of another human rights treaty, the International Covenant on Civil and Political Rights, also tells us that all rights of the Covenant derive from the inherent dignity of the human person. Thus, inherent dignity might be taken as such a basic moral right on which all other human rights are based. The concept of dignity, of course, needs explanation. What does inherent dignity mean?

One could say that it means something that is violated when people are subjected to cruel, inhuman or degrading treatment. The victims are treated as if they did not count, that is, as if they had no say over what is done to them. Inhuman and degrading treatment of people amounts to denying that they have their own normative authority, which might just be the basic right people have. Inherent dignity might be taken as having *normative authority* over essential aspects of one's own life, provided that this is what paradigmatic violations of human dignity such as inhuman and degrading treatment amount to.

But what does it mean to have such a normative authority? It means being authorized to stand up for certain things: to be treated or not treated in certain ways. It also means having a say in deciding your own destiny, having a say as far as it is in your power to determine what happens to you. Thus, it is the right to decide for yourself concerning what is done with your own body and mind. It is the right to decide what job you're going to have, with whom you are going to live, whom you will get married to, what books you are going to write, etc.

Normative authority also includes the right to exclude others from using your person for their purposes. It is also the right to authorize others to do to certain things with you. Respecting people's normative authority is, one could say, respecting their right to be a sovereign person. Acts of humiliation, degradation or torture violate this sovereignty of people. When humans are humiliated, they are treated as if they did not count, as if they could be used at will.

7. Deriving human rights

Recognizing that others have a normative authority over their lives has certain normative implications: It provides us with reasons to assign further rights to humans. If I have a normative authority over myself, I also have the right to exercise my normative authority. Thus, I have rights to those goods and capacities that are required to do so. I have the right to use my body and mind the way I want to use them. And I'm able to do this if I have options. Thus, in order to exercise my normative authority, I need options. But I think I need more than just any options: What I need are *acceptable options:* that is, options I have reason to choose. If you are faced with options you have no reason to choose, that is to say, you would never choose if you were not forced to, you are not choosing. If I have a right to exercise my normative authority over my life, I also need rights which protect acceptable options: Rights protect the options people have. My right would remain unfulfilled if I had no acceptable options. This would be the case, for example, if I had to live a life in absolute poverty. My right over myself could not be exercised. If I have a right to exercise my normative authority, I can demand of others to provide me with acceptable options. Thus, dignity provides us with reasons to assign further rights, namely all those rights required to protect options we need to exercise the basic moral right which I take to be what inherent dignity means: to have normative authority over oneself.

Different human rights protect the normative authority of people: the right to liberty and security, the right not be held in slavery or servitude (Article 4 of the Universal Declaration of Human Rights), the right not to be tortured and degraded (Article 5), the right to freedom of thought, conscience and religion (Article 18), the right to freedom of opinion and expression (Article 19) and others. The normative authority is also protected by social human rights such as, for instance, the right to an adequate standard of living (Article 25) or the right to basic education (Article 26). The normative authority over essential aspects of one's life can only be exercised if one has access to basic goods as well as to the development of basic capacities. Thus, a normative authority over oneself as a basic moral right could lead us to other rights we have as humans. Of course, the idea of a basic moral right to have normative authority over essential aspects of one's own life needs to be elaborated in a way which cannot be done here. But I think it is a way worth pursuing: to base human rights on a basic moral right of persons, namely the right

to have a normative authority over essential aspects over one's own life, that is, the right to be an independent being and recognized as such.

In taking this path, we should not be worried by the political aspects of human rights: whether they are universally accepted, whether they guide the current human rights practice. Human rights might be about respecting the basic moral right to have and to exercise your normative authority. This might in the end lead us to a theory of human rights that could explain why human rights are so important, and even "why", as Raz puts it, "all and only such rights should be recognised as setting limits to sovereignty" (Raz 2010, 334) and thus why they should be respected by all governments. I do not know whether all rights we find in the Universal Declaration can be justified by reference to this basic moral right. Some of them might not be justified this way; but then, it could well be the case that some of the official rights should as a matter of fact not be seen as human rights. But I think it is a promising way of providing us with reasons for establishing rights of international concern, that is, rights we all have to care about. This would be a traditional or moral theory of human rights and not a political one.

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The political and moral conceptions of human rights – a mixed account

Erasmus Mayr

1. Introduction[1]

One of the central issues in the modern human rights debate is the controversy over whether human rights should be primarily conceived as moral rights or as politico-legal concepts. Moral conceptions of human rights, developing themes from classical and modern natural law theory, typically take human rights to be moral rights which every human being possesses qua member of the human species. As Alan Gewirth put it: "We may assume, as true by definition, that human rights are rights that all persons have simply insofar as they are human" (Gewirth 1982, 41). Adherents of the moral conceptions typically try to derive these rights from central features of human nature or basic human interests. There exists, however, a considerable latitude in both the number and kinds of features and interests that are thought to provide the basis for human rights.[2]

Political conceptions of human rights, on the other hand, take their cue from the current, especially post-WWII human rights discourse and international practice, to whose central strands, they believe, every philosophical conception of human rights must do justice in order to qualify as an adequate conception.[3] Accordingly, they see human rights essentially as individual rights that limit the sovereignty of states and whose infringement by state agencies is a cause of international concern and, possibly, a reason for intervention. According to John Rawls, the first prominent proponent of the political conception, "[h]uman rights are

1 For helpful comments on earlier drafts of the paper I am indebted to Elif Özmen and Erich Ammereller.

2 See the debate between Griffin and Tasioulas as to how many fundamental human rights should be posited, cf. Tasioulas 2002; Griffin 2008, 51 ff.

3 Cf. Beitz's description of what he calls his "practical conception" of human rights (Beitz 2009, 102 ff.).

a class of rights that play a special role in a reasonable Law of Peoples: they restrict the justifying reasons for war and its conduct, and they specify limits to a regime's internal autonomy."[4] Human rights violations need not always fully justify international sanctions and interventions, but they necessarily provide pro tanto reasons for other states to take interventive measures, and this provision is, conceptually, part of what it is for a right to be a "human right" (cf. Raz 2010; Beitz 2009, 109).

At first glance, the difference between the two approaches may appear to be extreme, and it may even seem that both kinds of conceptions are not engaged in the same kind of enterprise. While moral conceptions seem to be engaged in the *normative* enquiry as to what moral rights human beings possess qua human beings, political conceptions appear to address the primarily *descriptive* task of providing a conceptualization of current human rights practice. If this were true, then moral conceptions, though able to justify human rights independently of the current practice, might, for this very reason, have no impact on this practice, while political conceptions, though directly connected to this practice, might lack critical potential with regard to it.[5] But both impressions would be mistaken: Adherents of the moral conceptions can well consider what John Tasioulas has called "fidelity" to the current practice as a key requirement of any conception of human rights[6], while on the other hand features of the current practice can well be criticized on the basis of a political conception (cf. Beitz 2009, 105f.), for instance if a putative right accepted in international human rights conventions is not really of sufficient weight for its violation to provide pro tanto reasons for international intervention. Thus, adherents of both conceptions can both intend to relate their conceptions meaningfully to current human rights practice and, at the same time, to retain some critical potential in relation to it.

Similarly, the impression that political conceptions only attempt to provide an answer to the conceptual question of what it is for a right to be a human right, while moral conceptions additionally address the further questions of how human rights are justified and whence their

4 Rawls 1999, 79. A different kind of political conception, which focuses on the function of human rights as legal rights within the national legal order, is developed by Habermas 1992, 136, based on his strict separation of law and morals.

5 This worry is also raised by Gilabert 2011, 15.

6 Cf. John Tasioulas "On the Nature of Human Rights", in this volume, 18.

normative force derives,[7] should be resisted. While it is true that, on the moral conception, the connection between the question about the nature of human rights and the explanation of their normative force is particularly close, adherents of the political conception regularly say something about the question of justification as well. Indeed, their accounts of the nature of human rights impose constraints on the possible justification of such rights, and often they have tried to demonstrate how these constraints can be met.

Although, accordingly, both the moral and the political conception are engaged in the same enterprise and address the same normative issues, the differences between both conceptions still seem to be quite stark. The most important points of divergence concern the following three questions:

(1) Are human rights part of individual morality or of political morality, i. e. do they only concern the conduct of political institutions? If, as it is claimed by the moral conception, human rights are rights held by human beings as such, the corresponding duties must (also) be part of individual morality, and these duties would have to apply to actions irrespective of any political setting within which they take place. If, however, human rights are essentially rights limiting state sovereignty, they are primarily objects of political morality, which need not necessarily impose duties on individuals unless the latter perform public functions.[8]

The answer to this first question is crucial for determining which group of agents can violate human rights and bears duties for their safeguarding. According to the moral conception, human rights are just a subclass of moral rights imposing duties on individuals; therefore individuals can, unproblematically, violate such rights[9] and are, by way of obligations to help others, themselves the direct bearers of duties for safeguarding these rights. These two points are contested by a "statist" (Beitz 2009, 122; cf. also Nickel 2007, 38f.) or "institutional" (Pogge) view of human rights. Thomas Pogge, for instance, insists that violations of human rights necessarily involve "official disrespect" (Pogge 2002, 58), and argues that ascribing a human right to person

7 Cf. Beitz's (2009, 103) claim that moral conceptions "treat the question of the authority of human rights as internal to the question of their nature."

8 Cf. Raz's (2010, 335) characterization of human rights as rights "which transcend private morality."

9 Cf. Orend 2002, 133. Koller 1998, 100f., argues that human rights must impose duties on individuals, for otherwise states would have no reasons for enforcing them.

P primarily implies claims about how the society in which P lives should be organized (ibid., 64f.). Insofar as human right claims do entail moral duties for individuals, for Pogge, these duties are only indirect and concern the individuals' contributing to a structure of society in which persons are protected from certain harms. Beitz insists that states are both the primary "subjects" of the duties derived from human rights and the principal guarantors in case of violations by other states. Whereas moral conceptions of human rights are directly at odds with an "institutional" or "statist" understanding of human rights, political conceptions, while not implying such a view per se,[10] are clearly compatible with it.

(2) The (relative) (a)historicity of human rights. If we look at Rawls' characterization of human rights, it seems clear that the existence of such rights presupposes a system of states[11] whose relations with each other are either already governed by a Law of Peoples or, at least, can meaningfully be subjected to it. Therefore, the existence of something like the current system of states functions as an implicit background assumption for a political conception of human rights such as Rawls'. Consequently, on such a conception, ascribing human rights would not make sense either historically at a time where no system of states comparable to the present one existed, or in a hypothetical situation where all states have merged into one global state.

Against this conclusion, moral conceptions argue for a much more temporally extended, if not even timeless ascribability of human rights. While Tasioulas argues against a timeless existence of human rights, and wants to restrict their validity to the obtaining of the conditions of "modernity" (Tasioulas 2007, 76) – which still gives human rights a much wider span of 'existence' than they have on the Rawlsian conception – philosophers like Griffin argue for the existence of some abstract

10 Political conceptions are only committed to the claim that what distinguishes human rights from other rights is that they impose limits to state sovereignty; this does not exclude that some rights both impose such limits and directly generate individual moral duties on the part of other persons (see below).

11 Officially, for Rawls, the actors to which the Law of Peoples is meant to apply are peoples rather than states, cf. esp. 1999, §2. However, the sovereignty-limiting function of human rights is best spelled out in terms of the duties of states or "regimes"; cf. Rawls own formulation "specify limits to a regime's internal autonomy", 1999, 79.

timeless rights, which, according to the specific circumstances of different epochs, may take on different forms.[12]

(3) The conditions for justifying human rights claims. For moral conceptions, justifying a human rights claim requires showing that a person possesses a moral right simply in virtue of being a human being. In other words, what distinguishes the justification of human rights from the justification of other rights is a certain restriction on *how* the rights-claim can be justified, i. e. the justification must not rely on characteristics a person does not have simply in virtue of being human. For political conceptions, a human rights claim is justified by showing that the person possesses an individual right that limits the sovereignty of states and whose infringement is a cause for international concern. The reasons justifying the rights claim may, but need not, according to all political conceptions, necessarily be *moral* reasons. What is distinctive about the justification of human rights claims is, therefore, not a restriction on possible ways of justification, but an additional characteristic of the alleged right which must be justified. That is, on the political conception, the distinction is based on *what* must be justified, rather than on *how* this is justified.

While points (1) to (3) undoubtedly state key points of divergence between adherents of the moral and political conceptions, one might still be doubtful whether we are not overstating the differences between the two positions. True, it might be conceded, when we look at paradigmatic proponents of these positions, such as Rawls or Gewirth, there will be considerable disagreement on all these points, as well as on others. But the differences will begin to dwindle once we look at political conceptions which claim that human rights are a subclass of individual moral rights, such as Joseph Raz's theory. Theories of this latter kind combine key elements of both the moral and the political conception, and in looking at them we may well begin to wonder whether there is really a substantial question at issue between adherents of the two conceptions.

As I will try to argue, however, there remain important points of contention between the two conceptions, which concern, primarily, the questions of how human rights are to be distinguished from other individual rights and what is required for justifying human rights claims. With regard to both these questions, I believe, there are clear advantages

12 Griffin 2008, 49f. Griffin admits, though, that the applicability of human rights could be restricted to human agents in society.

for adherents of a moderate version of the political conception, such as Raz's: Human rights are indeed to be distinguished by their function of limiting state sovereignty. But in developing a viable version of the political conception we must be careful both to connect the external limiting function, which has been stressed by Rawls, with an internal limiting function, which is both systematically and historically more fundamental, and not to lose sight of the connection between the rise of the *modern* state and the development of human rights theories. Spelling out the way in which human rights essentially limit the authority of the modern state will show that, even though they are singled out essentially by their political function, accepting human rights claims is not tied to the existence of an international system of states, nor even to the existence of states at all. And it will further rehabilitate the project of adherents of the moral conception, namely that of showing that there is a substantive list of rights possessed universally by human beings per se, when we see that universality of human rights is required to ground an obligation of other states, or of the international community, to interfere to protect human rights. So the account of human rights that I am going to argue for can aptly be called a mixed account: While it follows a moderate version of the political conception with regard to the distinguishing characteristic of human rights, it concedes that human rights can only be ascribed the role they have in international practice today if many of the central claims of adherents of the moral conceptions are true.

In the following, I will begin by briefly looking at three main exponents of the two conceptions: James Griffin as a defender of the moral conception, John Rawls as an exponent of what might be called the strictly political conception, and Joseph Raz, who has developed a moderate version of the latter. I will then go on to show why the moral conception fails to offer a convincing answer to the conceptual question of what distinguishes human rights from other individual rights, before turning to the task of developing a viable version of the political conception. In the final section, I'll look at some consequences of this theory, especially with regard to the justification of human right claims.

2. Griffin, Rawls, Raz

Though Griffin views his project in *On Human Rights* as situated within what he calls the "Enlightenment Project on Human Rights" (Griffin 2008, 9), which he connects to the moral conception, his version of the latter is a considerable development from the traditional version as expressed by Gewirth's dictum quoted earlier. Human rights, for Griffin, are not just rights possessed by human beings per se, but essentially "protections of our human standing or […] personhood" (ibid., 33), whose centerpiece is what Griffin calls the capacity for "normative agency". The latter comprises the following three basic elements:

> To be an agent, in the fullest sense of which we are capable, one must (first) choose one's path through life – that is, not be dominated or controlled by someone or something else (call it "autonomy"). And (second) one's choice must be real; one must have at least a certain minimum education and information. And having chosen, one must then be able to act; that is, one must have at least the minimum provision of resources and capabilities that it takes (call all of this "minimum provision"). And none of this is any good if someone blocks one; so (third) others must also not forcibly stop one from pursuing what one sees as a worthwhile life (call this "liberty") (ibid., 33).

Personhood is, however, not the only ground for human rights. For while the content and extent of some rights can be fixed in a sufficiently determinate manner simply by reference to their function of protecting one of the basic features of personhood – such as in the case of the right not to be tortured – this is not generally true: In most cases, this function alone does not give a sufficiently clear-cut rationale for what specific protections are to be included within the content of the right and which not, though such a rationale is clearly necessary for applying the rights in practice. We have to know not only what interest is supposed to be protected by a right, but also what it is supposed to be a right *to*, in order for the right to play an action-guiding role. Precisely determining the exact boundaries of a right is particularly difficult when the rights of one person are in potential conflict with the rights or essential interests of others. To give rights a tolerably determinate content in such cases, Griffin introduces the notion of "practicalities", which are to serve as the second ground for human rights. "Practicalities" are "features of human nature and of the nature of human societies", knowledge of which is required to make rights "socially manageable" (ibid., 38).

From the three basic features of personhood together with practicalities, it is possible, according to Griffin, to derive most of the conventionally accepted human rights. Many specific human rights, such as the right to a free press, will not turn out to be truly universal on this account, as Griffin recognizes; for, depending on historical circumstances, they may simply have no point in some social settings. However, the more abstract human rights from which they are derived by applying those abstract rights to particular historical and social circumstances can claim universality, at least within all human societies. As we have seen, the most abstract rights protect the standing of a human being as a normative agent, or self-decider – and this standing is in danger of violation, and in need of protection by human rights, in any social setting whatsoever (ibid., 49f.).

What Griffin regards as essential for human rights – that they are moral rights protecting the status of personhood – becomes, on the strict version of the political conception proposed by John Rawls in *The Law of Peoples*, an accidental property of human rights at best. Rawls first introduces the notion of human rights into his account of the law of peoples when wondering which principles of international justice liberal societies might agree upon when put into an original position analogous to the one envisaged for deciding on the basic principles of justice within a society in his *Theory of Justice* (Rawls 1999, 37). However, the notion becomes truly important only when Rawls extends his account of the law of peoples to cover a society not only of liberal, but also of "decent" hierarchical peoples. The rules of international justice are generated, according to Rawls, by constructing an original position among decent peoples, which includes not just liberal peoples but also societies which are hierarchically ordered, i.e. do not accord their members all the rights conceded by liberal states, but that are nevertheless "decent" because they are – outwardly – non-aggressive, and because – inwardly – they safeguard their members' human rights and impose moral duties and obligations on all persons within their territories and their law-administering officials reasonably believe that the law is guided by a common idea of justice (ibid. 64ff.). The principles such peoples would agree upon, in the original position, would include, according to Rawls, a rule excluding forceful intervention by other states, subject to the proviso that a state does not violate human rights.

Thus, human rights, in Rawls' account, have a twofold function: Firstly, their fulfillment is necessary for a society to qualify as "decent" in the sense of the law of peoples, and secondly their fulfillment is –

alongside a lack of outward aggression – sufficient to exclude outside intervention; or, to put it differently, human rights are the only individual rights whose violation gives pro tanto grounds for international intervention (ibid., 80). As these are the only features that essentially qualify human rights, the list of human rights Rawls accepts is considerably shorter than the lists accepted in the traditional moral conception (cf. ibid., 65). Furthermore, human rights as envisaged by Rawls need not be moral rights. Rawls especially stresses that their inclusion in the Law of Peoples cannot rest on any specific moral argument – for this would base them on a comprehensive doctrine, which would be incompatible with their general acceptance in the original position. Instead, the justification for these rights rests only on the (supposed) fact that decent societies in the original position would accept both the necessity for their protection and the possibility of intervention against their violations. And this justification does not guarantee that the rights of individuals picked out in this way will be *moral* rights of these individuals.[13]

The account of Joseph Raz, which follows Rawls in claiming that "setting limits to sovereignty […] is the predominant mark of human rights" (Raz 2010, 334), parts company with him in acknowledging that human rights are *moral* individual rights. (For this reason one can call Raz's position a moderate version of the political conception.) Still, human rights are only a *sub-class* of these moral individual rights, and are singled out among the latter by their function with regard to their political and institutional impact and the claim to institutional recognition transcending private morality – and not, as Raz stresses, by the fact that they are possessed by human beings per se, nor by their universality (ibid., 334 ff). (Nor by the fact that they protect essential features of personhood.)

Justifying a human rights claim, for Raz, involves three steps: First, an individual right must be established in the first place (e. g. by showing how it is required for the satisfaction of some individual interest). Second, it must be demonstrated that, under certain conditions, states are obliged to respect and protect this right. And last, it must be shown

13 It is important not to be misled into a moral reading by Rawls' description of the relevant societies as "decent". As "decent" societies are, for him, partly defined by their acceptance of human rights, it is clearly not possible to derive an independent moral justification for these rights from the fact that they are accepted by such societies.

that, with regard to this respect and protection, states should not enjoy the immunity from interference which the doctrine of state sovereignty normally accords to states with regard to their internal affairs.[14]

3. Between the moral and the political conception

Comparing Raz's version of the political conception and a refined version of the moral conception might well make one wonder whether the two theories are really fundamentally opposed to one another. True, both theories insist on different contents of the concept "human rights" and on different standards of justification of human right claims. But might not both approaches eventually converge and thus be combined into a unified account of human rights? E.g., to take Griffin's and Raz's theories, are not rights protecting personhood the ideal candidates, if there are any, for individual rights whose violation is sufficiently important to give cause for international concern? Would this not yield an attractive 'division of labor' between both approaches, presumably vindicating to some extent the (erroneous) impression mentioned earlier that the political conception is primarily concerned with the conceptual question and the moral conception primarily concerned with the question of justification of human rights claims?

While a positive answer to these questions would, undoubtedly, have many attractions, it is unfortunately not available, because this 'convergence' of both approaches cannot be expected. The role of rights possessed by human beings per se within an adequate theory of human rights is more complex, as we will see in the final section of the paper.

3.1 The failure of the moral conception

The moral conception is faced with a number of interrelated worries, the most important of which is the Irrelevance Objection, which has been raised by Raz (ibid., 327f.) and goes as follows: If adherents of this conception want their theories to have any relevance for and impact on current human rights practice, they must aim at "fidelity" (Tasioulas)

14 Raz 2010, 336. There is a parallel to the three-step procedure for justifying human rights claims Beitz proposes, 2009, 137, though Beitz's procedure involves no step for deriving rights from interests.

to the main features of this practice. For, otherwise, though they may well succeed in establishing human right claims independently of this practice, e. g. by singling out a criterion X fulfillment of which qualifies a right as a human right, it would be unclear why any divergence between these claims and the human rights claims actually accepted in current practice should be considered as a fault in the latter and should give rise to rational pressure to modify it so that it accords with the human right claims on the basis of criterion X.

Among the chief features of the current practice is, indisputably, the role ascribed to human rights in international law, viz. that their violations give grounds for international concern and, possibly, humanitarian intervention. Each theory fulfilling the "fidelity" constraint must establish that all human rights do or should have this international role. Of course, one cannot, without begging the question at issue against the moral conception, require that this has to come out as a conceptual truth on any adequate theory; but such a theory must at least, by and large, "extensionally" fulfill this requirement.

Now, when one considers the moral conception's traditional criterion for a right to qualify as a human right, i. e. that it is a right possessed by every human being as such, it is quite implausible to assume that the class of rights singled out in this way should either completely or approximately overlap with the class of individual rights whose violations would give ground for international concern. This difficulty is particularly glaring if we look at the 'simple' version of the moral conception, such as expressed in Gewirth's dictum. Even when we presuppose that the task of singling out those rights which are possessed by human beings *as such* can be resolved, it is very hard to see why the violation of these rights, in comparison with the violation of other rights, should generally be of such a greater weight that it would justify their special role in international law.

Two kinds of rights possessed by human beings as such provide particularly strong grounds for skepticism. First, there are very trivial moral rights that are possessed by everybody:[15] E.g. when I play cards with you, I have the moral right not to be cheated by you, and this right can be derived from my standing as a person and the moral duty of respect you owe to me in virtue of this standing. So, presumably, it is a right I have qua person. Nevertheless, it is not plausibly a human right, for it is clearly not a right whose violation – either by you, or

15 Following example from Griffin 2008, 41.

by the state when it fails to protect me from your cheating – provides a pro tanto reason for international concern. Even though states should do something to protect people against being cheated in private card circles, and even if there were no decisive practical obstacles, or costs to others, involved in doing so, it is not a failing of sufficient weight to provide grounds for international concern. For the whole point of the idea of sovereignty in international law is to protect states against the 'butting in' of other states or international agencies for minor injustices or failures to protect its citizens. And if we were to renounce the idea that states can legitimately reject some outside interference into their internal affairs, even when they have failed to fully live up to the standards of political justice, we would have altogether rejected the institution of state sovereignty as it presently exists in international law; and an account of human rights that was based on this rejection of sovereignty could hardly count as exhibiting "fidelity" to current human rights practice.

The second kind of case involves moral rights possessed by human beings per se that cannot be enforced or protected by state agencies. Take the right to gratitude for beneficiary acts one has performed. Obviously, it would be perfectly senseless for state agencies to enforce such a right, if only because such enforcement would be self-confuting: No action enforced by state agencies could count as a fulfillment of the moral right to gratitude. These moral rights, which for reasons of principle resist transformation into institutional or legal rights, cannot play the roles assigned to them by the current human rights practice. So, if "fidelity" to current human rights practice is a desideratum for which rights can count as human rights, these rights cannot be considered as human rights, though they would qualify as human rights on the criterion defended by the traditional view of the moral conception.

These cases provide strong grounds for thinking that there will be considerable extensional divergence between rights possessed by human beings as such and rights whose violation gives grounds for international concern. But once we accept such divergence, the Irrelevance Objection becomes pressing: Why should we adjust our current human rights practice to fit a criterion the fulfillment of which does not guarantee one of the central roles of human rights in the current practice?

Now, an adherent of the moral conception might respond at this point that he need not ascribe human rights *merely* on the basis of moral rights or of interests shared by all human beings as such, but that only rights possessed by all human beings as such that fulfill further

conditions qualify as human rights. One important condition of this kind would be a "threshold of importance" condition: Only rights whose protection is sufficiently crucial to its bearer can count as human rights. Therefore, completely trivial individual rights, even when possessed by all human beings as such, need not qualify as human rights, nor need the right to gratitude if its implementation would be self-defeating.

However, there is one major difficulty for this kind of response. When an adherent of the moral conception spells out the additional conditions, in particular a "threshold of importance" condition, he seems to be faced with the following dilemma: Either these conditions make explicit or implicit reference to these interests having sufficient weight to limit state sovereignty – but then the proposal turns out to be a version of the political conception in disguise. Or else these conditions lack such reference – but then it's hard to see how the original difficulty is overcome, i. e. how the gap between what qualifies as a human right on the proposed criterion and what is to play the role human rights do in fact play in contemporary international law is to be bridged. Call this the Threshold Objection[16] to the moral conception.

These considerations provide a strong case for the claim that the 'simple' version of the moral conception, which simply equates human rights with individual rights possessed by human beings per se, will not succeed in fulfilling the "fidelity" constraint, because the class of rights that would qualify as human rights according to this version would not even approximately coincide with the class of individual rights whose violations provide grounds for international concern.

However, it is not immediately clear whether the same kind of criticism also applies to more sophisticated versions of the moral conception such as Griffin's, which considers human rights to be rights that protect the essential ingredients and preconditions of personhood and "normative agency" (see 2.). E.g., the objection based on trivial rights obviously fails to apply here, because these rights do not protect their bearers' essential standing as persons and self-determining actors. With regard to the second kind of case mentioned above – individual moral rights that resist transformation into legal rights, such as the right to gratitude we have considered earlier – Griffin can appeal to his second ground for

16 Also Raz 2010, 325f., criticizes the moral conception (in Griffin's version) for its inability to spell out in a principled way minimal standards for human rights.

human rights, practicalities. Knowledge of human nature and society will tell us that such rights are no good candidates for legal enforcement.

But there are two central difficulties remaining for Griffin's account. The first, as Raz has argued, lies in dealing with the Threshold Objection. As we have seen, Griffin is faced with the task of giving a clear-cut formula for which rights protect essential ingredients and preconditions of personhood. In attempting to provide such a formula, he is "torn" between two different poles: On the one hand, he could restrict the class of human rights to those rights whose enjoyment is essential for *bare* human status, or for the *bare* status as an intentional agent. And, officially, that is the course he is taking: "they are rights not to anything that promotes human good or flourishing, but merely to what is needed for human status".[17] However, de facto, Griffin believes that he can qualify a much larger class of rights as human rights than those rights which protect bare intentional agency; e.g. he also includes the right to education within his list of human rights. But as these further rights cannot be plausibly seen as rights protecting the essentials of personhood, Griffin, who explicitly does not want the class of human rights to coincide with the class of individual rights tout court, needs some principled way to distinguish among those rights that do not merely protect bare personhood. He attempts to do so by adding the proviso "minimal" to the content of those further rights – but that is hardly a principled distinction.[18] The only way to draw this distinction in a

17 Griffin 2008, 34. Again, in Griffin 2010, 348, he insists that "being a normative agent" is a threshold term.

18 For this criticism cf. Raz 2010, 326. Griffin 2010, 348, in his answer to Raz, argues that in order to draw the dividing line between states below the threshold of normative agency and states at or above it, "we should consider the general run of people" and "we should focus on the conditions necessary to ensure that this general run of people will be at or above the threshold." At least general literacy, Griffin argues, will, on this criterion, be required, because in some parts of the world literacy "is the most efficient way of reducing infant mortality". While this answer, arguably, goes some way to drawing the distinction in a more principled way, it is still not fully convincing: For it has the consequence that the status of the right to basic literacy does not derive from the interests of the right-bearers themselves, but from the interests of other persons (e.g. newborn or future infants). So, it turns out, on Griffin's new strategy, human rights do not always, or even essentially, protect the status of the right-bearer as a normative agent! And this is hardly compatible with the traditional view of human rights as founded in the interests and needs of the right-bearers themselves, to which Griffin wants to do justice in his account.

way that guarantees fulfillment of the "fidelity" constraint, it seems, is to add some requirement of the form that violation of these rights by state agencies should be sufficiently serious to justify international concern. But doing so would amount to espousing a version of the political conception of human rights.

The second central difficulty for Griffin springs from the question of how to account for the historical 'growth' in human rights lists. The group of particular human rights accepted almost generally today (and accepted by Griffin himself) contains many rights that would have been either absurd or pointless to posit as human rights in the 17th or 18th century, such as a general right to literacy. If Griffin were right in his assumption that human rights are "minimal" protections of personhood and that the elements of personhood itself are timeless in the way described, the explanation for this change could only lie in a change in the historical circumstances,[19] for personhood itself is the same for people then and now. Two possible changes, it seems, could explain an expansion: The rise of new threats to personhood, and the enlarged ability of other people, or the state, to deal with those threats. But while for some human rights, the expansion could be explained in this way – e.g. for the right of freedom of the press – such an explanation is not plausible for all rights.

Take the right for elementary education, for instance, as possessed by an illiterate peasant in a remote and isolated rural region in the Andes whose social and economic structure has changed little since the 17th century. Certainly, even without elementary education, this peasant is able not only to be a true self-determiner[20] – within limitations, of course, but this applies to everyone – but even to live a decent and happy life. This was as true of many illiterate peasants in the 17th century as it is now. However, in the 17th century, it would have been pointless to assume that the peasant had a human right to elementary education – not only due to both the lack of an institution to provide universal elementary education and the comparatively much smaller need for literate working people than nowadays, but also because he could be a normative agent without it. If we look at the peasant's situation today, we see differences in external circumstances, which, as Griffin would say, allow us to derive his right to elementary education from

19 Rather than in a change of what Griffin 2008, 38 calls "practicalities", for these latter are supposed to be more general features.

20 As Griffin himself accepts, 2010, 348.

his more abstract right to autonomy. But as we have constructed the case, the change in external circumstances has no relation to the peasant's own life – to how he determines (or not) what course of life to pursue! How, then, could it relate to new threats to *his* standing as a normative agent, or how could there be old threats to this status which could now better be safeguarded against? But if there are no such threats, how could the change in outward circumstances justify a new human rights claim?

The correct analysis of this case seems to be the following: What provides the grounds for ascribing the right to elementary education to the peasant now are basic considerations of equality: It is a grave mark of disrespect to persons to treat them unequally with regard to important interests, even when these are not essential to normative agency, because this at least implicitly shows that one denies them equal moral status with others. Griffin explicitly excludes equality as a third ground of human rights in addition to the protection of personhood and practicalities (Griffin 2008, 44). But equality-based considerations do have an independent role to play in justifying human rights. This role, however, is not one adherents of the moral conception can easily capture: For demands of equality arise as often from considerations about the particular agent who is acting and his special characteristics as they do from considerations about the nature of the person towards whom the agent is acting. In other words, considerations of equality are as often agent-based as they are patient-based. Some demands on what the agent must do follow only from the particular agent he is and what he can do overall. For instance, an individual human being in his private dealings can well display a significant amount of partiality; he is not required to treat "equal things equally", and can, at least to a certain degree, act according to his own principles or even arbitrary preferences. E.g. when deciding which charities I'll support I am perfectly at liberty to pick out those whose religious background I can identify with or even to choose at my whim. This kind of partiality or arbitrariness is, however, considered illegitimate in actions of state agencies: State officials are not allowed to base state support for private charitable organizations on their own sympathies or their religious background. And much less are they allowed to let such considerations influence their decisions when then intervene in people's rights.

Looking at such cases, and keeping in mind that the state is a special kind of agent, both with respect to the extent of its power and to its claim to legitimacy in exerting force, it is very plausible to assume

that, for the state, there exist special kinds of demands that derive only from the kind of agent it is – in particular concerning which considerations it can legitimately base its decisions on. And it is equally plausible to expect that these specific kinds of demands will be relevant to human rights claims. But insofar as these demands are linked to the special kind of agent a state is, it is very hard to see how adherents of the moral conception, who only focus on the human person vis-à-vis whom the state or another agent is acting, can adequately capture these specific demands.

If these considerations are correct, they show that even a more sophisticated version of the moral conception, such as Griffin's, cannot evade the Irrelevance Objection without somehow taking into account the special status of the state as an agent sui generis if they want to fulfill the "fidelity" constraint. But it is very hard to see how they can do so without covertly accepting the central tenet of the political conception of human rights, namely that there is a conceptual connection between what makes a right a human right and its imposing requirements on the state. We can therefore conclude that a moral conception developed along the lines of the traditional conception cannot provide for the required overlap between the rights it singles out itself and the rights the violation of which is legitimately seen as a matter for international concern. The only way to ensure such overlap, it seems, is to accept some form of the political conception that builds this connection into its very concept of human rights.

3.2 Towards an adequate version of the political conception

Hence on the conceptual level, the political conception is preferable. However, as we are going to see, this does not make the project of the moral conception – that of showing that there are rights possessed by human beings per se – redundant. Nor does it mean that current versions of the political conception are not in any need of modification.

To develop an adequate version of the political conception, let's take as our starting point Rawls' characterization of human rights: "Human rights are a class of rights that play a special role in a reasonable Law of Peoples: they restrict the justifying reasons for war and its conduct, and they specify limits to a regime's internal autonomy." (Rawls 1999, 79) While Rawls is undoubtedly correct to stress the international dimension of human rights, focusing just on this international role

would nonetheless be a distorting oversimplification and amounts to neglecting an essential aspect of the history of the concept of human rights. One main concern is that Rawls' view ties human rights too strictly to the existing system of national states and its concomitant international legal order.[21] As a critique of Rawls' exaggerated reliance of the law of peoples as the primary locus of human rights, this worry seems justified: Human rights are clearly not *just* rights whose violations give grounds for international concern. Instead, they are rights that have this limiting function on the international level *because* they already limit any legitimate state power on the purely national level.[22]

To bring this important point into better focus, we must remind ourselves that the set of individual rights whose violations give grounds for international concern and the set of human rights are not necessarily co-extensive. For instance, it is quite conceivable that international law would legitimately give states a limited power to interfere, under certain conditions, into the affairs of another country in order to protect the individual rights of its own citizens because of particular interests *of the state itself*, without the range of these rights being restricted to human rights of these citizens. E.g., states could have the right to interfere in order to protect certain property rights of their own citizens when another state is no longer able to protect them within its territory. Such intervention rights might be justifiable when it is of particular importance for the intervening state that the individual rights are respected, because, e.g., they concern the trade of important commodities for the other country's economy. In this case, the individual rights in question are rights violations of which give grounds for international concern by providing possible grounds for interventions. However, this would not turn the individual property rights in question into human rights, even though they limit state sovereignty. (It is not that these rights could not be human rights – the point is that if they are, they must be so even without the special intervention rights just mentioned.)

What the exclusive focus on the international role of human rights misses is the centrality of the function of human rights of imposing *internal* limits on state power, i.e. limits directly within the relationship between state and citizen. This function is clearly both systematically and historically primary, and must be so in any adequate account of

21 Cf. John Tasioulas "On the Nature of Human Rights", in this volume, 47f.

22 This dependence is recognized by Raz 2010, 336, in his three-step procedure for justifying human rights claims.

human rights. These rights only limit state sovereignty on the international level because they limit (any) state power internally, and the former function derives from the latter.[23] In the case we've constructed in the last paragraph, this derivation relation is precisely what is lacking; the property rights in question do not limit any legitimate state power, because, for instance, the two states in questions could, by a concerted procedure (e. g. a treaty and parallel national legislation), abolish their existing intervention rights.

This derivation relation is signally neglected in Rawls' account of human rights. Though in the law of peoples the sovereignty of states is, on his account, restricted by human rights, only in the case of liberal states is there a preceding internal limitation of state power by human rights, because their basic structure is "chosen" in accordance with Rawls' version of the social contract model and its justification depends on this model. For non-liberal decent states, though, Rawls cannot argue for their internal limiting power independently of the law of peoples, because the internal authority of such states toward their citizens does not depend on any clearly specified model that would make its authority depend on the safeguarding of human rights.[24] Hence the binding role of human rights for such states arises *only* from the law of peoples – and this cannot be correct, given the primacy of the internal limitation.

The historical precedence of the internally limiting function is also obvious: Until the 20th century, the idea of international enforcement was practically completely absent from the human rights discourse. The *only* function of human rights was to set limits to the power of any legitimate state, and this was the only role of human rights envisaged in the documents of the American and French revolutions. Redress from violation of human rights was not to be had by international intervention, but either by the state's own jurisdiction, or, if that failed, by the armed resistance of the citizens themselves.[25] Only after the horrors of the 1930 s and 40 s and their mostly trans-border perpetration had shown especially vividly that international back-up was necessary to en-

23 Pace Pogge 1998, 398, who argues for viewing human rights as standards for judging *global* institutions.

24 Cf. Rawls 1999, 64f. and 70.

25 Somek 1995, 56 is quite right in tying the origin of human rights discourse to the right to resistance: "Ohne Widerstand keine Menschenrechte".

force human rights did the international role of human rights come into prominence.

Human rights limit any legitimate state power in two respects: Either as negative limits on what positive actions the state can legitimately take, or as positive claims on what the state must do, i. e. which individual interests it must protect. However, in view of the historical development of the idea of human rights, this claim needs a further qualification. Human rights, historically, came to the fore as devices for countering the threats arising from a particular kind of state – namely the *modern* state (which began to emerge, roughly, with the rise of absolutism, in the 17th century) with its special range of powers. That the human rights discourse historically developed as an 'answer' to the inherent dangers arising from the modern state with the extensive range of powers it possessed, in comparison to its predecessors – such as a developed bureaucratic system, large police and (standing) armed forces, and an extended legal system – has been convincingly argued by Jack Donnelly.[26] However, even more than the general growth of resources available to the modern state, the following three key characteristics crucially distinguished it from its predecessors and made it especially important to restrict its authority by safeguarding human rights: (i) the monopoly of power claimed by the modern state within the borders of its territory, (ii) sovereignty on the international level and (iii) the state's claim to regulate, in principle, every area of its citizens' lives.

Factor (i) was, historically, the key step in the development of the modern state. 17th century France, which provided the 'role model' in the development of the absolutist state, took this step most dramatically with Richelieu's suppression of the Huguenot security places, which had not been subject to centralized power, and Mazarin's and Louis XIV's suppression of the nobility as an independent power factor of its own, which left the French centralized state as the only bearer of military and political power within its own territory. The suppression of rival bearers of powers, which had earlier been tolerated, went hand in hand with the abandonment of the idea that several systems of political authority could co-exist side by side, and that there could be regional exemptions from state power in favor of another source of legitimate authority.

Factor (ii) was the 'other side' of the coin in international politics; and in political systems like the Holy Roman Empire, where particular

26 Donnelly 2003, 46ff.

territories evolved as autonomous political entities by simultaneously eliminating internal rival bearers of political power within their boundaries and by emancipating themselves from the authority of the central institutions of the Empire, the development of factors (i) and (ii) was, perforce, so closely linked that it does not even make sense to regard them as historically separate.

Factors (i) and (ii) combined to make the individual citizen vulnerable and helpless in the face of state threats in a way that was both historically new and clamored for a new method of protection. For these factors eliminated the authorities rival to the state to which the citizen, at least in theory, had been able to appeal for help and protection against unjust measures by the state. By this elimination of any extra-state juridical procedure for the protection of rights and redress in cases of violation, the only remedy in cases of rights violations by the state itself was, ultimately, technically illegal armed resistance. And human rights very quickly emerged as the major resource to justify such technically illegal resistance – as we can clearly see from Locke's justification of the English Glorious Revolution, as well as from the justification of the American Revolution in the Declaration of Independence (cf. Locke 1988, 202ff.).

Lastly, factor (iii) implied a fundamental change in the range of the state's functions: From the early Middle Ages onwards, the task of the state had been mainly restricted to outward defense and to the settlement of quarrels between smaller social organizations like clans, tribes or federations, so that the state's authorities were thought to have 'no business' settling quarrels arising merely within these organizations. In the 17th and 18th century, this view changed, and the state was gradually seen to have both a general duty and authority to safeguard the citizens' well-being. It is obvious that not only did the potential dangers from state authority became more pressing and 'global' with this change, but also that a much more comprehensive protection of individual interests by the state could reasonably be expected. This latter aspect was crucially important for the development of human rights: E.g., only when it is considered that state's business to regulate intra-family relations and to protect individual interests within such relations can it make sense to ascribe a claim-right to individuals against the state to provide such protection.

As the function of human rights has consisted in protecting human beings specifically from the dangers arising from the institution of such a state, it seems plausible to modify our claim about the nature of human

rights in the following way: Human rights are individual rights that constrain any state power of comparable extent as the one claimed and possessed by the modern state (or would do so, where such a state to be instituted) – i. e. a state power having, in particular, a monopoly of force within its territory and sovereignty vis-à-vis other states, and concerning itself with all, or most, areas of its citizens' lives. So the modern state and its characteristic threats provide the benchmark by which to determine whether an individual right can count as a human right or not.

4. Consequences

As we have been arguing, human rights are, essentially, individual rights that set limits to any state power which is comparable in extent to the one claimed and possessed by the modern state. Their limiting role is both from the outside – as their violations provide reasons for international concern – and from the inside – they limit any state power directly within the relation between person and state. In fact, both these aspects of the limiting role can be described as limits of "sovereignty" in the traditional sense of the term, which not only concerns the relation of one state towards others, providing the basis of non-interference, but was, as originally introduced in the modern discussion by Jean Bodin, also a characterization of the internal structure of the state; in the latter respect, the idea of sovereignty expressed the state's possessing the highest authority against which no appeal "under heaven" or rightful resistance was possible (Bodin, Six Livres, esp. book I, ch. 8). Therefore both the 'internal' and 'external' aspect of the limiting role of human rights are tied together.

What does it mean that human rights impose limits on any legitimate state power? Of course, it means, inter alia, that any state authority which systematically violates human rights cannot be legitimate – but the condemnation of illegitimacy, by itself, does not carry very much weight unless we know what follows from it. As far as the 'external aspect' of the limiting role is concerned, the violation of human rights provides cause for international concern, so that international sovereignty is impugned. 'Internally', the limiting role manifests itself in restricting the state's rightful claim to obedience by its citizens. Violations of human rights provide citizens with pro tanto reasons for civil disobedience and, in the extreme case, armed resistance, because they override

the state's claim to obedience even in cases where this claim has a strong moral foundation, e. g. because a well-functioning process of democratic legitimization is in place. In Raz's terms, if we see the claim of legitimate state authority to obedience as "protected" by exclusionary reasons to disregard counteracting considerations which speak against acting as the authority orders one to act,[27] then human rights are those individual rights whose violations provide reasons overriding even these exclusionary reasons. Of course, this does not mean that every human rights violation per se justifies civil disobedience or even armed resistance: Only when violations are systematic and when they cannot be remedied within the state system of legal redress can they justify these measures. But human rights violations are, in any case, the right kind of consideration to override the state's claim to obedience by its citizens.

The characterization of human rights as individual rights which limit state sovereignty in the two ways described, may easily give rise to the impression that the existence of human rights, on the account proposed here, presupposes an actually existing system of nation-state and international law, or at least the actual existence of some state power. But this impression would be mistaken: For individual rights of the sort described can exist even without the actual existence of any state – it is merely necessary that these individual rights are such as to set limits of the kind described on any state power that the right-bearers might enter into. I.e. it is necessary that a right should set limits to state sovereignty if there is or would be a state possessing power comparable in extent to the one claimed by the modern state. The latter conditional can obviously be true even if there exists no state of this kind. This separation of human rights from the actual existence of states or legal institutions shows that they are not simply legally created rights, but rather must have their basis in pre-positive morality. In this sense, they are indeed 'natural' or 'moral rights'.

This raises the question, though, what it means to describe an individual right as a human right without an already existing system of states. In order to answer this question, we must spell out in general the conditions an individual right has to meet in order to set limits to any legitimate state power in the ways we have described – i. e. we must answer the general question of what we have to show in order to justify the

27 For the concept of ‚exclusionary' reasons cf. Raz 2006, 49ff. Raz himself argues that "authoritative" claims should be seen as constituting second-order reasons, loc. cit., 82ff.

claim that a particular individual right must be included in the set of human rights. How one answers this question ultimately depends on the model for justifying state authority one subscribes to. While I cannot argue for this theory here in any way, for the following considerations I will assume for the sake of illustration that the correct theory to rely on for the justification of political authority is some version of the social contract model which derives the authority of the state from some form of rational agreement, based on the individual interests of the persons participating in this agreement.[28]

On the basis of such a theory, it seems tempting as a first approach to pick out as human rights those individual rights that people, when contracting to enter into a society with institutions that are comparably strong and far-reaching as in the modern state, would reasonably want safeguarded within this society in appropriate ways. In other words, human rights would be those rights persons would rationally agree to have safeguarded by the internal structure of the state they agree upon.

The problem with this answer is that it fails to capture the special importance or urgency of the protection of human rights. Rational agents would, in the original contract situations, plausibly want *all* their rights to be appropriately safeguarded, not just their *human* rights (but also, e.g., consumer rights in case of defects of purchased goods). But not all rights are human rights, nor is a state whose organization in some respect violates principles of justice per se a state that violates human rights. The point that not all rights are human rights is often expressed by the claim that human rights only provide a *minimal* standard for government behavior.[29] This point is of special importance for political conceptions, because, plausibly, not all infringements of rights should provide even pro tanto reasons for international intervention.

How can we capture the idea that human rights are in some sense minimal? One approach would be to distinguish *human* rights from others by the special *kinds* of safeguards persons would reasonably want for the rights in question. For instance, one might argue that while some rights might reasonably be considered to be accessible to change or abolition by otherwise legitimate political decisions, e.g. by democratic decisions, as there may arise practical need for such changes, no one could reasonably want *human* rights to be subject to majority decisions of this

28 Be it a Hobbesian account or a Rawlsian original position model.

29 Nickel 2007, 36. Shue 1996 described human rights as specifying "lower limits on tolerable human conduct".

kind.[30] This special need for protection even against democratic decisions is what characterizes human rights.[31]

However, even this proposal, though it considerably narrows the number of human rights in comparison to its predecessor, would still yield too inclusive a criterion for human rights. In particular, rights of democratic participation – e. g. the right of equal access to political office, the right to a free and equal vote – would plausibly count as rights whose possession should not be subject to change by democratic decision. It is very questionable, though, whether (all) such rights should properly be regarded as human rights. Hereditary monarchies do not guarantee equal access to all political offices for all their citizens – in particular, the position of the monarch is only accessible to a very limited number of people. Nevertheless, the existence of monarchies does not per se seem to constitute a violation of the human rights of their citizens. Even if we consider this form of state organization as inferior to republican democracy, the fault lacks the urgency of redress that is characteristic of violations of human rights.

The key to an answer lies in the role of sovereignty and the monopoly of force of the modern state. Clearly, this monopoly, which the modern state characteristically claims, provides its citizens with obvious benefits, especially concerning personal and property security, in comparison with a state that lacks this monopoly and would therefore be in danger of regular internal violence and civil strife. In a comparable way, sovereignty – now used in the technical sense of giving the state the possibility of rebutting unwanted outside inference in its home affairs – plays a protective role, both by strengthening the state monopoly on power and by reducing foreign interference that might itself endanger the citizens' security.

The advantages accruing to the individual citizen from the state monopoly on power and sovereignty may not be as enormous as they were

30 An alternative way to stress the special standing of human rights is Rawls' account of basic liberties in the *Theory of Justice*, Rawls 1971, esp. §11. Rawls argues that, in the original position, when determining the principles of justice applying to the basic structure of society, rational agents would choose equal basic liberties for all, and that these basic liberties could not be "bargained" against social or economic advantages (principle of serial ordering). However, the following objection, with regard to an account of *human* rights, also applies to Rawls.

31 Also Wildt 1998, 142, considers it an essential characteristic of human rights that their protection may not be subject to political majority decisions.

thought to be by Thomas Hobbes in the *Leviathan*, but clearly they will compensate the individual, to a large degree, for many of the injustices within the organization of the state. This is particularly clear in the case of unjust judicial decisions: Even when judicial systems generate many such decisions to the detriment of one person, this person will, provided these decisions are not too invasive, still be better off when such a system for pressing claims exists and efficiently excludes other violent alternatives of doing this, than he would be without it. Therefore, a person might quite reasonably go along with a considerable amount of suppression if, in exchange, he can enjoy the benefits of the state monopoly on power and state sovereignty, which would otherwise be denied to him.

There will, however, be a turning-point, where the benefit-loss balance will no longer be in his favor. Notoriously, Hobbes went so far as to claim that the benefits from the institution of a sovereign state were so large compared with a situation where there was no state that they outweighed every disadvantage arising from state suppression short of direct danger to one's own life or basic physical well-being. This claim rested on his own dire view of what the state of nature without any sovereign state would be like. But this view is hardly compelling, and other writers, such as Locke, have held a much more benign view of the state of nature. Besides, the relevant comparison we have to draw here is not the one between the modern sovereign state and a situation completely lacking any state institutions, but between the modern sovereign state and a considerably weaker type of state, which, while enforcing some measure of internal and external security, lacks both the power monopoly and sovereignty in the modern sense and has (as it was the case with the pre-modern state) a considerably more restricted range of tasks.

On the basis of a contract model for justifying political power, human rights thus appear as the 'baseline' for reasonable people that must be met if they are to be able to reasonably enter into any state possessing the key characteristics of the modern state, especially power monopoly and sovereignty. Thus, safeguards for human rights are not only part of any constitutional structure people *would* rationally agree upon; inclusion of such safeguards is a precondition for any constitutional structure people *could* rationally agree upon – where rational choice is seen as taking place against the background of the alternative of not instituting a (modern) state at all, with its concurrent disadvantages. Failure to safeguard human rights means that, for rational agents, it will never make sense to institute such a state, no matter what the other ad-

vantages of this institution might be compared to a situation without that institution. This function of human rights captures Rawls' idea that political regimes, in order to make any minimal claim to legitimacy, must be schemes of social cooperation for (at least minimal) mutual benefit.[32] Regimes violating human rights per se fail to satisfy this criterion because the disadvantages caused by their establishment are necessarily greater than any compensatory advantages it might bring.

This clearly distinguishes the standard of human rights as a minimal standard from an ideal standard of (international) justice: Faced with the alternative of a situation without a modern state, rational agents can agree upon a system that is significantly unjust, e.g. gives many special privileges to some individuals. As long as they can rationally do so, the ensuing system will, as we have argued, not violate human rights, though it may be substantially unjust. By contrast, human rights are those rights whose violation cannot be compensated for by any other economic or security advantage the modern state might bestow on its citizens.

Viewing human rights as the 'baseline' for rational agreement to a social contract has two important consequences: First, human rights cannot ever be bargaining stakes. For otherwise their violation could be compensated for by other advantages the system bestows upon people entering into it – and, as we have argued, this is precisely what is impossible for human rights, though it may be possible for other rights. Second, the alternatives that form the background for the decision for or against instituting the modern state can change to some extent due to a change in historical circumstances. Four factors that form the background of the quasi-"original position" decision for or against instituting the modern state are especially subject to change, and this change will make it reasonable for persons to give much greater, or much less, power to the state. (i) The economic situation of the population; e.g. in countries subject to severe crises of famine, it can be reasonable to give the state large powers of intervention into the economic process, thereby considerably cutting in on the economic liberties of its citizens. (ii) The situation of external security; again, in countries in danger of constant aggression by their neighbors, it will be reasonable to give to the state the necessary means for defending its citizens, which may include extensive authority to intervene in the citizens' lives. (iii) The

32 Rawls 2001, 6. This idea also figures importantly in Williams' account of human rights (Williams 2006, 62–64).

possibility and potential form of international intervention; if there is a fairly just and well-functioning system of international redress for violations of individual rights – as there is, arguably, in the EU – rational agents will stand for considerably less intervention by the state and, in consequence, will considerably restrict the limits of the sovereignty of their own states (cf. Raz 2010, 330). (iv) The danger of civil war and internal conflict in case there is no central authority with the three basic characteristics of the modern state.

What do shifts in conditions (i) through (iv), which can change the parameters for what agents could rationally acquiesce in, mean for human rights ? Most importantly, they lead to some degree of relativization in human rights standards: Improving overall economic conditions and an improving situation of international security and international institutions mean (surprisingly) that the number and extent of human rights will grow – simply because under these conditions, agents could rationally concede less power to the state or accord the state sovereign power only under a greater number of caveats. But this does not lead to a total relativization: For some individual rights will be sufficiently important that even under dire external circumstances, giving up these rights cannot be worth the advantages produced by instituting a modern state.

Furthermore, the kind of relativization that follows from the version of the political conception defended here is only relativization to external circumstances. This does not imply cultural relativism per se, i. e. the claim that the validity of human rights claim must be "relativized" to a particular culture. Instead, relativization to external circumstances is fully compatible with the possibility that the list of human right claims valid for every human being is the same once the external circumstances are fixed.

But what about cultural relativism – does our version of the political conception not lead to this form of relativism, too? For even if, even under dire circumstances, rational agents cannot acquiesce in a system that allows pervasive violations of some of their individual rights, what guarantees that these rights, for all agents, are the same? Or, accepting that there may be differences, what guarantees that there is a sufficient overlap between those individual rights such that we can say that there exists, interculturally, *one* system of human rights – instead of several such systems? If there are several such systems, they would still all count as systems of human rights when these rights fulfill the criterion

we have proposed earlier, even though their contents could greatly diverge.

The answer to the question of whether there is one system of human rights or many ultimately depends on the success of the project pursued by adherents of the moral conception of human rights of showing which rights are possessed by human beings per se. If they can show that there are fundamental interests common to all human beings per se, then these interests – or, rather, those of them that are of sufficient weight – will provide the basis for a set of individual rights that are valid interculturally. It's highly plausible to suppose that there will be *some* such common set of interests (life, bodily integrity, etc.). How large this set will be, however, is a different question – and if adherents of the moral conception should fail to show that there is a substantial such set, then, indeed, we might have to conclude that there is no substantial single system with global validity.

Such a negative result would not only show that the project of adherents of the moral conception is doomed to failure for reasons quite different from the ones we have discussed here. It would also be deeply damaging to the political conception itself. For, as we have seen earlier, it is one of the chief features of human rights in the current human rights practice that their violation gives pro tanto grounds for international concern and humanitarian intervention. For whom does it provide these pro tanto grounds? Primarily, at least, for other states and the international community. When human rights violations of sufficient magnitude occur and there are no sufficient reason against intervening, the other states and the international community not only have the possibility of legitimate intervention, i. e. they are not only allowed to intervene; but they even have a duty to intervene under these circumstances, which corresponds to a claim to assistance of those persons whose human rights are violated.

Now, if we assume that there is no universal system of human rights, but, e. g. that there are, in different cultures, fundamentally diverging such systems, it becomes very hard to see why states from one of these cultures should have a duty of political morality to intervene to prevent or stop violations of rights which are, in their own culture, not accepted as human rights. They may be *allowed* to do so once a right that sets limits to the sovereignty of the offending state is violated; but why should they have a *duty* to intervene in protection of rights that

they need not themselves accept as human rights, or need not even accept as individual rights at all?[33] The same question arises at the level of international organizations in which states from different cultures participate.

The only way to convincingly account for an obligation of all other states to help prevent human rights violations is to show that a sufficiently robust set of individual rights is held universally by all human beings, at least at a certain time.[34] And the most promising way to establish that there are rights of this kind is to show that such a set of individual rights are possessed by human beings per se. Not all of these rights will count as human rights, if our earlier arguments have been correct, and the set of human rights to be picked out from the set of the rights universally possessed by all human beings may be larger or smaller depending on different external circumstances. But at least there will be enough overlap in the human rights that are to be accepted whatever the external circumstances may be to explain why, in general, both other states and international organizations have a duty to intervene in order to protect human rights.

Therefore, the success of the projects pursued by the political conception of human rights – showing which rights can play the role assigned to them in the current practice of international law – and of the moral conception – showing which rights can be derived from interests common to all human persons – are much more closely related than one may be tempted to think from a look at the contemporary discussion.

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33 This point is overlooked in Raz's 3-step procedure for justifying human rights claims: the third layer, namely that states should not enjoy immunity from interference with regard to violations of such rights, does not yet show why other states have a positive duty to interfere (Raz 2010, 336).

34 Skorupski 2010, 370, argues against Raz for the need for universality in a different, though related, way, claiming that only thus can it be explained why other states have the standing to demand rectifications of human rights violations.

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II.
Rights and Duties

Problems with some consequentialist arguments for basic rights

Samuel Freeman

I. Introduction

Most contemporary Anglo-American philosophers are liberal or social democrats. We endorse democratic forms of government that provide all citizens equal rights of political participation, and we also endorse equal rights to basic liberties that protect society's members from majority will and government overreach – such rights as freedom of speech and expression, freedom of conscience, freedom of association, and freedom of tastes and pursuits. We also support the idea of a democratic society without inherited class privilege and freedom of occupation with rights to equal opportunities of some form; and most (though not all) of us endorse some account of economic rights and entitlements owed to all members of society, enabling them to be independent and not economically exploitable by others. Moral philosophers however disagree about the philosophical framework that is best suited to justifying these liberal and social democratic commitments, a framework that best enables us to debate and decide how to resolve the many issues and conflicts regarding rights, interests and the common good that are a normal part of social and political life in a democratic society.

The range of conceptions that are known as 'deontological' is a diverse group of positions, mainly united in their rejection of consequentialism. Many contemporary deontological conceptions assign priority over other social values to principles of justice and the basic rights and liberties that these principles protect. Or if justice and basic rights do not have priority over other values, they are among the class of fundamental moral principles and values (as in W.D. Ross's list of seven prima facie principles, or G.A. Cohen's egalitarianism). Consequentialists, by contrast, normally regard individual rights as secondary principles which are justifiable in so far as they are instrumental to creating greater overall good consequences.

Consequentialism involves two basic claims: The first is that what is right and just to do, whether via individual action or general rules and institutions, is to take the *most effective means* to realize ultimately good consequences (including means that are the cheapest, simplest, most probable, requiring the least time and effort, etc.). The second basic claim is that, given available means and resources, we are to create the *greatest sum total* of good consequences. The basic idea that we are to *maximize the good* incorporates both of these conditions.

For many of its adherents consequentialism is grounded in the seemingly obvious claim that we ought to create the greatest good, impartially construed. As Sidgwick says, "It is right and reasonable [...] to do what [is] ultimately conducive to universal Good" (Sidgwick 1981, 507). This is Sidgwick's principle of benevolence, the unshakeable "philosophical intuition" upon which he grounds his argument for classical utilitarianism. Sidgwick's philosophical intuition assumes that practical rationality fundamentally involves maximizing something. Since right conduct and just laws must be rational, in ethics practical reason requires that we impartially maximize ultimate good. Non-consequentialists find that, though good consequences surely must matter to morality in some way, it is a mistake to construe the Right as simply maximizing total Good, for this disregards the interpersonal nature of morality. Morality, many deontologists say, concerns not the relationship of persons to states of affairs or impersonal good, but the relationship of persons to persons, where each is regarded as a distinct individual whose fundamental good is not to be subordinated to aggregate or universal good. Consequentialists by contrast appear to assimilate morality to the impersonal pursuit of non-moral values, such as pleasurable experiences or preference-satisfaction or some other account of well-being, or perfectionist values such as knowledge, aesthetic appreciation, love and friendship, or the Vision of God. Non-consequentialists thus object that what matters primarily for consequentialism is not the nature or quality of relationships among persons, but maximizing the sum total of good states of affairs, without regard to the kinds or quality of relations that obtain among the persons who must pursue this good, and without regard to how the good is to be distributed among persons.

Here I will discuss versions of consequentialism which seek to avoid these criticisms regarding the impersonal nature of consequentialist morality, and do so by incorporating into the good consequences to be promoted either distribution-sensitive values such as equality, or moral values of justice, such as individual rights, or fairness of outcomes.

The enduring philosophical attraction of consequentialism, I believe, is that it provides an outline for a *completely rational morality*, or a morality which says that between any two alternatives, one is the more rational choice, and among all feasible alternative actions or norms, there is one that it is most rational to choose. The problem is to find some unambiguous conception of the one rational good that is reasonable enough to play the extraordinary role of serving as the final end of all rational conduct. This is an exceptionally tall order. Sidgwick thought this rational good could only be pleasurable experience, since all other ends – including knowledge and the perfection of human capacities, freedom, justice, enjoyment of beauty, love and friendship and other desirable human relations, and all other values – have unreasonable or irrational consequences when regarded as the sole ultimate good to be maximized. The vast majority of contemporary consequentialists do not endorse Sidgwick's hedonism or his classical utilitarianism, largely because they believe that there are ultimate goods in addition to, or other than, pleasurable experiences or the satisfaction of individual preferences regardless of their object.

Here I examine three ways that consequentialists argue for moral, human, or basic individual rights: first, there is the framework provided by J.S. Mill; second, distribution sensitive accounts of well-being (such as relied on by Philip Pettit, Larry Temkin, and Bill Talbott), and then finally, arguments, such as Amartya Sen's, that directly incorporate rights and other moral concepts into the good that is to be maximized.

II. The Millian argument for individual rights

The upshot of consequentialism's demand that right conduct maximize the good seems to be that there can be no legitimate constraints upon taking the most effective means to achieving the greatest good, nor any limitations upon promoting the sum total of goodness capable of realization. But moral rights, human rights, and other basic rights are normally understood as restrictions upon taking most effective means to realizing desired or desireable ends – "side constraints" (Nozick), "trumps" (Dworkin), or "reasonable constraints" (Rawls) upon the rational pursuit of good consequences. Hence, if basic rights are to have any justification within an orthodox consequentialist position, they cannot really be what to many they seem to be. Rather than constraining pursuit of the ultimate good, consequentialists contend that basic rights

instead concern the very measures that enable the wholehearted pursuit of maximum goodness. As J.S. Mill says, though common opinion regards the just "as generically distinct […] from the expedient and in idea opposed to it", in truth the just and the expedient always coincide in the long run (Mill 1979, ch. 5, pts. 1–2).

This was quite a turnaround in thinking within utilitarianism. For Bentham was quite clear that moral rights are "rhetorical nonsense…-nonsense upon stilts". It was Mill apparently who first endorsed the idea that justice and moral rights are especially effective means to maximizing the good. He said that justice and rights are names for especially important utilities, of such great weight that they warrant special protections. These especially important utilities are "the essentials of human well-being" (ibid., ch. 5, pt. 32, 58). "Justice is a name for certain moral requirements which, regarded collectively, stand higher in the scale of social utility, and are therefore of more paramount obligation, than any others" (ibid., ch. 5, pt. 37, 62). These especially important utilities include, Mill says, "moral rules which forbid mankind to hurt one another", to which Mill crucially adds "in which we must never forget to include a wrongful interference with each other's *freedom"* (ibid., ch. 5, pt. 33, 58). This provides the basis for Mill's argument in *On Liberty* that the rights and liberties that protect individuals' freedom and autonomous self-determination, or "individuality", are necessary to realize "the permanent interests of man as a progressive being" (Mill 1978, ch.1, pt.11, 10).

In making this argument Mill draws upon two important insights regarding human nature, or natural human propensities. The first is the anti-paternalist argument[1] that under appropriate conditions each person is in a better position than anyone else to judge what sort of life is the best life to live. A precondition for individuals' insight into their well-being are social conditions that allow for liberty of conscience, freedom of thought, expression and inquiry, freedom of association, and "freedom of tastes and pursuits". Individual rights protecting these freedoms are preconditions for "the free development of individuality", which Mill thought largely constitutive of living a good life.

The Millian claim that people are normally the best judge of their own well-being once they have educated their natural abilities is normally true of people. It may not be true of those brought up in repressive, traditional, or otherwise non-liberal societies, since widespread ed-

1 See Talbott (2005), who relies upon Mill's argument.

ucation and free flow of information are not available, and the values those societies endorse cannot thrive if individuals have personal freedoms. Cultural relativists might then claim that Mill's utilitarian argument for liberal justice is limited to Western democracies, and that there is no persuasive argument that people in all societies ought to be guaranteed individual rights needed for self-direction.

This criticism is addressed by a second argument of Mill's, which appeals to a fact about human psychology. It is that, other things being equal, humans enjoy engaging in activities that call upon the exercise of their developed capacities; moreover, once they have had the opportunity to develop their "higher" or distinctly human capacities, then, barring unfavorable circumstances, humans will invariably exercise a "decided preference" for pursuits and plans of life that involve the exercise and development of their capacities for intellect, imagination, higher human feelings and relationships, and moral sentiments. Mill's claim strongly resembles Rawls' "Aristotelian principle", which also refers to a tendency of human nature – that people with mature capacities living under favorable conditions normally prefer conditions in which they have the freedom and opportunity to determine their capacities and live their own chosen way of life.

I think there is much to be said in support of the empirical assumptions about natural human propensities that Mill (and Rawls) rely upon in arguing that freedom of action and self-determination (or "individuality") are "essentials of human well-being". Assuming that certain freedoms are essentials of well-being, then it seems also true that individuals generally ought to have the rights of justice that are preconditions for freedom of conscience, thought, association, and freedom of tastes and pursuits. If this is what Mill sought to prove on consequentialist grounds, then I think that, with a few caveats, he makes a credible case for it.

The question however is whether Mill's argument for freedom as an essential of well-being is adequate to argue for *equality* of rights and liberties within a revised utilitarian framework. This after all is the fundamental question of *justice* at issue, for justice concerns primarily the equal or fair distribution of rights, and not simply the question of what rights most individuals normally ought to enjoy to enable them to realize individual well-being or overall good. Even assuming that Mill has shown on consequentialist grounds that normally providing individuals with substantial freedoms is necessary for their individual well-being, this does not warrant the conclusion that *equal* freedom and the *equal* rights

necessary thereto are always or even *ever* necessary to maximizing the sum total of individual well-being (no matter how well-being is construed). For from Mill's claim that having certain freedoms and the political rights to protect them are normally necessary conditions of *each person's* well-being, it clearly does not follow that *equal* rights and *equal* freedoms always, or ever, maximally promote *total* well-being summed across all individuals in society. For the sum total of individual well-beings almost always can be marginally increased by denying some small minority of individuals those freedoms which they would otherwise use in ways a majority find offensive or scandalous. Mill says, in arguing for freedom of thought and expression and freedom of the press: "If all mankind minus one were of one opinion, mankind would be no more justified in silencing that one person than he, if he had the power, would be justified in silencing mankind" (ibid., ch. 2, pt. 1, 16). I believe this is true, but I see no way to establish it on Mill's consequentialist grounds. For how can it be that the right of one person to express an opinion which all the world finds dangerous or obnoxious can outweigh in its consequences for aggregate well-being the detrimental effects on the well-being experienced by the rest of the world? How on any understanding of well-being can denial of equal rights to one or more persons not often lead to a greater overall good?

The problem then is not simply to show that respecting certain rights among persons generally is normally a precondition for promoting general well-being (or any other good consequence). The crucial problem rather is to show that those consequentialist rights that are very important and normally ought to be afforded to everyone ought also to be *equally* or fairly distributed among them. That's the question of justice that bedevils traditional consequentialist views, and which the Millian argument does not satisfactorily come to terms with.

One potential way around this problem is to argue for a complicated account of moral psychology that attributes to humans not simply natural sympathy and a desire to take everyone's well-being into account, but also natural predispositions to cooperate with others on terms of equal respect and reciprocity. Rawls finds something like this argument in Mill.[2] But even if these conjectures regarding human nature are true,

2 Rawls conjectures that Mill's argument for the coincidence of maximum utility and equal justice rests on two further principles of moral psychology Mill invokes. The first is a principle of dignity. Mill says there is "a sense of dignity,

the argument still would have to show that it is only under favorable conditions where people's natural moral sentiments of equality and reciprocity are fully developed and satisfied that aggregate well-being can be maximized. Then, even assuming that is so, it still remains as a question whether these favorable conditions would correspond to the equal rights favored by liberal and social democrats.

III. The good of equality and other values of justice

The main obstacle to justifying equality of basic rights within Mill's framework is that it requires an unlikely coincidence of equal rights of justice with maximizing the sum of general well-being. Perhaps this problem can be addressed by directly incorporating into the good consequences to be promoted certain values normally associated with justice and individual rights – values such as equality of well-being or equal distribution of goods, or individual freedom and autonomy. In an article predating his contractualism, T.M. Scanlon outlines a "two-tiered" consequentialist approach that regards rights and other norms of justice as second-tier principles that promote such first-tier values as freedom, equal distributions of desirable goods, and individuals' ability to control significant aspects of their lives (Scanlon 2003, 26–41).

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which all humans possess in one form or another, and in some proportion […] to their higher faculties, and which is so essential a part of happiness of those in whom it is strong that nothing which conflicts with it could be otherwise than momentarily an object of desire for them" (Mill 1979, ch. 2, pt. 6, 9). Second, Mill says "a natural basis of sentiment for utilitarian morality" is "the desire to be in unity with our fellow creatures, which is already a powerful principle in human nature". (ibid., ch. 3, pt.9–10, 30–31). Mill says that a person who has developed this "social feeling", and conceives of himself as a "social being" does not think of others as "struggling rivals with him for the means of happiness". Rather one of his "natural wants [is] that there should be harmony between his feelings and aims and those of his fellow creatures" (ibid., ch. 3, pt.11, 33). Mill emphasizes that the desire to be in unity with others leads us, not just to take others' interests into account, but also to harmonize our own interests with theirs. Rawls liberally construes this as a desire to act from a principle of reciprocity: "For Mill says in pt. 10 that the feeling of unity with others, when perfect, would never make us desire any beneficial condition for ourselves in the benefits of which others are not also included" (Rawls 2007, 282). Rawls adds: "The fact that Mill says this leads us to ask whether the difference principle is a better expression of Mill's view about equality and distributive justice, than the principle of utility" (ibid., 282 n.).

Scanlon says it is a good thing that individuals are autonomous: that they are able to freely develop their capacities and choose their own aims and commitments, make their choices effective in shaping their own lives, and contribute to the formation of social policy. It is also good that certain resources are equally distributed among individuals. On this account, autonomy and equality seem to be higher-order ultimate goods that apply to the choice and distribution of other ultimate or subordinate goods. For example, assuming self-determination is an ultimate good, equal capacity or equal opportunity for self-determination might be among the goods to be promoted in a pluralist consequentialist view; or perhaps equal welfare on some views.[3] Larry Temkin has endorsed a similar consequentialist position that regards equal welfare as an intrinsic good which ought to be promoted. And Bill Talbott refers to "appropriately distributed well-being" as the good consequence to be promoted in his argument for universal human rights.[4]

According to Scanlon's and similar "two-level" views, equal rights and other principles of justice are second-tier subordinate principles that guarantee the values of justice that they are designed to promote, such as each person's autonomy, equal welfare, or the proportionate distribution of income and wealth. For example, equal rights to liberty of conscience, freedom of thought, freedom of association, freedom of persons in tastes and pursuits, and other liberal basic liberties are justifiable in that they promote a state of affairs where (normal adult) members of society *each* enjoy autonomous self-determination. This is one way to recast Mill's account in *On Liberty* that avoids problems mentioned earlier. We might conceive of the good to be promoted as "appropriately distributed well-being" (Talbott) and regard Mill's Principle of Liberty as among the principles of justice that enable *each* member of society to realize his or her individuality and other components of well-being.

I'll focus here on the idea that *equality* of some good (or some other preferred distribution) is itself an ultimate good that is to be incorporated into the maximand of a consequentialist view (e.g., equal well-being or equal opportunity thereto, or equal proportionate satisfaction, or

3 Scanlon also suggests that, along with equality, the fairness of certain procedures is a good that ought to be promoted (Scanlon 2003, 30–32). If fairness is describable only by referring to certain rights or moral principles, his claim resembles a different position endorsed by Amartya Sen, which I will take up in section IV below.

4 "For a consequentialist, a just government is one that promotes the (appropriately distributed) well-being of its citizens"; cf. Talbott 2005, 159–160.

maximin well-being on a prioritarian view). Rawls says that distribution is normally considered under principles of right, which suggests that questions regarding the appropriate distribution of goods should involve non-consequentialist principles. But if the goods to be promoted and equalized are definable in non-moral terms that are applicable in the natural or social sciences (equal welfare or well-being, or equal capabilities, for example), then we can regard equal distribution of some natural or social good as an aspect of the consequentialist end-state that is to be maximized. On such distribution-sensitive consequentialist views we would no longer be maximizing simply an aggregate of goods; we would also seek to maximize an aggregate's equal (or maximin, or some other function) distribution according to a consequentialist account of appropriately defined distributive shares of the good.

Now deciding how much weight to assign to equal distributions is a difficult issue within a pluralist consequentialist view. The problem is to construct an index that gives an appropriate weight to equal distribution compared with other intrinsic goods.[5] Let's assume however that these problems can be resolved satisfactorily and that an index of goods can be suitably constructed that gives each good its proper weight within the consequentialist maximand. To incorporate equal or some other proportionate distribution of goods into the maximand may then seem fitting and a promising avenue for consequentialists who seek to provide a

5 One problem with constructing any such index of ultimate goods in a two-tiered pluralist consequentialist view is that appeals to intuition (or considered convictions) regarding the proper balance of values that constitute the maximand seem unavoidable. By themselves, appeals to considered intuitions or convictions or the balance or reasons are normal in moral thinking. But the main attraction of consequentialism, I have claimed, is that it outlines a method for making rational choices between any alternatives and resolving conflicts between values, duties, and other normative claims. Given a relatively precise measure of greater and lesser good, there should always be a determinate answer to the question of which course of action or rule creates greater sum of goodness? The problem is that, once a plurality of goods is injected into the maximand, that precision is lost and we seem thrown back upon the balancing of intuitions that many sought to avoid by conceiving of rightness and justice as maximizing the one rational good. My belief is that non-utilitarian and pluralist consequentialism often fold all the problems of vagueness, indeterminacy and so on that deontological views are prone to into the maximand, and then fail to confront or address these problems, since they are concealed by the maximizing idiom.

justification for equal rights. But in the end I do not think this strategy can succeed, for at least two reasons.

First, for the sake of simplicity, let's assume that equality is given lexical priority among the plurality of values. Presumably, no one would argue that equal distribution itself is a good, no matter what is being distributed (e.g. punishment, grades, or Nobel Prizes). Rather the argument is that equality of some fundamental good, such as equal well-being, equal opportunities for welfare, equal capabilities, or equal autonomy, is the sole ultimate good that is to be maximized. Any state of equality of a fundamental good that is strongly Pareto superior (in G.A. Cohen's sense) is preferable; thus, situations where each person enjoys greater equal good outranks situations where all have less equal good. Now, it may often be the case that affording each person equal rights of various kinds is a reliable means to realizing the ultimate good of equal distribution of well-being or opportunities thereto, equal autonomy, etc. – often, but not always. For as is well known, because of peoples' different wants and needs, unequal income and wealth normally is required to realize greater equality of well-being; and if this is true of rights to income and wealth, it is as likely to be true of other rights and liberties, including those that liberal and social democrats regard as fundamental. There is no more reason to think that equal well-being, or even equal autonomy, or equal non-domination (Pettit), requires equal rights to liberty of conscience and freedom of thought and expression, or equal rights to freedom of association, choice of occupation, and the political rights of participation, than to think it requires equal income. People's well-being, however defined, is affected by all sorts of social and biological circumstances and contingencies, and regardless of what sort or degree of compensation they are given, there is little reason to think that anything approximating equal well-being can be achieved only when equal basic rights are provided for.

It seems then that we should have to adjust the relative degree to which any person enjoys and exercises the full panoply of basic rights so that equality of well-being (or the opportunity thereto) with others can be approximated and maintained. For each person there should be some distinctive trade-off and mixture of rights and liberties that determines his or her share and that is needed to maintain approximate equality of well-being. For example, equal well-being may require that some people – those who have bad judgment, or care nothing for politics, or have no concern for the public good – have no right to vote, and that others who use their votes wisely enjoy several

times the voting rights that other people enjoy. Or perhaps people who have proven themselves prone to imprudent life-choices must be deprived of a right to make certain crucial life decisions (regarding their career or marriage partner, for example) if there is to be any hope that their well-being is to approximate that of others. Here people deprived of their right to vote or make crucial life decisions might be compensated for the resulting loss to their sense of self-respect and well-being by a greater share of wealth or some other benefit, in order to bring them up to the level of equal well-being others enjoy. Academics, journalists, lawyers, writers, and other wordsmiths may require far more protections of freedom of speech and of expression than farmers, plumbers and electricians, unless of course these wordsmiths are prone to expressing obnoxious views that upset large numbers of people and undermine their fair share of well-being.

The problem then is that there is little reason to believe that equal basic rights and liberties of the kind prized by liberal and social democrats, or advocates of universal human rights, will be justified by a maximand requiring any fixed distribution of well-being, capabilities, autonomous self-determination, non-domination, or any other natural or non-moral good. But now suppose these difficulties can be overcome, and that it is safe to assume that equal rights of a familiar and desirable kind are needed to promote equal well-being, equal autonomy, or some other intrinsically desirable distribution. A further problem is that it is unreasonable to contend that equality of any state of affairs should have lexical priority over all other values, or could serve by itself as a sufficient account of the ultimate good to be maximized. For to contend that equality of some good has lexical priority or is the only ultimate good implies that any state of affairs of equal distribution is better than any other unequal state, regardless of how little each person has and how much better off everyone might otherwise be with an unequal distribution. For example, a state of equal unhappiness would be better than a state where everyone was generally satisfied with their lives to differing degrees. To avoid this undesirable outcome, it is reasonable to incorporate maximum aggregate well-being or some other aggregative value into the consequentialist maximand. Then, equality of good is regarded as but one intrinsic value that is to be put into the balance and weighed off against other intrinsic goods to determine the ultimate combination of goods that are to be maximized. (This seems to be Temkin's position.) Then we have an aggregative-distributive dichotomy of

the kind discussed by welfare economists, now generalized to include not just income and wealth, but the plurality of ultimate goods.

In this event, there is even less reason to believe that equality of basic rights can be maintained at the subordinate level of second-order moral principles. For the plurality of ultimately good ends must be adjusted to determine the right combination of goods – "organic unity" or "fitting" or "weighted end" as it might be – that is to be maximized. And there appears to be very little likelihood that equality of basic rights will be preserved in the end, nor is there any guarantee that some individuals will not lose out entirely in the final distribution of certain basic rights if this is needed to maximize the plurality of goods. Inequalities of rights of many different kinds, even of rights that are regarded as basic, would appear to be unavoidable within virtually any pluralist consequentialist view, including those that are distribution-sensitive.

So it seems that incorporating into the consequentialist maximand equality and other distribution-sensitive values that rights and norms of justice instrumentally promote still does not make the case for *equal* basic rights and liberties. Once again we have the familiar problem that consequentialism faces with respect to justice.

IV. Equal rights as an intrinsic good

It may be then that the only way to guarantee equal basic rights and other norms of justice within a consequentialist framework is to incorporate them directly into the ultimate good that is to be maximized (perhaps giving them lexical priority over other values). This might seem entirely appropriate. For evidently what is behind many consequentialists' concern for distribution-sensitivity of the good is the thought that certain *deontological values* and norms of justice – the equal worth and dignity of persons, equal respect for persons, etc. – are so important and fundamental that they ought to be protected and promoted as intrinsic values. For example, assume that the ideas of equal respect, or respect for persons as free equals, are deontological values – by which is meant, values that can be satisfactorily described and explicated only by reference to moral concepts and principles such as equal rights and other concepts of justice. Suppose that we cannot understand what is involved in the value of equal respect for persons without regarding persons as having, and being recognized as having, certain equal basic rights and liberties. Naturalistic terms would not suffice to

describe or explicate this deontological value, just as they do not suffice to explicate the normative claim that we ought to recognize and treat other humans with the respect due free and equal moral persons. The same may be true of the moral ideal of dignity of persons; it too is a deontological value that can only be explicated by appealing to irreducible moral concepts. If so, then perhaps the best way for a consequentialist to guarantee the dignity of and respect for persons is to directly incorporate the equal rights and other norms of justice needed to explicate these moral concepts into the consequentialist maximand. This goes beyond the "two-tiered" positions discussed earlier, which regard basic rights and other principles of justice as second-order rules instrumental to achieving appropriately distributed well-being, autonomy or some other non-moral value.

Amaryta Sen has proposed a version of this view, which he has called "broad consequentialism".[6] He says: "Consequential evaluation that takes note of freedoms, rights, and obligations, and their violations would argue that bad things have happened *precisely because* someone's freedom has been breached, and some rights and duties have been violated".[7] "The fulfillment of rights is a good thing to happen – the more the better – as it would be seen in a consequential perspective […]" (Sen 2000, 498). Sen suggests as part of consequential evaluation a "consequentialism of rights" that says: (1) "the badness of the violation of rights, or the goodness of their fulfillment" are to be "included among the consequences; (2) there can be 'trade-offs' between rights; and (3) there can be 'trade-offs' between the goodness of rights fulfillment and other good consequences" (ibid., 499; 499 n.).

Following Sen, I will call such positions "broad consequentialism" – "broad" because they include both natural states of affairs and moral principles (including rights) among the plurality of goods to be maximized, optimized, or otherwise promoted. Unlike the position just discussed, which says that equal distribution of some natural or social good is itself an ultimate good, broad consequentialist positions directly incorporate deontological values and moral concepts and principles of justice

6 'Broad consequentialism' is the term he initially uses in Sen 1982. 'Consequential evaluation' or 'evaluation of comprehensive outcomes' are used in his recent book, The Idea of Justice (Sen 2009), where it is no longer so clear whether he intends a distinct version of consequentialism, or simply a method of individual evaluation not tied to any particular moral conception.

7 Sen (2000), at 494 (emphasis added). This paper develops the position set forth in 'Rights and Agency', where Sen also refers to "goal rights systems".

into the maximand. Now, offhand it seems that even incorporating equal basic rights into the good consequences to be maximized will not solve the problem raised earlier with pluralist consequentialism; the plurality of values still inevitably will compromise the equality of basic rights that liberal democrats contend ought to be maintained. (For example assuming that average well-being and equal rights to basic liberties are the two goods to be promoted, restrictions on a despised or otherwise insular minority's freedom of religion may be required to maximize good consequences.) To avoid inequalities of basic liberal liberties, the broad consequentialist might propose assigning lexical priority to certain equal basic liberties and regard the promotion of other consequentialist values as subject to this priority condition. Thus, for example, we maximize average or equal (opportunity for) well-being, or welfare rights to a threshold of capabilities for all, on condition that everyone's equal basic rights of conscience, expression, association, and freedom and integrity of their person are respected. This may not be Sen's position since he envisions trade-offs between rights, liberties, and other values, but guaranteeing certain basic liberties and "maximizing" (or at least "satisficing") their provision before promoting other values may be one way to maintain the integrity of a liberal democrat position within a consequentialist framework.[8]

Whether or not assigning lexical priority to certain equal basic rights and liberties is acceptable to consequentialists, a potential problem with broad consequentialism of any variety is that it can no longer strictly be maintained that maximizing the good, or promoting the best consequences, is the *sole* ultimate principle of right. For there are already non-consequentialist moral principles built into the ultimate good, and these principles must be balanced off against other ultimate goods and the measures that instrumentally promote them. What are we to do when required to instrumentally promote fair procedures or respect for rights themselves? What if doing so requires that we violate these same rights and procedures (e.g. violate the rights of a few to protect similar or other rights enjoyed by the many)? Which principle has priority then? To say we should decide by maximizing the good provides

8 Since it may not make sense to maximize either basic liberties or two or more things, it may be better to think in terms of "satisficing" basic liberties for all before proceeding to maximize other values. How much such a principle would resemble Rawls' non-consequentialist first principle of justice requiring a "fully adequate scheme" of equal basic liberties is worth considering.

no answer, for we are trying to decide just what that involves. If the moral principles that are part of the maximand are to be given any independent weight at all, then it appears that we have in effect two (or more) separate moral principles at work – a consequentialist principle that tells us to maximize aggregate goodness (and perhaps its distribution), and a deontological one that tells us to observe fair impartial procedures, respect individual rights, or achieve a just distribution for its own sake. These separate moral principles must be somehow weighed against one another to decide what is right to do. If this is done intuitively and without appeal to some further consequentialist principle, then broad consequentialism is really a deontological form of moral intuitionism, or a pluralist deontological view.

My own view is that we might as well give up any pretense of maximizing the good or promoting the best consequences in broad consequentialism, and face the fact that once principles of right and justice (including just distributions, fair procedures, or equal rights, respect for human rights, or fulfillment of duties) are themselves regarded as ultimate intrinsic goods to be realized, then we have a full-fledged intuitionist position requiring the balancing of both teleological and deontological principles. It is only in an attenuated sense that such a broad pluralist position can be said to aim to maximize or promote the best consequences overall. For it can be said of most any moral conception that it promotes or realizes good consequences in the sense it requires that people do the best thing overall by conforming to that conception's principles. For example, W. D. Ross' intuitionism might be said to enjoin that we realize the best consequences. Ross requires balancing a prima facie teleological principle of benevolence along with prima facie deontological principles of justice, fidelity, gratitude, etc., to come up with a judgment "all things considered". It does not seem that Ross' position formally differs in any significant way from a broad consequentialist position; the structure is the same. And Ross' intuitionism is one standard example of a deontological moral conception.[9]

Here it is important to see that in his account of consequentialist evaluation, Sen's use of 'maximize'– taken from set theory and contemporary axiomatic economic analysis (Sen 2000, 484) – is different from its use within classical utilitarianism and other traditional teleological

9 Here it's noteworthy that Sen recognizes that "the substantive gap between some versions of broad deontology and broad consequentialism may not be very great" (Sen 2000, 479 n. 5).

conceptions. Sen uses the term "optimization" to refer to utilitarianism, and defines 'maximizing' so that it involves ordinal rankings of states of affairs, and moreover "does not demand completeness of ranking" (ibid., 483). Among the considerations Sen would take into account in ranking states of affairs as better or worse are the degree to which individuals' rights and duties are fulfilled, alongside considerations of how much individuals' capabilities, freedoms, and well-being are promoted.

Now to choose the highest ranked option from among an ordinal ranking of states of affairs which may contain incommensurable elements is quite different from maximizing (or in Sen's usage, "optimizing") aggregate goodness, conceived as a measurable state of affairs. There are different ways to "maximize" outcomes in the sense of achieving ordinal rankings of them. There are also different ways to represent peoples' valuations by choice functions of the kind Sen envisions.

In his lectures on Sidgwick, Rawls says that, to avoid confusion, modern economic analysis and rational choice theory should use a term such as 'multiple-objective function' rather than 'utility function' or 'welfare function':

> Anyone's moral or political judgments can […] be represented by some mathematical function. In terms of this function, one can say: they judge as if they think that in each case society should maximize this function, promote the *best consequences* (as defined by this function) […]. [But] mathematically speaking, the representation-function may be such that there is no natural sense in which it describes the agent as *maximizing anything*. E.g. there may be multiple objectives; or lexical orderings (no continuous representative function) […]. This way of speaking [maximizing a multiple-objective function] implies *no specific* political conception. The question then is: what is the *shape*, or what are the *special features* of this function; and what conceptions and principles stand behind it in the thought and judgments of agents (individuals and society)?[10]

The implicit suggestion here is that no specific moral or political conception, consequentialist or deontological, is implied by "maximizing" a "multiple-objective" function of the kind Sen advocates, which contains rights and principles of justice in the maximand. It depends upon what the aims or objectives are that are being pursued or promoted, as well as the role of any principles involved in agents' deliberations and attitudes towards one another. A further implication, I believe, is that once we uncover these aims and objectives, including the reasons and

10 Rawls 2007, from Sidgwick lecture III, final section. Compare Rawls 1999, 489, where he voices similar thoughts.

moral principles underlying judgments of good consequences and rankings of states of affairs in broad consequential conceptions, it may be that we no longer have a view that says that maximizing good states of affairs is the sole ultimate moral principle. For if we assign any independent weight at all to the moral considerations of justice, respect for rights, etc. that are to be maximized, then it follows that there are moral reasons that constrain the maximization or instrumental promotion of total goodness. And if we do not assign them any independent weight then rights and other moral concepts serve no real purpose in the maximand, but only obscure the good consequences or states of affairs that really inform our judgments about what is the best thing to do.

For example, suppose one of the goods that are part of a broad consequentalist maximand is said to be "equal rights of free expression". Offhand, the value being promoted here would seem to be individuals' freedom of expression itself and perhaps their enjoying the opportunity to exercise this freedom equally. If so, then it obscures this fact to incorporate a deontological principle of (respect for) *equal rights* to freedom of expression and claim that "we want to maximize (respect for) equal rights of free expression". If what Sen really has in mind is maximizing equal (opportunities for) freedom of expression, or equal or adequate capabilities of certain kinds, then his broad "rights-consequentialism" is really just a confused version of the pluralistic distribution-sensitive position discussed in the preceding section. On that account equal rights (to freedom of expression, or adequate capabilities) might be brought in as an instrumental principle that promotes the achievement of a state of affairs where individuals enjoy equal (opportunities for) freedom of expression and adequate capabilities; but in that case, individual rights themselves are no longer part of the maximand to be promoted.

Moreover, there is a serious question whether it is even coherent to include rights, fairness, duties, just distributions, and other moral concepts in the maximand of a consequentialist conception. For if we understand consequentialism as a distinct kind of moral conception that says that the sole ultimate principle of right and justice is to maximize good consequences, then it would seem that there is no conceptual space left for the claim that there are independent reasons of justice to respect others' rights, or that states of affairs where individuals respect one another's rights and fair procedures ought to be promoted for their own sake. In so far as requirements of right and justice *are* incorporated into the ultimate good to be promoted and are given any weight independent of their consequences at all, it is no longer the case that the *sole*

ultimate principle of right action is that we maximize the good. For among the good consequences to be maximized are people respecting these antecedent non-maximizing moral principles (of fairness, or recognition of others' rights, and so on). Suppose that we inquire why people ought to conform to these principles. Why should respect for just *these* specific rights be so important? Why should they be equal? It's not as if individuals respect one another's rights without reason, detached from other considerations. The answer to these questions cannot simply be that individuals' compliance with these principles (respect for rights or rules of fairness, etc.) promotes good consequences, for then the argument becomes circular. ("We should respect others' equal basic rights in order to maximize good consequences, which include respecting others' equal basic rights.")[11] To avoid this circle, the broad consequentialist would seem to have to concede that respecting these principles of right is intrinsically good and hence the right thing to do for its own sake ("precisely because", as Sen says, rights and duties ought to be respected). In that event, the ultimate good itself cannot be described in the absence of an antecedent non-maximizing moral principle of right; principles of right are part of its very definition. But then it is no longer the case that maximizing the good is the *sole* ultimate principle of right, and thus we do not have strictly speaking a consequentialist view.

Moreover, if we assume that these antecedent principles of right can ever provide sufficient reasons to act independently of their consequences, and we act on them at all for their own sake and the related deontological values they realize (respect for persons, dignity of persons, etc.), then we are no longer acting in order to maximize good consequences; thus we no longer satisfy the consequentialist requirement that requires that we *always* act so as to maximize good consequences. Rather these non-consequentialist principles (respect for others' rights for example) and the deontological values they realize are sufficient justification, and we act upon these principles for their own sake – not for the

11 The charge of circularity here resembles Sidgwick's response to the claim that virtuous conduct is the ultimate good to be rationally promoted, or maximized: "If we mean by Virtue conformity to such prescriptions and prohibitions as make up the main part of the morality of Common Sense, [then] to say that 'General Good' consists solely in general Virtue….would obviously involve us in a logical circle; since we have seen that the exact determination of these prescriptions and prohibitions must depend on the definition of this General Good" (Sidgwick 1981, 392).

sake of further good consequences they promote. To say that we then maximize the good or promote good consequences by acting on these very non-instrumental principles of right is uninformative if not empty.

Perhaps one way to interpret a broad consequentialism that avoids these problems is to contend that it is an intrinsically valuable state of affairs when people, no matter what their reasons or what principles they consciously observe, act in ways that fulfill and do not violate others' rights. If they do so because they think they have a non-consequentialist moral duty (e.g. to respect others as equal moral persons, or to do justice for its own sake), then their reasons for respecting others' rights are false, just as their reasons are false if they think they are under a duty to respect rights because God commands them to do so. But the fact that people might need to falsely believe in fundamental deontological principles and values or the existence of God in order to be sufficiently motivated to not violate others' rights is neither here nor there. The only reason they really have for recognizing others' rights is to do their part in *maximizing the sum total of rights-satisfying actions*. In this event, it cannot be said of people generally that "they ought to respect one another's rights *precisely because* [as Sen says] rights ought to be respected". For the only reason there can be to respect anyone's rights on any occasion is that it results in still greater numbers of rights-respecting actions. This position is suggested (though I do not think intended) when Sen says: "The fulfillment of rights is a good thing to happen – the more the better – as it would be seen in a consequential perspective […]".[12]

It's hard to know what to make of this suggestion. To begin with, it offers little prospect of guaranteeing *equal* basic rights, for it regards rights as detached from the persons who bear those rights, and demands that we maximize aggregate rights-satisfactions (or minimize rights violations) without regard to their distribution among persons. Thus the rights of some might need to be violated wholesale, in order to minimize total rights-violations overall. More problematic still, this position would seem to have absurd consequences. If rights-fulfillments were themselves among the states of affairs to be maximized, then (for example) it would make sense for us to go about manufacturing rights claims

12 Sen 2000, 498. Sen refers on p.499, n.34, to Nozick's suggestion of a "utilitarianism of rights", which would seem to be prone to this problem since it says that we ought to maximize rights-satisfactions, or alternatively minimize-rights violations. See Nozick 1974, 28–29.

for no other reason than maximizing rights-satisfactions; for example, we might enter into trivial agreements and make legal commitments to fulfill thousands of promises and contracts we otherwise would not dream of making, for no purpose other than creating rights in others with corresponding duties that we fulfill. What could be the point of maximizing rights-fulfillments, so regarded? (Minimizing rights-violations would have opposite effects: we minimize prospective violations of rights by failing to exercise or create those rights; for example, we should avoid entering into legal transactions creating rights others might violate; or we should cease expressing ourselves in controversial ways, to deprive government of opportunities to violate our free expression rights.)[13] The idea that there is something intrinsically good about the state of affairs of (maximum) rights-fulfillments – where rights are regarded as detached from peoples' projects, relations, and reasons for interacting in a particular way – is peculiar, to say the least.

In any case, I do not think this interpretation of rights-consequentialism solves the problems I've raised earlier, since we still need some explanation of why states of affairs where rights are respected are worth pursuing for their own sake. The answer cannot be: "They just are; it's self-evident"; nor can it be: "Because respecting rights is instrumental to other goods".[14] Moreover, we need an explanation as to which rights are most important and ought to be respected *as* fundamental, why just *these* rights and not others should be *equally* distributed, and so on. I do not see a way to address these questions without invoking deontological reasons and moral principles that explicate such deontological values as respect for persons as free and equal, the dignity of persons, and so on. Once these reasons are invoked, we no longer have a consequentialist view.

13 The position is also prone to the population problems and other excessive numbers problems that consequentialists often confront – for example, if the sum of rights-satisfactions ought to be maximized then offhand we would seem to be under a duty to increase population to as many people as needed to maximize the number of rights-satisfying actions. Minimizing rights-violations would have the opposite effect in requiring extraordinary birth control measures.

14 For example, if the answer is that respecting rights increases individuals' freedom and autonomy, then we have an example of the kind of position discussed in the preceding section that Bill Talbott contends for, and not a position that says that respect for rights is an intrinsically good state of affairs that ought to be maximized.

To conclude, I have argued that broad consequentialist positions and consequentialisms of rights like Sen's are either incoherent, or they are not what they pretend to be. We can make perfectly good sense of what is going on in broad consequentialism within a traditional intuitionist framework where consequentialist principles are combined with and weighed or balanced against deontological principles as well as each other. Depending on the weights or importance assigned to each of the plurality of principles involved, sometimes individual rights may be traded off in order to promote greater rights-fulfillment; sometimes they may be traded off to promote other values; and sometimes individual rights should be enforced simply for their own sake (just as Sen suggests (Sen 2000, 499 n.). But in striking a balance among these consequentialist and deontological principles, nothing is being maximized in any informative sense, certainly not in the sense of maximizing the "one rational good" that has driven teleological conceptions from Plato's perfectionism to modern forms of utilitarianism.[15] The fact that Sen describes what is going on in terms of maximizing a mathematical function does not alter this fact, even if it might create an illusion to the contrary.

V. Conclusion

I have discussed three common strategies for incorporating the idea of equal rights – which is essential to both liberal and democratic thought – into a consequentialist framework, and have argued that each has serious if not insurmountable problems. This does not mean that all consequentialist efforts to incorporate equal rights must meet with failure. If we abandon the act-consequentialist principle which assesses the rightness of actions solely by their individual tendency to maximize the good, then there may be a way to formulate an indirect-rule-consequentialist conception and defense of equal rights. The kind of rule-utilitarianism implicit in Hume's account of justice, or in Rawls' practice-conception of rules, and perhaps other versions, in effect deny the act-consequentialist assumption that rightness consists in maximizing the good.[16] Instead, they usually begin with the common sense assumption

15 On the doctrine of the one rational good, see Rawls 1999b, 360.

16 See Rawls 1999c. Brad Hooker (2011), section 8, also argues that rule consequentialists reject the assumption that right actions should maximize the good.

that morality is interpersonal, and that the rightness of actions involves obedience to certain impartial rules, including rules that bestow upon individuals the necessary rights and powers needed for each person to safely and freely pursue his or her individual interests. Taking maximally good consequences into account is rarely, if ever, a legitimate reason for individuals or even governments to act upon. Instead it enters into rule consequentialist justifications (if at all), not at the level of deciding rightness of actions, but in the justification of the entire system of rules and specification of the kinds of rights that individuals ought to have. My argument does not address these positions, which on the whole seem to be a more promising way for consequentialists to argue for equal moral rights.

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Human rights as rights

Rowan Cruft

This essay makes three suggestions: first, that it is attractive to conceive individualistic justification as one of the hallmarks – maybe even the one hallmark – of human rights; secondly, that combining this conception of human rights with standard worries about socioeconomic rights can tempt one to take the phrase "human rights" to refer to any individualistically justified weighty normative consideration (including considerations that are not rights); and thirdly, that reflections on the individuation of rights and rights' dynamic quality give us some reason to resist this temptation – though this reason is interestingly inconclusive.

Human rights as individualistically justified

In recent work, Joseph Raz has adopted a "political" conception according to which a central, defining function of human rights is to set limits to state sovereignty, limits that require states to "account for their compliance with human rights to international tribunals where the jurisdictional conditions are in place, and to responsibly acting people and organisations outside the state".[1] Part of Raz's motivation for this "political" conception is, I venture, a dissatisfaction with the rival view that takes "human rights" to be a secular way of referring to what would once have been called "natural rights": those important moral rights that people hold simply in virtue of being human. Of course, this "natural rights" conception might – like Raz's "political" conception – make human rights matters of international concern, but this will be a derivative rather than an essential feature of them qua human rights.

Raz writes that human rights are "thought to combine exceptional importance and universality. Even though various writers have offered explanations of the first element, that of importance, none seems to

1 Raz 2010, 42. Compare the different "political" conceptions of human rights in Beitz 2009; Cohen 2006; Dworkin 2011, ch. 15; Pogge 2002; Rawls 1999.

me successful" (Raz 2010, 39). A successful explanation here would make a special kind of importance the distinctive feature of human rights, thereby bypassing the need to distinguish them by their (purported) special political role. The explanations of human rights' importance on offer tend to make them distinctive as protectors of particular important substantive values – personhood, needs, freedoms (Griffin 2008; Miller 2007, ch. 7; Wiggins 1987, ch. 1; Sen 2004). I share Raz's concern about these accounts. It seems doubtful that anything can be both narrow enough to qualify as a genuinely distinct substantive value ('the' value that human rights protect) yet still broad enough to encompass all the things we want to call human rights.[2]

But Raz fails to notice that his own account of rights in general is better taken as a theory of the narrower category, human rights, a theory that gives human rights a special kind of importance which renders unnecessary a further political account of human rights' distinctiveness. Raz's celebrated general account of rights is as follows:

> "X has a right" if and only if X can have rights and, other things being equal, an aspect of X's well-being (his interest) is a sufficient reason for holding some other person(s) to be under a duty (Raz 1986, 166).

According to this account, all rights are individualistically justified, where this means that any given right is justified by what it does for its holder, considered independently of whether it serves or disserves people other than its holder. To put this more precisely, a person P's right R is individualistically justified if and only if:

1. Some genuine feature F of P is of sufficient non-instrumental importance to constitute a powerful (i.e. hard to defeat) ground for P's holding a right that will protect, serve or in some other way ensure respect for F – and R is such a right.
2. This ground is undefeated and hence R is justified.[3]

On Raz's account, the relevant individualistic right-justifying feature F will always be some interest of the individual right-holder, an interest sufficient on its own to justify a duty. Alternative individualistic approaches make each right justified by how it serves its holder's autono-

2 For a pluralist approach which allows that various values can ground human rights when they are appropriately "important", see Tasioulas 2002.

3 This draws on my Cruft 2006, 154–158.

my or needs, or by how it embodies its holder's self-ownership or status.[4]

Individualistic approaches are too narrow to work as general accounts of rights. They fail to explain the many cases in which a right's existence depends on something other than the importance of some aspect of the right-holder. Trivial property rights (e.g. my property rights over my pen) are a good counter-example: such rights are clearly morally justified, but they are surely not justified simply by what they do for their individual holders, whether this is conceived in terms of interests, autonomy or status. I have argued elsewhere that most of an individual's justified property rights are justified because the property system of which they are a part serves the common good (Cruft 2006). Individualistic accounts exclude this plausible possibility. This is just one type of counterexample, but a survey of our morally justified rights suggests that many are justified on non-individualistic grounds, including the importance of the development of knowledge for its own sake (e.g. a scientist's right to pursue research whose results could threaten cherished religious beliefs), the common good (e.g. the system of rights created by traffic regulations), the value of beauty (e.g. your right that I not interrupt your musical performance).

Raz thinks he can accommodate these counter-examples. He considers a journalist's right to withhold the names of her sources. Raz suggests that this right cannot be justified solely by how it serves the interests of its holder (an individual journalist), but must instead be justified in part by how it serves the common good. To accommodate this example, Raz allows that a person can qualify as a right-holder even when that person's interests only justify duties because serving these interests in this way also serves other people's interests. Thus Raz maintains that the journalist has a right not to reveal her sources because (as required by his theory) the journalist's interests justify a duty. Yet he maintains that the journalist's interests only justify this duty because serving them also serves the common good.[5] While Raz presents this as a way to interpret his theory it is actually an admission of defeat

4 The following theorists are all plausibly read as offering individualistic accounts of rights, although they differ over the particular feature of the individual (e.g. freedom, interests, needs) that grounds rights, and how exactly the grounding works: Hart 1955; Kamm 2007, sect. II; Miller 2007, ch. 7; Nagel 2002, ch. 3; Pogge 2002; Sreenivasan 2010.

5 Raz 1986, 179. See also Raz 1994, 49–55.

for, as Kamm notes, "[i]f the satisfaction of the interests of others is the reason why the journalist gets a right to have his interest protected, his interest is *not sufficient* to give rise to the duty of non-interference with his speech".[6]

In my view, the individualistic account is most attractive when applied to those basic rights a person has simply in virtue of being human. For example, my right not to be dismembered is plausibly individualistically justified. It is natural to regard my bodily integrity as a feature of me that is of sufficient non-instrumental importance on its own – independently of whether this serves people other than me – to constitute a powerful ground for rights protecting it, including a right not to be dismembered. The other basic rights that protect our most important features are similarly plausibly individualistically justified. Why not, then, take individualistic justification as the hallmark of human rights? This would furnish us with a conception of human rights within the "natural rights" tradition, but one that defines them by the distinctively individualistic structure of their justification, rather than by some distinctive value (personhood, needs, freedom) that they all purportedly serve. On this account, a right will qualify as a human right whenever it is justified simply by what it "does for" its holder considered independently of whether it serves or disserves others. This "doing something for" the holder might involve serving the holder's interests, or protecting her needs, or securing her freedom, or reflecting her status, etc. So long

6 Kamm 2002, 485. For Raz's commitment to the *sufficiency* of the right-holder's interests for grounding a duty, see Raz's original definition of rights at Raz 1986, 166 and also ibid., 183–184. As well as the response to the journalist case considered in the main text, Raz also offers a second response, aimed at counter-examples in which a person lacks any interest in having a right (as opposed to cases like the journalist, in which the right-holder might have some interest in their right, but not an interest sufficient on its own to constitute a powerful ground for duties). Of someone whose property is "more trouble than it is worth", Raz says "[t]heir rights serve their interests as persons with [certain general characteristics], but they may be against their interests overall" (ibid., 180). But in what sense do I have *any* interest in my property qua property-owner, if all things considered I would be better off without my property? And if we allow that people can have such 'kind'- or 'role'-based interests, why should we see them as possessing any justificatory force in the grounding of duties? And even if we allow this, won't such force be derived from the justification for the existence of the relevant general kind (i.e. property owner), a justification that will surely refer, in non-individualistic fashion, to more than simply the importance of serving or respecting one member of this kind?

as the right's justification is individualistic, it will be a human right whatever the particular values at work in the justification.

The individualistic approach to human rights is very attractive: as well as avoiding the difficulty of finding some single substantive value that all human rights serve, it gives center stage to the common concern that non-individualistic theories of human rights are inadequate. For example, according to welfarist consequentialism, if the long run collective interest would be best promoted by denying human rights to certain people, then there would be no justification for the existence of human rights for the relevant people. Concern about this counter-intuitive implication is, in part, what motivates John Rawls's famous claim that "[u]tilitarianism does not take seriously the distinction between persons" (Rawls 1971, 27). If human rights are individualistically justified then they offer the special protection grounded in respect for each separate person that Rawls identifies as necessary – while other rights need not, and might be justified on consequentialist or other non-individualistic grounds.

Defining human rights by their individualistic justificatory structure seems a promising route for those who want to avoid adopting a "political" conception of such rights. But two problems might seem pressing. First, can the individualistic approach make sense of human rights that protect social goods – such as the rights to political participation or to freedom of speech?[7] In my view, such rights can be explained as individualistically justified: for example, the individual's interest in being able to have a say in how their community is run seems sufficiently important on its own to constitute a powerful ground for a right to political participation for the relevant individual, independently of whether this would serve anyone other than this individual. Of course, the right-justifying interest's existence depends on the social nature of our world, but that does not undermine the fact that it justifies a right in an individualistic way: given its very great importance to its possessor, it constitutes a powerful right-justifying ground independently of whether this would serve anyone else.[8]

7 As in his handling of the journalist's right not to reveal her sources, Raz is willing to depart from strict individualism in accounting for traditional civil rights such as the right of free speech; he allows that my possession of this right might be justified in part by what it does for people other than me (Raz 1986, 179–180).

8 Note that the thoughts in this paragraph can be re-run without using the concept of interests. Note also that related criticisms will charge the individualistic

A second problem is of more concern: the individualistic approach seems over-inclusive, for it seems to encompass a person's right to spousal fidelity, their right not to be murdered and many other rights that are very important, but whose classification as "human rights" is doubtful. For my spouse's being faithful to me is sufficiently important on its own, in terms of what it does for me, to justify a right held by me. And my not being murdered is similarly clearly sufficiently important to ground an individualistic justification in this way.

Here I think the theorist faces a difficult choice. Many writers – including Gewirth, Sen, Tasioulas and Wellman – are willing to allow that human rights encompass a range of very important rights including "personal" ones such as the right to a say in key family decisions, or the right not to be lied to by one's friends.[9] If this seems too inclusive, then we could add that human rights are distinguished not only as individualistically justified, but also as rights that are "everybody's business" – not in the sense that they must entail duties for everyone, for the human right to free speech, for example, seems primarily to entail duties for governments and organizations, and not for "ordinary individuals".[10] Rather, the suggestion is that human rights are distinguished as those rights respect for which can be legitimately demanded on the right-holder's behalf by anyone anywhere.[11]

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approach with (i) being unable to accommodate group rights as human rights, and (ii) being unable to guarantee the universality of human rights. While many significant theorists doubt that group rights can be genuine human rights (e.g. Griffin 2008, ch. 15; Wellman 2011, 66–69), my individualistic approach does not exclude this possibility. It allows that a group right could be individualistically justified (and hence qualify as a human right) when some feature of the group considered on its own is sufficiently important to constitute a powerful ground for the group's holding a right. Similarly, the individualistic approach will imply that human rights are universally held if the features of each person sufficient on their own to justify rights are universal features. The antecedent here is endorsed by those like Tasioulas who espouse individualistic accounts of human rights via commitment to Raz's account of rights in general (see Tasioulas 2002, at p. 87, for defence of the idea that human rights are universally held, but not across time).

9 The first example is drawn from Sen 1999, 229, the second from Gewirth 1982, 56; see also Wellman 2011, 36–39 and Tasioulas's contribution to this volume, "On the Nature of Human Rights".

10 For the view that human rights must entail duties for all others, see, e.g., Wellman 2011, 26.

11 I am tempted by John Skorupski's suggestion that "to demand" in this context means to make a request backed by a permissibly enforceable threat – where this

This might still seem too inclusive because many of the most important individual moral rights that are standardly protected by the criminal law (such as my rights not to be murdered or assaulted) are both individualistically justified and demandable by anyone on the right-holder's behalf – but the conventions of international law, and many thinkers working on human rights, deny that such ordinary individual criminal law rights are human rights.[12] To narrow the concept further one could add that human rights are not only (i) individualistically justified and (ii) demandable by anyone anywhere but also (iii) rights whose violation can trigger legitimate international intervention. This would be to add a strong Rawlsian version of the "political" conception of human rights to my proposed individualistic justificatory one.[13]

In my view, linguistic usage underdetermines the choice between the three ways of conceiving human rights sketched above. Quite frequently one encounters the term "human rights" used to refer to any very important rights – and this importance, I think, is best accounted for in terms of individualistic justification. But one also encounters the thesis that human rights cannot be too "private" in the way Gewirth, Sen, Tasioulas and Wellman allow; instead, a particular human rights violation must be everyone's business. And the recent growth of "political" conceptions of human rights reflects a very significant strand in current human rights discourse.[14] It is tempting to try to argue that when an individualistically justified right possesses features (ii) and (iii), this is precisely because it is individualistically justified. For feature (ii), this argument would be that if something (an interest, need etc.) is sufficiently important to ground an individualistic justifica-

force could be merely social and hence need not involve the type of international military intervention that would make the position outlined here collapse into the "political" position that I am about to introduce in the next paragraph of the main text (Skorupski 2010, 310).

12 See, e.g., Pogge 2002, ch. 2.

13 Weaker versions of the 'political' account – such as that (iv) support for, condoning, or maybe even simply allowing violation of human rights is sufficient to undermine a state's legitimacy, or to render certain weak forms of intervention justified – do not so obviously help exclude all the moral rights recognised by criminal law from qualifying as human rights. For it is not implausible to say that the more a state supports, condones or allows common assaults, rape, murder, fraud and theft, the less legitimate it is, and the more justified weak international intervention (e.g. official reprimands) can be.

14 See especially Charles Beitz's argument that the 'political' account best reflects the actual 'practice' of human rights (Beitz 2009).

tion for a right then it will be important enough to legitimate anyone's demanding respect for it, unless (as in the case of "private" spousal and familial rights) so doing would fail to respond appropriately to the particularly "private" grounding value in question. For feature (iii), the argument would be that if something is sufficiently important to ground an individualistic justification for a right then it will be important enough ceteris paribus to justify international intervention in the right's support – it is just that for many individualistically justified rights in many contexts ceteris is not paribus when the costs of international intervention are considered.

Luckily, I do not need to pursue these arguments for my purposes. All I need is the thesis that individualistic justification is one of the defining features of human rights. I must confess that I am doubtful that a political function in terms of international intervention is a further defining feature. Taking this as essential to human rights makes their existence too contingent on the existence of a system of nations, on intervention being a genuine possibility etc.; and it risks overly narrowing the set of human rights. But I do not need to pursue this here. My aim in this section has been merely to argue that individualistic justification is one of the defining features of human rights; this offers a plausible secular way of thinking about human rights as forms of "natural right", a way that makes sense of the distinctive importance of human rights without tying them to any particular grounding value. It does not rule out supplementary defining features of types (ii) and (iii).

The temptation to deny that human rights are rights

Surprisingly many theorists deny, implicitly or explicitly, that human rights need be rights. This position allows that of course some human rights are rights, such as the right not to be tortured. But other human rights – often socioeconomic human rights in particular (to food, holidays or "the highest attainable standard of physical and mental health")[15] – are, it is alleged or implied, not genuinely rights at all, but

15 The quotation is from the notoriously demanding Art. 12 of the International Covenant on Economic, Social and Cultural Rights.

rather goals or important values.[16] This thesis that human rights are not all genuine rights, and that this is not a problem for human rights discourse, has been explicitly defended by James Nickel:

> One approach that should be avoided puts a lot of weight on whether the norm in question really is, or could be, a right in a strict sense. […] This approach begs the question of whether human rights are rights in a strict sense rather than a fairly loose one. The human rights movement and its purposes are not well served by being forced into a narrow conceptual framework (Nickel 2010).

Note that the position under consideration accepts that the majority of human rights listed in international law are genuine *human rights*; it simply denies that this makes them genuine *rights*. Some human rights are better conceived not as rights but as goals or important values or some other non-right consideration.

Why think this? All the reasons to think it stem from the premise that genuine rights have a strict logical relation to directed duties (duties owed to someone). Most common is the assumption that rights must entail such duties. This can mean either that rights are Hohfeldian claims, in which case any right with a certain content must strictly correlate with a directed duty (owed to the right-holder) with the same content, or that a given right must (in non-Hohfeldian fashion) be the ground for a changing set of directed duties owed to the right-holder and perhaps to others.[17] Some also allow Hohfeldian privileges, powers and immunities – and combinations of these positions along with claims – to constitute rights.[18] But, the premise maintains, something cannot be a right if it lacks some such relation to directed duties.

Thus one reason for adopting the position sketched by Nickel above is that socio-economic human rights work in a duty-independent way in international law. Carl Wellman writes: "a real right imposes definite obligations upon some second party, but the International Covenant on

16 For the charge that Griffin 2008 does not do enough to distinguish his account of human rights as genuinely grounding *rights*, see Tasioulas 2010; see Griffin 2010 for a reply.

17 For the former position, see Hohfeld 1964, Kramer 1998. For the latter, see Raz 1986, 171. See the discussion in the next section below.

18 See e.g. my Cruft 2004; Wellman 2011; Wenar 2010. A privilege to do X is constituted by the absence of a duty not to do X; a power is (to put it roughly and imprecisely) constituted by the ability to create a new duty; an immunity is (similarly roughly) constituted by someone else's disability to create a new duty for one (for precise details, see Hohfeld 1964).

Economic, Social, and Cultural Rights commits state parties only to take steps progressively to achieve the goals it affirms. This seems to give unlimited discretion to state parties as to what steps they will take and when they will take them" (Wellman 2011, 71). Those who think that all human rights are genuine rights can respond to this concern in two ways. First, one might argue that even a mere discretionary requirement to take "steps progressively to achieve" socio-economic goods for individuals is a directed duty owed to right-holders, and hence can correlate with a genuine right in international law, a right that such steps be taken within the addressee's discretion. If one takes the Hohfeldian view that the content of a claim-right is given by the content of the duties it entails, then this will make the content of the right to health (to take one example) in international human rights law rather weaker than perhaps it should be – but it will leave it as a genuine right, entailing genuine (if weak) directed duties.[19] Secondly and perhaps more persuasively, one might argue that the International Covenant on Economic, Social, and Cultural Rights is simply mistaken in its account of what is entailed by socio-economic human rights. The morally justified rights that ground human rights law in this area entail demanding moral directed duties that go beyond the weak requirement to take progressive steps within one's discretion.

This response takes us to a second reason to deny that socio-economic human rights are genuine rights: they are perceived to be too demanding to be justified as rights. Thus Nickel again:

> Treating very demanding rights as goals has several advantages. One is that proposed goals that exceed one's abilities are not as farcical as proposed duties that exceed one's abilities. Creating grand lists of human rights that many countries cannot at present realize seems fraudulent to many people, and perhaps this fraudulence is reduced if we understand that these "rights" are really goals that countries should promote. […] Another advantage is that goals are flexible; addressees with different levels of ability can choose ways of pursuing the goals that suit their circumstances and means. Because

19 See Nickel's related thoughts on 'right-goal mixtures' (Nickel 2010). One might see the 'discretion' element as incompatible with genuine rights-correlative duties, because it seems to make the duty in international law at most a Kantian 'imperfect' duty. However, I see no reason why 'imperfect' duties, *if defined as duties which allow discretion in their exercise*, need not be owed to people and thereby correlate with rights.

> of these attractions of goals, it will be worth exploring ways to transform very demanding human rights into goals.[20]

Note that Nickel is not here appealing to "ought implies can" to deny the logical possibility of rights entailing jointly unfulfillable duties.[21] He is rather arguing that it is "farcical" or "fraudulent" to ascribe rights that entail duties which vastly exceed what their bearers can do. The thought is that if an impoverished state could not afford to educate more than a few of its citizens, then all citizens' holding genuine rights to be educated entailing state-borne duties to all citizens to educate them would be "farcical" or "fraudulent" – but not logically inconsistent, because the state could afford to educate each individual, taken separately.[22]

One response – a response that Nickel partially endorses[23] – takes this worry to conceive human rights as too state-focused. If states are not the primary addressees of human rights, but just one addressee among others (including all other human individuals, all states and international institutions), then while some socio-economic duties for impoverished states might "farcically" vastly exceed their abilities, similar rights-derived socio-economic duties borne by wealthy individuals, states and international institutions will often not do so. Certainly there can be no human right to that which cannot be provided by human agency at all, but most people's socio-economic rights are not

20 Nickel 2010. Somewhat similar thoughts are evident in Dorsey 2005. For the related thought that fixating on the violation of the Hohfeldian duties correlative to human rights impoverishes human rights discourse, see Brems 2009. And for the claim that even 'negative' or 'civil' human rights frequently fail to entail individually borne directed duties in a traditional way, see Ashford 2006. For reasons of space I cannot examine Ashford and Brems in the detail they merit; instead I focus on Nickel's approach here – and, indeed, on just the one aspect of Nickel's approach sketched in the quotations in the main text. Nickel's full position encompasses many alternative moves too.

21 For a plausible argument that sometimes jointly unfufillable duties are logically consistent, see Waldron 1989.

22 For a similar concern – about taking Waldron's argument for the compatibility of unfulfillable duties as a ready answer to those who worry about conflicting rights – see Eddy 2006 at p. 351: "An uncomfortable implication of [Waldron's] approach is that if there are twenty million people who are at risk of disease, and only enough vaccine for one person, we would have to say that all twenty million people had a right to the vaccine". Not inconsistent, perhaps, but surely farcical.

23 See, e.g., Nickel 2007, 150.

in this category.[24] Instead, there is enough wealth in the world that some allocation of directed duties (to educate Joe, provide medical care for Jill, etc.) will be possible that ensures that most people have most of their socio-economic human rights fulfilled. The allocation will confer weighty duties on the wealthy, but not on impoverished states. In this way farcicality can be avoided even with genuine Hohfeldian duty-correlative socio-economic rights.

A more concessive response accepts that it is valuable to regard a person's state or government as having special responsibilities vis-à-vis her human rights. We might therefore resist the conclusion that if your state genuinely cannot afford to educate more than a few of its citizens, then you no longer hold the human right to education against your state but only against those who can afford to educate you. But denying that you and your fellows' human rights against your state entail genuine directed duties borne by that state is not the only way to go. One could instead maintain that you and your fellows' rights to education entail less demanding duties for your state, but directed duties nonetheless: duties owed to citizens, to work towards universal education, say, by developing the national economy and infrastructure. Nickel considers and partially endorses this alternative too.[25] It involves abandoning the Hohfeldian premise that a person's genuine claim-right, against some second party, to X (e.g. to be educated) must entail duties, borne by that second party, to ensure X for that person (i.e. to educate the person). But it is consistent with the non-Hohfeldian view that a right to X can ground a range of contextually variable directed duties, not all of which will be straightforwardly to supply X. A position inconsistent even with non-Hohfeldian views would have to maintain that you and your fellows have human rights to education against your state but your state has no directed duties generated by this right; at most, it has some strong reasons or maybe some undirected duties to adopt some relevant goals, say. I shall return to this position in a moment (I split it into positions (2) and (3) below).

First I should consider a third reason to deny that socio-economic human rights are genuine rights. Onora O'Neill writes:

24 See Miller 2007, 186. As Miller's discussion makes clear, that duties cannot require what humans cannot provide is compatible with some very demanding duties and rights.

25 See, e.g., Nickel 2007, 151–152.

> [T]he correspondence of universal liberty rights to universal obligations is relatively well-defined even when institutions are missing or weak. For example, violation of a right not to be raped or of a right not to be tortured may be clear enough, and the perpetrator may even be identifiable, even when institutions for enforcement are lamentably weak. But the correspondence of universal rights to goods and services to obligations to provide or deliver remains entirely amorphous when institutions are missing or weak. Somebody who receives no [subsistence supplies] may no doubt assert that her rights have been violated, but unless obligations to deliver that care have been established and distributed, she will not know where to press her claim, and it will be systematically obscure whether there is any perpetrator, or who has neglected or violated her rights (O'Neill 2000, 105).

Without institutionalization of assistance duties, it is (sometimes) extremely unclear who bears the duty to assist a person needing assistance. But if there is nobody who bears the duty to the needy individual, then that individual cannot have a right, because rights correlate with duties.

Against this charge, one can argue that while the directed duties correlative to socio-economic rights are epistemically obscure without institutions, they are nonetheless genuinely allocated, and closer examination of principles of justice will reveal their allocation. Proposals in the literature include Barry's contribution principle, Kamm's principle of the importance of proximity, Miller's "connection theory" of responsibility, Wenar's least-cost principle, Wringe's suggestion that such duties are borne by everyone collectively (Barry 2005; Kamm 2007, sect. III; Miller 2007, 99–107; Wenar 2007, Wringe 2005). If any one of these proposals is correct, then while the allocation of directed duties correlative to pre-institutional socio-economic rights is obscure, it is nonetheless determinate.

However, it is unlikely that any such principle will always allocate directed duties to states or governments. Impoverished states or governments will not be captured by either the "capacity" or "least cost" principles, and if they are also post-apartheid or postcolonial states or governments, then they might not be captured by the "contribution" principle. It seems to me that the strongest reason to go down the route sketched in the quotation from Nickel at the start of this section – to weaken the link between human rights and directed duties, and thereby undermine the thesis that human rights are always genuine rights – arises from a commitment to seeing human rights as always importantly held against one's state or government. This thesis is evident in the way

human rights language is used, and in the popularity of the "political" conception.

If on this basis we want to say that even citizens of deeply impoverished states hold human rights against their governments to a range of socio-economic goods that their governments cannot supply widely, then to avoid "farcicality" we will need to allow that such human rights need not entail directed duties to supply their precise content to each right-holder. Instead, we must hold one of the following three positions:

> (1) Certain socio-economic human rights held against impoverished governments entail, contra Hohfeld, directed duties (owed to right-holders) borne by the relevant governments, the content of which differs from the content of the human right in question (e.g. my human right to a primary education entails for my government only a duty, owed to me, to work towards primary educational provision, rather than a duty to educate me).

As noted earlier, even fairly demanding socio-economic human rights like the right to be educated might well entail directed duties borne by beings other than the state in a way that fits the Hohfeldian model (e.g. duties to educate Joe and Jill, allocated by principles like the "capacity" or "least cost" ones) – and to that extent such human rights will be genuine rights even on the Hohfeldian view. But in their central, important role as binding governments, they will on the Hohfeldian view not be genuine rights held against governments if they only entail governmental duties of type (1).

> (2) Certain socio-economic human rights held against impoverished governments entail, contra even non-Hohfeldians, only undirected duties borne by the relevant governments.
>
> (3) Certain socio-economic human rights held against impoverished governments entail no duties whatsoever for the relevant governments, but at best non-right normative factors such as strong reasons to adopt certain policy goals.

Anything less than (3) – e.g. the view that socio-economic human rights need entail only weak reasons, or perhaps need entail no normative factor whatsoever, for their holders' governments – will leave human rights doing very little indeed in terms of their relationship to right-holders' governments.

Position (1) is quite common in the literature, though its adherents do not normally think of it as involving a rejection of the thesis that

human rights are genuine rights. They simply reject the Hohfeldian premise that a genuine claim-right to X must correlate with a directed duty to supply X; instead, they maintain merely that genuine rights must entail some directed duties, though the duties entailed might change, and need not share the content of the right.[26] Position (2) is much less common,[27] and I am rather doubtful about it. For don't impoverished states that do not even attempt to move towards fulfilling human rights let their citizens down, wronging them and thus violating directed duties towards them? Aren't we compelled to see this if we think citizens hold rights against their states? I am even more doubtful about position (3): Don't impoverished states bear some duty-type normative demands in relation to their citizens' human rights?

Suppose, however, that we accept one of these positions (1)–(3). The approach to human rights outlined in the previous section – according to which individualistic justification is one of the defining features of human rights – gives us a way to make sense of human rights as distinctive even when they are not genuine rights in one sense or another. For we can say that human rights include any case in which some proper feature F (perhaps needs, important interests, freedom) of a person P is of sufficient non-instrumental importance to justify some serious normative factor protecting that feature: either a directed duty with some content or other that will protect F, or an undirected duty protecting F, or some serious high-weight non-duty reason, important goal or aim, etc. that asks for protection for F. On this account, we take individualistic justification as the hallmark of human rights and thereby allow human rights to include individualistically justified moral factors that are not rights.

Nickel argues that if we allow that some human rights are not genuine rights, then we can accept international human rights law and human rights discourse without making these practices farcically demanding (Nickel 2010). My individualistic account of human rights offers a way of explaining why this might be correct: if individualistic justification is the hallmark of human rights, then it would be quite natural for our practices to have extended the concept to encompass other individualistically justified serious normative factors. For on this approach, the human rights that are genuine rights and those that are not will share a distinctive role as protectors of aspects of an individual sufficient on

26 See, e.g., Raz 1986, 171; Tasioulas 2010, 656–657.
27 But see Ashford 2006.

their own – before others are considered – to constitute powerful grounds for such protection. In this way even the human rights that are not genuine rights play the Rawlsian role of protecting the "separateness of persons".

The cost of denying that human rights need be genuine rights

The position sketched in the two paragraphs above should perhaps appear no great innovation to those who reject the Hohfeldian approach to rights. In replying to O'Neill, John Tasioulas writes:

> Why should this indeterminacy [in the pre-institutional allocation of duties entailed by socio-economic rights] […] undermine the very existence of such rights prior to their institutional embodiment? Why is not the person's interest and the fact that it is sufficient to generate duties to respect, protect, and further it, etc., enough to warrant the existence of the right? In view of the strength of the argument for recognizing and imposing duties based on that interest, there is a strong case for regarding the issue of claimability [i.e. the issue of the determinate allocation of duties] as separate from that of the right's existence (Tasioulas 2007, 94).

On this view rights are prior to the directed duties they entail, and the directed duties they can generate vary over time. From this view it might seem a small step to add that as well as generating a changing set of directed duties, a right might in certain contexts also generate undirected duties and other normative phenomena such as important goals. And it might well then seem rather a small step again to add that sometimes some rights do not generate or have any relation to duties at all, but only to other normative phenomena like goals. Although Tasioulas himself insists that rights must entail directed duties (Tasioulas 2010, 656–657), these further steps might seem consistent with the view of rights he sketches above; an adherent of this view might thus seem able to embrace each of positions (1)–(3) without abandoning the thesis that the human rights modeled by these positions are genuine rights.

In my view, though, there is a cost attached to any position that abandons the thesis that genuine rights are constituted by Hohfeldian claims, privileges, powers, or immunities or some cluster of these positions. Those who abandon this position – including those like Tasioulas who stick to position (1), maintaining that rights must entail some di-

rected duties – are often motivated by what Raz calls rights' "dynamic character":

> [T]here is no closed list of duties which correspond to [a] right. The existence of a right often leads to holding another to have a duty because of the existence of certain facts peculiar to the parties or general to the society in which they live. A change of circumstances may lead to the creation of new duties based on the old right. The right to political participation is not new, but only in modern states with their enormously complex bureaucracies does this right justify […] a duty on the government to make public its plans and proposals before a decision on them is reached, as well as a duty to publish its reasons for a decision once reached (Raz 1986, 171).

Many, including Raz, infer that if rights can entail changing waves of directed duties, then rights should not be construed as Hohfeldian positions, with their strict relationships between rights with a given content and directed duties with the same content (or, in the case of privileges, between rights and the absence of directed duties, or in the cases of powers and immunities, between rights and the ability or inability to alter specific directed duties).

But, as Matthew Kramer points out, there is no need to abandon Hohfeld's framework in order to make sense of rights' dynamic character. For – to focus only on Hohfeldian claim-rights here – we can explain this character as involving a rather abstract right (e.g. respect for one's life) that correlatively entails rather abstract directed duties (to respect the right-holder's life), which in changing circumstances will entail differing more specific right-duty pairs (e.g. in certain contexts the abstract right might generate a right to a dialysis machine correlating with a duty to provide it; in others it might not but might still generate a right to assisted suicide correlating with a corresponding duty). As Kramer puts it, "[a]n abstract right that is strictly correlated with an abstract duty can comprise or undergird any number of concrete rights, each of which will of course be strictly correlated with a concrete duty".[28]

When considering rights in general (as opposed to specifically human rights), I believe we have strong reasons to favor Kramer's Hohfeldian suggestion over the rival view implicit in Raz and Tasioulas. This is because abandoning the Hohfeldian framework – even while,

28 Kramer 1998, 43. See also Raz's own awareness that "[t]his objection to the reduction of rights to duties [i.e. the concern to respect rights' dynamic character] does not rule out the possibility that 'A has a right to X' is reducible to 'There is a duty to secure A in X'" (Raz 1986, 171).

as in position (1), retaining the thesis that genuine rights entail directed duties – makes the individuation of rights worryingly indeterminate.

What are the existence conditions for my right to park my car in the space I have purchased? The Hohfeldian approach naturally characterizes this right as a combination of (a) my privilege to use the space and (b) my claim to be unimpeded in using it.[29] These Hohfeldian positions exist if (a) I do not bear a duty to refrain from using the space and (b) some persons have a directed duty, to me, to allow me to use it unimpeded. If these conditions are not fulfilled then I cannot have such a right, according to the Hohfeldian approach. Furthermore, if somebody has a directed duty to me that is derived from duty (b) (e. g. a traffic warden's duty not to attempt to give me a parking ticket when they see my car in the space), then the Hohfeldian approach tells us that this will correlate with a right derived from the former right to the parking space.[30] And if somebody has a directed duty to me with a different content to (b), and which is not derived from duty (b), but that is grounded in the same sorts of considerations that ground (b) (e. g. a duty to allow me to take priority when I am on the main road and they are waiting to turn onto it, grounded – like my right to the parking space – in the importance of efficiency in the movement of traffic around town), then the Hohfeldian approach tells us that this will correlate with a different right not derived from my right to the parking space.

By contrast, what will the non-Hohfeldian approach of type (1) imply about the existence conditions of this right to park in the space I have purchased? It says that the right is in some sense "prior" to the directed duties it generates, and that it need not correlate with any one particular such duty. Instead the right is the ground for a range of directed duties that vary with context. Which duties are grounded by or associated with this right, then, and which with other rights? It seems natural to regard the duty not to impede me in using the space as the primary duty correlating with the right, while the traffic warden's duty to leave me alone is in some sense secondary: derived from the right, but not correlating with it. And the other driver's duty to let me take priority when I am on the main road seems naturally not to

29 Both (a) and (b) should be qualified with the phrase "within reasonable limits", but I ignore this for simplicity.

30 For useful discussion of different ways that rights and duties can be derived from other rights and duties, see Wellman 2011, 48–49.

be derived from the right to the parking space at all. But I am not sure how the non-Hohfeldian approach can deliver these conclusions.

Once one abandons the Hohfeldian assumption that each right (or at least, each claim-right) correlates with or, perhaps, is constituted by a directed duty with the same content, it is unclear what can enable us to say that one duty entailed by a right somehow takes priority in the way it is entailed by the right – is more fundamentally grounded by the right – than some other duty also entailed by it. It thereby becomes difficult to distinguish how my right to the parking space relates to the (fundamental) duty to leave my space unimpeded from how it relates to the (derivative) traffic warden's duty not to bother me. Both duties are entailed by the right. What – other than the Hohfeldian approach – can allow us to say that one is more fundamentally entailed by it than the other? Perhaps we could say that the latter duty is only entailed given a certain contingent background in which traffic wardens exist and have a certain role, etc., while the former duty will exist in any possible world where my right to the space exists. On this account, we can seemingly continue as non-Hohfeldians but note that some duties necessarily exist whenever a right exists while others do not. But on closer inspection this seems like a way of returning to (or, indeed, of elucidating) the Hohfeldian notion of correlativity that we were attempting to move beyond: a right's correlative duty is whatever duty must exist wherever the right exists, no matter the changing context.

An even more worrying problem for the non-Hohfeldian approach is that it threatens to extinguish the distinction between a right and its grounds.[31] For the approach says that a right is the ground for a range of duties, a ground that exists independently of and prior to these duties. But what is it for a right to function as a ground in this way? When we look for the ground for some duty associated with a right, it is very natural to "look straight through" the right directly to the considerations – interests, needs, etc. – that ground both right and duty. For instance, if we enquire into the ground for the duty not to torture Joe, we will be most unlikely to focus on Joe's right not to be tortured; instead, we will look directly at Joe's basic interest in not being tortured. Similarly, if we look for the ground for your duty not to impede my parking space, I think we will look at the important efficiency considerations that justify

31 That is, I think, the non-Hohfeldian approach threatens to collapse into something like what Tasioulas calls the "Reductive View". See Tasioulas's essay in this volume, "On the Nature of Human Rights".

a town's system of parking regulations. If, instead, we 'stop' immediately at my right to my parking space (or Joe's right not to be tortured), then in my view we are not really investigating the duty's ground. There might be a sense in which the rights in these examples ground the relevant duties, but I suspect this is an epistemic rather than a metaphysical sense: if I want to know what duties I have vis-à-vis Joe, then sometimes I can learn about this by focusing on Joe's rights (e.g. not to be tortured).[32] In the non-epistemic or 'metaphysical' sense of grounding – the sense in which when X grounds Y, X makes Y the case – the grounds of duties are naturally conceived as certain values; if rights are the grounds of duties, they seem to be identified with these values. But this would leave us unable to distinguish my right to my parking space from my right to priority on the main road, because the duties they generate (to leave my space unimpeded, and to cede me priority on the main road) are both grounded in the same value: efficiency in traffic management.

In response to this the non-Hohfeldian will insist that two rights can differ while sharing the same 'metaphysical' ground, and that these two rights can each themselves 'metaphysically' ground a range of differing duties (without privileging any special correlative duties whose content matches the rights). This picture makes it extremely unclear what individuates one right from another. Their grounds do not do the individuating: we have seen that this would bizarrely imply that my right to my parking space was the same right as my right to priority on the main road. But there are no special correlative duties, duties invariably tied to rights with matching content, by which we can individuate one right from another. So we cannot individuate my right to my parking space from my right to priority by attention to the difference between your duty to let me use the space and your duty to let me use the road: both duties might well be entailed by the same single right in a way that gives them an equal status in relation to that right. For the two rights to remain individuable as "distinct existences", then, it must be on the basis of some other characteristic that distinguishes them, but I am not sure

32 Raz stresses the epistemic role of rights as grounds for duties when he describes them as "intermediate conclusions in arguments from ultimate values to duties" (Raz 1986, 181). That this role in argument is epistemic – that is, it concerns the uncovering of the implications of ultimate values, rather than the non-epistemic determination of such implications – seems clear from Raz's discussion of the epistemic utility of rights' role as grounds for duties (ibid.).

what this could be. Perhaps some might point to differing legal sources for the traffic-related rights on which I have focused but, first, this would not work for rights that were purely conventional rather than legally instituted and secondly, how can we be confident that the relevant Acts of Parliament (or similar law-making events) genuinely succeeded in creating two rights here, rather than (despite what was intended) actually creating just one right or none? To answer this question, we need to know already what individuates one right from another; appeal to what law-making acts say cannot resolve this. Nor, of course, can we distinguish the rights spatio-temporally.

Things are murkier still for those non-Hohfeldians of types (2) or (3) – those who allow that rights need not entail directed duties at all, but only undirected duties or non-duty considerations. For these positions seem, even more than position (1), to make it difficult to distinguish rights from their grounding values. To take one example that is sometimes considered to fit (2) or (3), if my right to education does not entail any duties owed to me (or any other relationship to directed duties)[33], but instead entails perhaps only an undirected duty on my government to build what schools it can, then what enables us to refer to a right of mine here, as opposed simply to the value of my being educated or, indeed, the value of education as such? What distinguishing feature identifies what we are faced with as a right? If the duty to build schools is not directed to me, then it is unclear in what sense my being educated can be said to be a right, or in what sense not building schools wrongs me. Positions (2) and (3) cut off what seems most characteristic of rights: that they involve duties to others whose violation is not just a matter of doing wrong, but of wronging a particular person who is thereby distinguished as a right-holder.[34] This problem presses even before we note that positions (2) and (3) also bear the other difficulties of position (1): difficulties in distinguishing some primary duty generated by a right from secondary derived duties, and in individuating different rights with the same ground.

The Hohfeldian approach avoids these various problems by taking any (claim-)right to have correlative directed duties – duties that must exist if the right exists – that are intrinsic to the right's nature and hence its individuation from other rights; rights constituted by Hohfel-

33 For let us not forget Hohfeldian privileges, powers and immunities.

34 See Tasioulas 2010, 657–658 and Thompson 2004. Privileges, powers and immunities similarly involve relations to directed duties.

dian privileges, powers and immunities are similarly essentially defined and individuated by their relationship to directed duties. This approach makes rights clearly distinct from important values for, first, there is nothing about the nature of values as such that is tied to directed duties and secondly, when defined by certain logical relationships to directed duties (i. e. as what someone holds when owed a duty, or as the ability to alter directed duties) different rights can clearly be grounded on a range of varied values. In the traffic example examined earlier, the Hohfeldian approach can allow that both my right to my space and my right to priority on the road are grounded in the same way, but one of the rights (my right to the parking space) is constituted – at least in part[35] – by a certain duty (your duty not to impede me) while the other (my right to priority on the main road) is constituted by another (your duty not to pull out in front of me when I am on the main road). The value of the Hohfeldian approach lies in how it enables us to individuate rights clearly through the focus on correlative duties, and thereby to preserve the distinction between a right and its grounds.

For non-individualistically justified rights – that is, on my approach, rights other than human rights – these considerations are good enough to settle the matter in favor of Hohfeld. For human rights, things are more complex. This is because human rights' individualistic justification provides an alternative effective means of individuating rights: by their grounding source in their holder.

Why human rights might nonetheless not be genuine rights

Undirected duties need not, by their very nature, foreground a particular person in the reasoning of the duty-bearer (although they might, say, be duties to do something for a particular person, this is not essential to their character as undirected duties). By contrast, directed duties necessarily foreground a particular person for the duty-bearer: the person to whom the duty is owed. Similarly, Hohfeldian powers, privileges and immunities are also intrinsically bipolar, placing someone on a pole opposite the relevant liability-, no-right- or disability-bearer. Such a structure in the determination of how one ought to behave foregrounds someone in the reasoning of the agent subject to this structure (the directed-duty-, liability-, no-right- or disability-bearer), and the Hohfel-

35 It is also constituted by the Hohfeldian privilege to use the space.

dian approach maintains that it is to label a person's status as so foregrounded that we use the term "a right".[36] On this approach, genuine rights are identified as a structural-functional kind in the determination of what people ought to do: the kind we encounter when we encounter directed duties – or at least when we encounter them and some further conditions are fulfilled.[37]

I have suggested that non-Hohfeldian approaches, which sharply distinguish rights from any directed duties they entail, struggle to find some determinate kind for talk of rights to denote, a kind that is distinct from the values that ground the relevant duties. But the individualistic approach that I believe defines human rights can, even in its extended non-Hohfeldian form, arguably sidestep these worries. The extended approach, as sketched in the final two paragraphs of the section preceding the last one, maintains, in non-Hohfeldian fashion, that human rights include any case in which some proper feature F of a person P is of sufficient non-instrumental importance to justify some serious normative factor (including directed and undirected duties, and other normative considerations) protecting that feature; no special correlative duty is attached to each human right, on this view.

This approach, although encompassing positions (2) and (3) as well as (1), can avoid the particular worry outlined earlier for (2) and (3): the worry that rights so conceived will fail to involve the foregrounding of anyone in the reasoning of those encountering them, and hence will make no sense as things whose violation wrongs right-holders. The individualistic approach can evade this worry even in its extended non-Hohfeldian form, for on this approach the presence of a human right will always involve the foregrounding of a particular person: the P whose F is the justifying source of the relevant normative factors. Sometimes, on this approach, a human right will entail merely that certain goals ought to be pursued, and failure to pursue such goals will not qualify as a "violation" but simply as a failure to do all that one ought – or perhaps even simply as a failure to respond to all the reasons bearing on

36 The term "bipolar" comes from Thompson 2004.

37 For rights involve more than just claims, privileges, powers or immunities. My power to get myself sent to prison for dangerous driving is not a right, nor is my claim that you thank me (i.e. your duty to me to thank me) for helping me cross the road. But rights are a subset of claims, privileges, powers, immunities and complex mixtures of these things. There is, in my view, no right that fails to fit the Hohfeldian structure – except, perhaps, human rights, for which read on.

one. But even then, there will necessarily be a sense that a particular person has been let down by such failure: the person whose F is the justifying source of the 'ought' or reason. So the individualistic approach generates a form of 'directedness' or foregrounding that gives human-right-holders special status even without the Hohfeldian structure – and hence even when it does not involve genuine Hohfeldian rights.

Alternative accounts of human rights, such as those which say that it is essential to human rights only that (ii) they are demandable by anyone or that (iii) their violation can justify international intervention,[38] will, if extended in the non-Hohfeldian manner I have envisaged for the individualistic account, lack the individualistic account's resources to avoid the problem considered in the previous paragraph. For such accounts give human rights no way of foregrounding a particular individual other than as the terminus of a directed duty. There is nothing about an undirected duty's, goal's or reason's being demandable by everyone, or triggering international intervention, that can ensure that this undirected duty, goal or reason foregrounds a particular person in the way that its being individualistically justified ensures. (Indeed there seem to be examples of undirected duties, goals and reasons conformity with which is demandable by anyone but that foreground no particular person for the duty-, goal- or reason-bearing agent – I would include here our reasons to promote happiness in general and to respect beauty in general, to pursue important but instrumentally useless knowledge, and our undirected duty not to destroy distant barren planets; the latter also looks like something whose violation could (in situations where such destruction was possible) legitimately trigger international intervention.) Because individualistic justification, by contrast, necessarily foregrounds a particular person just as directed duties do,[39] it can thereby necessarily preserve a conception of human rights as having bearers, bearers who are let down when their human rights are not fulfilled, even when these 'rights' do not entail directed duties. The individualistic approach thus seems particularly well-suited to non-Hohfeldian extensions of human rights language.

38 See p. 135 above.

39 Though this is not, of course, to claim that the two modes of foregrounding are identical. They are clearly not, for directed duties can be justified on non-individualistic grounds. To deny this is to return to Raz's erroneous general theory of rights.

How does the individualistic non-Hohfeldian extended conception of human rights individuate one human right from another? One quasi-Hohfeldian option is to say that any given normative factor that is individualistically justified – a particular directed duty, undirected duty, goal etc. – identifies a different human right. This suggestion is very distant from the spirit of those, like Nickel and Tasioulas, who support a non-Hohfeldian expansion of human rights; these theorists clearly favor the view that a given human right could ground a range of changing duties and (for Nickel) other factors. But the only alternative (unless one can find some other feature of human rights conceived in this way that enables their differentiation – and as I argued earlier, I do not see what this could be) is to individuate human rights by their grounds. On the individualistic non-Hohfeldian extended account, my human right to education will entail both a directed duty to educate me, borne by those wealthy enough and appropriately related to me so as to be allocated such a duty,[40] and a strong non-duty reason for my impoverished government to work towards educating me insofar as it can, along with various other normative factors. The individuation of this human right from other human rights will, on this approach, be done by appeal to the justifying value it protects: perhaps the value of my being educated. Alternatively, perhaps two or more fundamentally important features of me are each sufficient on their own individualistically to justify the same set of duties, reasons and other normative considerations relating to my education – such as the value of my gaining knowledge, and the value of my autonomy (which requires education); if so, we need not say that there are two human rights here (though we could say that); we can instead see the two grounding values with identical education-related normative implications as differentiating my human right to education from other human rights (of mine and others) with different grounding values that do not have exactly the same implications. The key point is that even if it entails no directed duty, my human right to education will differ from my human right to liberty because of their differing justifying sources, which for each right might be one or many, sources which have (somewhat) differing implications in terms of duties and other normative factors.[41]

40 The appropriate relation here might be specified by a "least-cost", "contribution" or some other principle. See p. 141 above.

41 And, of course, the individualism of the approach says that both such justificatory sources will have individualistic justificatory force, where this means that

Individuating human rights by their ground is not as costly in the case of human rights, when conceived as individualistically justified, as it is in the example of my right to park and my right to priority on the main road. The latter are clearly different rights despite their entirely shared justificatory source, and denying this seems absurd. But it is not clear that the blurring into one of what might initially have looked like several human rights with the same individualistic justificatory source need be a problem. Nor is it clear that the blurring of such rights with the value that grounds the duties associated with them is clearly a problem. Such blurring is, instead, rather natural when discussing human rights. The first blurring occurs when one slips, as if these were the same right, from reference to Joe's human right to education in general to reference to Joe's human right to be taught to write. The second blurring occurs when one slips from reference to either right to reference to the fundamental importance of Joe's being educated. Both slips are very common indeed. If the non-Hohfeldian individualistic approach is correct, this is to be expected, since the only way to individuate human rights is by the justificatory source of the duties and other normative factors associated with them. And, importantly, it does not seem like a big leap to accept this view, even if its details need further spelling out. (In particular, I have avoided discussing the relationship between the individuation, the identity and the existence of human rights, but this needs spelling out before we can fully assess the position.) It preserves the distinction between my human right to be educated and yours, of course, because the approach sees these as having differing grounds (the one grounded in features of me, the other in features of you). And it preserves the distinction between my human right to be educated and my human rights to liberty, to bodily integrity and so on. Where the blurring happens is where it feels right anyway – between things with the very same ground.

The extended non-Hohfeldian individualistic approach can perhaps also make sense of a form of the distinction between duties and other factors correlative to a human right and duties less immediately derived from it. For the approach will allow that the duties and other factors grounded in one individualistic justificatory source might generate new duties or other factors when taken in conjunction with the duties

each is a value sufficiently important on its own to ground certain weighty duties, reasons and other normative factors independently of whether these things (duties, reasons, other factors) would serve other people.

and other factors grounded in some other individualistic justificatory source. For example, let us say that Joe's need for an education grounds a powerful reason for Joe's government to do what it can to educate him, and Jill's need for an education grounds a similar reason for the same government; enough individualistically grounded powerful reasons of this type could together entail that the government has a duty to start a school-building program. On its own, Joe's human right cannot generate this duty, but in conjunction with enough others it can. The powerful reasons (or, perhaps even directed duties to do something towards Joe's education) are here analogous to correlative duties in the Hohfeldian structure, while the duty to build schools is analogous to a secondary derived duty.

Conclusion

I have suggested that an extended non-Hohfeldian individualistic account of human rights can avoid some of the difficulties attendant on abandoning Hohfeld's conception of rights: even without regarding every human right as defined by a relation to directed duties, it preserves the premise that human rights have bearers who are let down (or, in some sense, 'violated') when human rights are not respected, and it can replicate something like Hohfeld's distinction between primary correlative duties and secondary derived duties. It threatens to extinguish the distinction between human rights and their grounds, but this is perhaps not an enormous cost.

More importantly, something like this approach is maybe what we should expect if human rights are individualistically justified. For given that the individualistic justificatory structure allows some mimicking of Hohfeldian structures, it would probably be no surprise if language users had begun to extend the concept "human rights" to encompass other normative phenomena that were individualistically justified but not rights in the strict Hohfeldian sense. Indeed perhaps we should rather see two rival notions of foregrounding at work in our use of the language of rights: one captured by the Hohfeldian notion of a directed duty, a notion that can encompass rights that are not individualistically grounded, including such trivial rights as those in games and regulations, another captured by my extended Razian notion of the individualistic source of a serious normative requirement.

We might wonder, though, why we should bother with this complex new approach rather than sticking to Hohfeld. To my mind, it depends largely on our reaction to the fact that the Hohfeldian approach will require us – if we are to avoid Nickel's worry about farcicality – to say that citizens of impoverished nations hold no human right against their governments to such goods as education or health care, but only to their governments working towards education. Human rights to the full important goods of education and health care might still be held against wealthy outsiders, but not against the relevant citizens' own governments. The individualistic extended non-Hohfeldian approach allows us to say that there are human rights to the full goods, held against the poor governments: it is just that such rights do not entail directed duties with the same content as the rights. (Instead, they can exist while entailing weaker directed duties or no directed duties at all but simply other powerful normative factors.) Is the value of saying this worth the cost of muddying the individuation of different human rights with the same grounds?[42]

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On human rights and the strength of corresponding duties

Corinna Mieth

The idea that negative duties are stronger than positive ones is widespread. The idea that human-rights-corresponding duties are strong is also widespread. I will show that both ideas are wrong. Alternatively, I propose the following three criteria for strong duties: (1) their reference to basic goods, (2) reasonable demandingness, and (3) determinateness. A duty is strong if and only if all three criteria are fulfilled. Together they are necessary and sufficient. The criteria themselves can obviously be more or less fulfilled. So the strength of duties is a question of degree: the closer the criteria are to being met, the stronger is the duty. The criteria can also be interpreted in different ways concerning their content. However, I will not go into detail concerning the interpretation of the criteria in this paper. Even if we keep the criteria quite formal, it will turn out that there are strong positive duties. And it will turn out that not all human-rights-corresponding duties are strong, either based on an individual or on an institutional understanding of human rights.

In the first part of my paper, I will show that there are strong positive duties. Furthermore, I will argue that the distinction between positive duties and negative duties is misleading with regard to their relative strength. I will discuss two possible ways of differentiating between positive and negative duties that are both implicit in current debates but do not lead to the same conclusion concerning the strength of duties. We can more plausibly explain the strength of duties in terms of the goods protected by the duty, I will argue, than in terms of their being positive or negative in the sense of being duties to act or to omit an action. The second criterion to determine the strength of a duty is reasonable demandingness: if we can only save another person's life by risking our own, this would be more than can reasonably be expected. Such a deed would go beyond duty; it would be supererogatory. The third criterion is determinateness. It must be clear who has to do or omit what in order to fulfill the duty. Taken the other way round, it must be clear by

which specific action or omission which person violates the duty and which person's moral claims or legal rights or human rights are violated by the action or omission in question. All this means that we are committing a serious moral or legal wrong if we violate a strong duty.

In the second part of the paper, I will apply this approach to the human rights discourse, where it is also common to interpret the strength of human rights in terms of the distinction between positive rights and negative rights. Onora O'Neill's thesis is that we can distinguish between human rights in a full sense and mere manifesto-rights by having a look at the corresponding duties. However, closer inspection reveals that it is not merely being positive or negative that determines the normative status of rights and of corresponding duties, but rather the relevance of the protected goods in combination with reasonable demandingness and the third criterion of determinateness, i. e. the specification of duty-content and duty-bearer.

In the last part of the paper, I will focus on world poverty as a human rights violation and the question of how strong human-rights-corresponding individual duties are in this context. I will again defend the idea that we should consider the normative relevance of goods protected by a right, the reasonable demandingness for the duty-bearer and the determinateness of the corresponding duty as the three decisive factors for the strength of duties, which means that there may be strong and weak, or stronger or weaker, human-rights-corresponding duties. It may, for example, be that a duty that refers to a human right (which implies that the first criterion, reference to basic goods, is met) is still weak because the other two criteria are not met. Furthermore, I will defend the idea that the relevance of the protected goods in combination with the possibility of effective institutional protection is decisive for the status of a right as a human right and not the demandingness or determinateness of corresponding duties. The demandingness and determinateness of corresponding duties, whether negative or positive, can vary with factors independent of the status of the right, so that the right might remain unfulfilled or violated by unjust structures rather than being violated by individuals. We can consider institutional arrangements as unjust if an institutional allocation of human-rights-corresponding duties could fulfill the factors of determinateness and reasonable demandingness. However, if such structures are not in place, individuals do not have as strong duties as they would have if just institutions were able to guarantee the determinateness of duties. Individuals might then have other duties, e. g. the duty to support the development

of better institutions, but these duties are not as strong as institutionally allocated human-rights-corresponding duties would be. This is partly so because the reasonable demandingness factor can depend on institutional arrangements.

I. Positive and negative duties

In this part of the paper, I give a systematic account of the distinction between positive and negative duties. I begin with two prejudices concerning positive duties:

> (1) There is no such thing as a positive duty. Actions that improve the well-being of others are not obligatory but supererogatory; they are arbitrary gifts. They are morally good but not required (the supererogation thesis).
>
> (2) Positive duties are weaker than negative duties. They are wide, imperfect, leave latitude concerning their fulfillment, they are mere "duties of virtue", cannot be enforced, they are not provided with corresponding rights (the subordination thesis).

By "positive duty" we usually refer to duties that require actions, in contrast to "negative duties" that require omissions. According to the supererogation thesis, there is no such thing as a duty that requires action. According to the subordination thesis, there might be duties to act, but they are only weak. Let us go into some terminological details here. An action that is supererogatory is morally good but not required. We don't owe it to others and we do not violate any duty if we don't perform the act. Weak duties in the Kantian tradition are duties without corresponding rights. Gewirth explains the weakness of a duty by referring to a commonly held position towards the duty to help the poor: "Few would deny that the more affluent should do something to help the poor. But most well-to-do persons understand this 'should' in a weak sense. They see such aid as beyond the call of duty, as supererogatory or, at best, as provided pursuant to an 'imperfect duty' of charity, humanity, or solidarity, which leaves it to donors' discretion as to how much they give and to whom. It is good to help, but the poor have no right to be helped" (Gewirth 2007, 219).

A related idea concerning positive duties is that they are duties to improve the well-being of others whereas negative duties are duties not to unduly harm others. This shows us the structural resemblance between supererogatory acts and weak duties: if we don't perform a supererogatory act or fulfill a weak duty, we do not violate anyone's right.

Where the stronger supererogation thesis says that there are no positive duties, the subordination thesis only says that there are weak positive duties but that there are no corresponding rights that are violated if a positive duty is not fulfilled. The moral wrong we commit is in both cases not as serious as the violation of any negative duty. The implicit assumption is that we improve the well-being of others via positive duties whereas we harm others (violate their rights) if we violate negative duties. If we talk of a strong duty we mean that we commit a serious moral wrong if we violate it. Therefore strong duties should have precedence over weak duties. This is plausible, but I will show in the following section that it is not plausible to claim that there are no positive duties or to consider positive duties weak. There must be different criteria for the (relative) strength or weakness of duties apart from their being positive or negative. Furthermore, in section II we will deal with the question of what it means to violate another person's basic rights or human rights and if all human-rights-corresponding duties really are strong ones.

Two arguments against the supererogation thesis and the subordination thesis

The first argument that can be employed against the supererogation thesis is the *argument from the possibility of harming by omission*. The defender of the supererogation thesis must claim that actions that improve the well-being of others are morally good but their omission is not morally or legally prohibited.[1] But there are two groups of examples for actions whose omissions we would morally (and/or legally) blame and sanction. Firstly, this holds of duties to care: Parents who let their child die of neglect while they are on vacation harm the child by omission. Secondly, this seems also to hold for professional duties: doctors who are on drugs while on duty can harm their patients by omitting to fulfill their professional duties. A lifeguard who does not save a child from drowning in his area of the beach since he is drinking with his buddies violates his professional duty to save people from drowning, whereas another person who is not a lifeguard on duty may sit at the beach with his buddies not paying attention to drowning people. If parents or doctors and life-

1 For this discussion see the classical texts of Urmson 1958, Chisholm 1963, Feinberg 1961, Heyd 1982.

guards violate their duties, we would say that they have harmed the ones they should have saved. Thus obviously not all actions are supererogatory. There are some strong positive duties which will not only morally but even legally be sanctioned if violated. This is, of course, also an argument against the subordination thesis.

A second argument against the supererogation thesis can be called the *argument for a duty to help*. At first sight this comes from the ability to render assistance in an emergency and the severe danger for the person to be saved. Someone who lets a small child drown next to his chair that he could have saved without any real effort can be blamed morally or even legally for serious wrongdoing. The less the helper has to sacrifice and the more can be saved for the endangered person, the stronger the duty. A failure to render assistance in an emergency is even legally sanctioned in most European countries. Here we might instantly think of Peter Singer's famous drowning child case. The above-mentioned "should", which Gewirth observed is often interpreted in a weak or supererogatory sense when it comes to our relationship towards the very poor, is interpreted in a strong sense in Peter Singer's drowning child case. Singer presupposes that there can be harming by omission. The utilitarian position even goes so far as to say that not to save the child's life would be equivalent to killing him or at least to negligent homicide.[2] For our purposes here, it makes no difference whether we speak of harming in the drowning child case or only in the two cases mentioned above. All three cases are cases of serious moral wrongdoing by omission, which is all we need to reject the supererogation thesis. The omissions in question are all morally prohibited since they constitute serious moral wrongdoing. Still, instead of classifying the drowning child case as harming by omission, I propose to classify only the violation of the duties of parents, doctors and lifeguards from the examples above as cases of harm. This is because there is a crucial difference between the first two and the third kind of positive duties. One could defend the idea that the decisive factor for the normative (and juridical) strength of parental and professional duties is what we can call their previous-behavior-dependency.[3]

2 For a discussion of the similarities or differences between killing and letting die cf. Birnbacher 1995, ch. 10, Rachels 1989, 258, and Singer 1984.

3 The notion was proposed by Dieter Birnbacher 1995, ch. 8.3. Others, such as Pogge, would not speak of duties but of positive obligations that come from duties to keep contracts as far as professional duties are concerned.

Duties restrict our freedom to act and, therefore, diminish our options.[4] These are their costs. Hence, from a liberal point of view, it makes sense to distinguish between duties resulting from intentional previous behavior and duties that are independent of intentional previous behavior. For example, parental duties are previous-behavior-dependent: parents have to care for their children since they brought them into existence. So they are the ones that have to bear the costs that come with the duties to care, and not, say, the neighbors or some bystanders. The same is true for professional duties. The lifeguard and the doctor decided to take their jobs; they signed contracts to take over certain duties during their working hours. So, at first sight, we seem to accept that there are positive duties that come from a more or less autonomous decision to behave in a way that implies the duty.

Obviously, in a scenario like Singer's drowning child case, the positive duty does not derive from such behavior of the duty-bearer, but comes simply from his ability to help on the one hand and the neediness of the person in danger on the other. While the failure to render assistance in an emergency is juridically sanctioned in Germany and most European countries, it is not in the UK, most US states and Australia. I suppose that the problem of previous-behavior-independent positive duties, especially for countries with a liberal tradition, is that the duty-bearer does not have control over their coming into existence: as in Singer's drowning child case, the duty comes from the simple fact that one person is in need and another one is able to help. What seems relatively unproblematic in this case has been a source of endless discussion in the case that Singer considers analogous: If the rich can save some of the poor from dying by donating money, this is supposed to be an analogously strong positive duty.[5]

At this point, we can leave open whether the drowning child case and the poverty case are really analogous or not.[6] If the argument

4 Marcia Baron sees the fact that "moral constraint is at odds with freedom" as a legitimation of David Heyd's defense of the category of the supererogatory: "even if heroic and saintly acts are not beyond the capacity of ordinary people, it is still vital that there be a category of supererogatory acts because, in his view, moral constraint is at odds with freedom, and in the interest of expanding (or at least not contracting) freedom, we want to keep moral constraint to a minimum" (Baron 1998, 58).

5 For discussion see Miller 2007, Kamm 1999a, 1999b and 2000, Mieth 2008.

6 For an analysis that points out morally relevant factors that make the cases disanalogous see Mieth 2011.

from the possibility of harming by omission and the argument for a duty to help are correct, then positive duties not generally supererogatory. In the three cases mentioned, the persons in need have a moral or even legal right to be helped. The boundary between supererogatory actions and duties is not congruent with the boundary between positive and negative duties. And obviously this is also an argument against a *general* subordination thesis.

Most of us would consider it a serious moral if not juridical wrong if someone did not render assistance in an emergency even though it would be possible for him or her at low cost and someone's life was at stake. This is even true for cases in which we would have to violate a negative duty (e. g. to keep a lunch appointment (Kamm 1985, 119 f.) or not to damage other's property (Unger 1996, 63 f.)) in order to save a life. In such cases helping is *not* considered superogatory, i. e. morally good to do but not morally prohibited to omit doing. In my view this goes back to the relevance of the goods involved. The theory of goods and the differentiation between basic goods and additional goods[7] can give us a twofold borderline between supererogatory actions and duties.

Supererogation 1 comprises actions that improve the situation of another person concerning a non-necessary good. If such an action is previous-behavior-independent, no-one is harmed if it is not performed. We are speaking of small favors here, such as inviting my neighbor for dinner or, to use Joel Feinberg's example from a different time, giving a stranger a match to light his cigarette (Feinberg 1961, 276 f.). Such acts are friendly and welcome, sometimes they are asked for, but they cannot be required. Here, the first proposed necessary criterion for a strong duty, its reference to a basic good, is not met. Some might consider such actions to fall under duties of charity or the weak general duty to improve other's well-being in a Kantian sense. For our aim of determining what makes a duty strong, the difference between those two op-

7 Authors from several different theoretical points of view, e. g. Pogge, Nussbaum, Gewirth, Höffe, Shue, come to the conclusion that there are some basic goods, basic interests or capabilities that are a presupposition to living a human life worth living. I cannot go into this discussion in any detail here. Let us start from the goods that are mentioned in the Declaration of Human Rights (art. 25): food, clothing, housing, medical care, "necessary social services" as well as "security" in the face of a "lack of livelihood in circumstances beyond […] control". What is important for us here is the differentiation between goods that everyone needs and has a (human) right to and further goods.

tions, a supererogatory action or a general weak duty of benevolence, is not relevant here.[8] We can even speak of a structural resemblance of the supererogation model with the Kantian one. Both models try to separate strong (negative) duties from actions that are supererogatory or from weak positive duties, the similarity being that not to perform a supererogatory act or not to fulfill a positive duty does not imply a rights-violation or serious moral wrongdoing. Both models are misleading since there are strong positive duties, e. g. in the drowning child case.

Supererogation 2 comprises actions that go beyond what is reasonably demandable in terms of their costs for the potential duty-bearer. Here it is appropriate to speak of saintly or heroic acts. Someone who jumps into a dangerous ice-cold river or into a burning house to save another person's life puts his own life at risk, and this is beyond what duty can require. Even Kantians see a general place for the supererogatory here.[9] While the hero risks his life, the saint sacrifices his life-plan in order to help others. If autonomy is also a basic good, the actions of the saint are supererogatory, too, since by jettisoning his life-plan, he goes beyond what is reasonably demandable. Here the first criterion for a strong duty, its reference to basic goods, is met but the second criterion, reasonable demandingness, is not. Saintly and heroic acts go beyond an otherwise strong duty.

Two additional problems with the subordination thesis

The aim of the last section was to show that there are strong positive duties. So the supererogation thesis and a general subordination thesis are wrong. In this section, we will have a closer look at the subordination thesis with regard to the implied understanding of positive and negative duties. We will see that there are at least four different possible ways to differentiate between positive and negative duties. They are often implicit in positions that accept the subordination thesis. Yet a closer look shows that they are not compatible with each other and lead in different directions as far as the question about the normative strength of duties is concerned.

Let us first have a look at two common ways of distinguishing between positive and negative duties that were already mentioned above:

8 For a discussion of this see Baron 1998.

9 For this position see Rawls 1971, 117 and O'Neill 1996, 265 ff.

(1) *In terms of the theory of action:* Positive duties require actions; negative duties require omissions (from the perspective of the duty-bearer).

(2) *In terms of consequentialism:* Positive duties refer to an improvement of the situation of another person; negative duties refer to a non-deterioration of the situation of another person (from the perspective of the recipient).

There are two main problems with these distinctions regarding the relative strength of duties:

(P1) Defenders of the subordination thesis usually think that the distinctions are congruent. Furthermore, they assume that non-deterioration has priority over improvement. However, the distinctions are not congruent. The distinction (1) is underdetermined with regard to its consequences. Duties to act can refer both to an improvement (e.g. a duty to rescue) and to a non-deterioration (e.g. the fulfillment of a treaty). Saving the drowning child is a positive action, not an omission. So is handing over the car-keys to you if you gave me 1000 Euro to buy the car. As I have tried to show above, in both cases we would commit a serious moral wrong or harm someone by omission by not saving the child or not handing over the car-keys.

Furthermore, the consequentialist distinction is underdetermined as far as the theory of action is concerned: As the examples above should have shown, we can, under certain circumstances, deteriorate the situation of others by omission. A doctor who is on drugs while on duty and forgets to give his patient a life-saving injection deteriorates the situation of the patient because he violates a duty that he willingly accepted previously.

And we can improve the situation of others by omission, e.g. not insisting on a loan repayment. Therefore the idea that we can improve and deteriorate the situation of others only by action is wrong.

(P2) These two ways of distinguishing between positive and negative duties cannot establish a general normative priority of negative duties. As we have seen, there are strong positive duties in the sense of distinction (1) as well as in the sense of distinction (2).

Nevertheless, there is another way of supporting the subordination thesis. Brian Orend (2002, 142 ff.) proposes a third distinction between positive and negative duties that takes negative duties to be duties not to harm others and positive duties to be duties to further others' well-being. We can call this distinction the normative differentiation (cf. ibid.); it seems to make the subordination thesis plausible.

(3) *Normative/conceptual differentiation:* Positive duties are duties to improve the well-being of others; negative duties are duties not to harm others.

Now, the implication of the prohibition of harming makes a negative duty stronger than a positive one. However, (3) is only formal. It lacks an independent criterion for what "harming" means. If harming by omission exists, there can also be strong positive duties in the sense of (1) and (2) that would count as negative duties under distinction (3). Under distinction (3) it would then be a negative duty to be clean if on duty as a doctor or lifeguard and to care for your children. And it would also be a negative duty to hand over the car-keys if you have already given me the 1000 Euro; otherwise I would harm you by keeping the 1000 Euro without exchanging them for the car. This would be like stealing the money.

These cases are the counterparts of strong positive duties whose violation by omission counts as harming. Still, the problem remains that previous-behavior-dependent duties have a different status from duties that are previous-behavior-independent. As we saw above, there is a previous-behavior-independent strong positive duty to save the drowning child. It would be counterintuitive to put this duty together in one class with those actions that we described as *supererogation 1*, which improve the well-being of others only concerning minor goods.[10]

For those who would speak of harming by omission in the drowning child case, it seems plausible to draw the line between harming and improving the well-being of others according to the relevance of the goods involved. If harming by omission exists, we can claim that normatively strong duties (called negative according to the normative differentiation) refer to the non-destruction, maintenance or provision of a basic good (which might be realized by fulfilling positive or negative duties as characterized by the theory of action) while normatively weaker duties (called positive according to the normative distinction) refer to non-basic goods. This leads us to the fourth distinction between positive

10 Pogge 2002, 132 would hold that the subordination thesis should be applied "other things equal". The negative duty not to throw the child into the pond is stronger than the positive duty to save it from drowning. We do not have to decide here whether this is true. What is important for us here is that from distinction (3) nothing follows concerning the strength of positive and negative duties in the sense of (1). Furthermore, if there can be serious moral wrongdoing without harming in the drowning child case, there is a strong positive duty that would have priority over other duties, e.g. not to take away others' property if the child could only be saved by stealing a boat.

and negative duties, which draws the baseline for harming from the theory of goods.

> (4) *Distinction from the theory of goods:* Negative duties refer to the non-destruction or providence of basic goods. Positive duties refer to non-basic goods.

What is really of interest here is of course not the labeling of duties as positive or negative, but the question of what makes a duty strong or weak. We need to either suppose a new definition of positive and negative duties as given in (3) and (4) or keep the intuitive understanding we gain from (1) and hold that there are strong positive duties. My first terminological proposal is to keep the intuitive understanding we gain from the theory of action[11] used in the first distinction (1). According to it, a positive duty is a duty to act whereas a negative duty is a duty to omit certain acts. An act implies a bodily movement whereas an omission implies that a certain bodily movement does not take place. However, this does not lead to a criterion for the strength of duties. By contrast, distinction (3) is already normative. Still, in (3), being positive or negative cannot be a foundation for the strength or weakness of the duty. The normative strength or weakness in (3) goes back to the distinction between harming and improving well-being. However, (3) is only formal since it does not say what "harming" means. Distinction (4) can be used as a criterion for the strength of duties. Yet its labeling is counterintuitive since saving the drowning child would count as a negative duty. Furthermore, (4) is not sufficient as a criterion for the strength of duties since it does not say anything concerning reasonable demandingness and determinateness.

11 Clarke 2010, 161 differentiates between "intentional positive actions" and "negative acts" or "intentional omissions" as "'acts of omission'". In the theory of action the difference between action and omission lies between bodily movement and the lack of the bodily movement that the omission refers to (ibid., 159). Sartori points out the difference between positive actions and omissions in her drowning child case: Sartori omits to save a child from drowning, eating ice cream instead. "The assumption that omissions are not identical to actions requires, in particular, that we distinguish an agent's omission from anything that the agent might have done instead of the action omitted. For instance in the drowning child scenario, my failing to jump in should be distinguished from my eating ice cream on the shore at the time when I could have been jumping in to save the child […] at least my failing to do something doesn't seem to be identical to my doing something" (Sartori 2009, 517).

I draw the conclusion that we should give up the idea of considering the description of a duty as positive or negative as a factor that determines its strength. This leads us back to my alternative proposal to derive the strength of a duty from (1) its reference to a basic good, (2) its reasonable demandingness and (3) its determinateness.

A question I cannot answer in detail here is why there should be any flexibility in the normative strength of duties at all. If a duty is something we must fulfill and, hence, overrides other possibilities of action, what does it mean for some duties to be weaker than others? It seems that our everyday notion of duties far more resembles a continuum. Nevertheless, there seem to be some clear duties. J.O. Urmson called these duties basic duties as opposed to supererogatory acts. He writes:

"If, then, we are aiming at a moral code that will best serve human needs, a code that is ideal in the sense that a world in which such a code is acknowledged, it seems that there are ample grounds why our code should distinguish between basic rules, summarily set forth simple rules and binding on all, and the higher flights of morality of which saintliness and heroism are outstanding examples" (Urmson 1958, 211).

According to the proposal I am working out here, strong basic duties refer to basic goods. Still, this is only the first criterion that they have to meet in order to qualify as strong. The condition is necessary but not sufficient. The second criterion already mentioned is reasonable demandingness. The third criterion is determinateness. This means that it has to be clear who the duty-bearer is: there has to be a clear accountability in case of violation. And it has to be clear what the violation consists in, i. e. which concrete actions or omissions should have been performed or omitted in order not to violate the duty.

As we have seen above, there can be strong positive duties that fulfill these conditions, e. g. rescue-duties in the drowning child case. Furthermore, especially for positive duties, it seems to be of crucial importance whether they are dependent on intentional previous behavior or not. Duties resulting from treaties and promises as well as professional duties, even duties to care for our own children, depend on previous decisions or at least on our own previous behavior. The same is true for duties to compensate for harm one has inflicted on others.

The underlying normative factor relevant here seems to be that wherever we want to assume duties in a strong sense, which means that their violation will be combined with serious formal or informal sanctions, we are confronted with the problem of overdemandingness. As Urmson pointed out 40 years ago, it must lie within the capacity

of ordinary persons to fulfill their basic duties. The real problem for positive duties lies in those that are independent of intentional previous behavior, since we cannot control how many of them we have merely by virtue of our ability to help. On the other hand, not all previous-behavior-dependent duties are as strong as the positive duty in the drowning child case. Of course, as Frances Kamm (1985, 118 ff.) and others have shown, the duty to save the drowning child would trump the duty to keep a promise for a lunch-appointment. Also, it would be legitimate and even obligatory to violate property-rights in order to save the drowning child, e. g. to steal a boat if there is no other possibility of saving the child. If it comes to a conflict between duties, the subordination thesis is not plausible in its ordinary form. Rather, the theory of goods shows that the strength of duties must somehow be linked to what is protected by the duty, the importance of the goods in question: not only for the right-bearer (criterion 1) but also for the one bearing the corresponding duty (criterion 2). Furthermore, the relationship between right- and duty-bearer must somehow be qualified: who owes what to whom. That is criterion 3: determinateness.

Let us draw a little summary at this point. Whether someone has a strong individual duty to do or omit something depends on three factors: that the duty refers to a basic good, that the action or omission required is not too demanding, and that the duty it is determined. This distinction is not congruent with the distinction between negative duties and positive duties. There are strong positive duties as well as strong negative duties. What we rejected was the idea of deriving the strength of duties from their being positive or negative in the sense of distinctions (1) and (2) as well as the idea of labelling strong duties as negative and weak duties as positive according to distinction (3). We rejected (4) because it is underdetermined concerning reasonable demandingness and determinateness, which must be given in addition to reference to basic goods for there to be a strong duty.

II. Human rights and the strength of corresponding duties

It is, meanwhile, common in the debate about basic rights or human rights to refer to the substances of these rights (Henry Shue) or the relevance of the goods that are protected by these rights (Thomas Pogge) in order to justify their important status. Furthermore, it is notoriously controversial whether positive rights have a weaker normative status

than their negative counterparts. The underlying idea is that negative rights protect the classical liberal goods of life, liberty and property, while positive rights or social rights refer to subsistence, the goods needed to lead a decent life like home, shelter, education, health etc. (Orend 2002). What is of interest for us here are the positions of Henry Shue and Onora O'Neill, who have investigated human-rights-corresponding duties. Let us first have a look at Shue's position.

Shue's idea is that it is not rights but duties that are positive or negative. He claims that there is a symmetry between negative as well as positive rights and corresponding duties to avoid depriving (negative duties) on a first level. Secondly, there are institutional duties to protect people from being deprived of their rights or the goods that they protect (positive duties) on the second level. Thirdly, there are duties to aid the deprived (positive duties). In Shue's picture, subsistence rights lead to the same structure of corresponding duties as security rights. So subsistence rights are not exclusively positive, and security rights not exclusively negative.

Furthermore, Shue claims that honoring subsistence rights can often involve not transferring commodities to people, but rather preventing people from being deprived of the commodities or the means to produce or buy the commodities (Shue 1996, 51). But, as I pointed out elsewhere (Mieth 2008; Mieth forthcoming), the analogy between security and subsistence with regard to corresponding duties is not convincing. Shue has the idea that subsistence should not be destroyed where it is already given. But this is not the only case we have to consider here. If we look at the social human rights as described in Article 25 (1) of the declaration of human rights, it seems that those whose subsistence is not yet or no longer given also have a human right to be provided with the means to subsist. "Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control."

If we distinguish between the protection of one's actual power to control the means of one's ability to exist *against* others and the transfer of money or goods *from* others in order to establish an adequate standard of living, we see that in the second case duties of omission do not play a primary role. The way in which Article 25 is formulated implies not only that people should not be deprived of their basic social goods

but also that they have a right to be provided with them where they are not in place. Here we are back to the problems mentioned in section I. It seems that to provide someone with goods (which means an improvement of his situation) would be classified as a positive duty whereas avoiding depriving him (which means not deteriorating his situation) is a negative one. However, we have also seen that securing someone's basic goods can be part of a strong duty, as in the case of the drowning child. Still, though it is clear in the case of social human rights that although the first criterion for strong duties, reference to a basic good, is met, it is not per se given that the other criteria for strong duties, reasonable demandingness and determinateness, are also fulfilled. Should this lead into a skeptical position towards social human rights?

Onora O'Neill is very skeptical of the existence of social human rights and their normative status because, as she points out, the strength of a right depends on the existence of institutions that allocate the corresponding duties (O'Neill 1996 and 2005). I think that we best understand Onora O'Neill's skepticism about the universality of social human rights by starting with the insight that the guarantee of social security mentioned in Article 25 (1) of the declaration requires the fulfillment of positive duties right from the start. Referring to the assumed asymmetry between positive and negative duties, O'Neill claims that there is an asymmetry between negative and positive human rights: negative human rights (classical human rights to life, liberty and property) entail corresponding universal negative duties that we owe every right-holder. These duties can be fulfilled by all duty-bearers (symmetry between right-holder and duty-bearer). Positive human rights (e.g. social rights) entail corresponding special positive duties that have to be fulfilled only by certain individuals (asymmetry between right-holder and duty-bearer). They are special universal rights: everybody has them, but not everybody has to fulfill corresponding duties. The allocation of corresponding duty-bearers is dependent on institutions, hence so is the existence of social rights. If our critical interpretation of Shue's approach is correct, O'Neill has a strong point. Positive rights seem more demanding right from the start if subsistence must be provided for by others. Positive human rights understood in this way are dependent on institutional duty allocation right from the start.

O'Neill's thesis is that we can distinguish between human rights in a full sense and mere manifesto-rights by the nature of corresponding duties. Negative rights have corresponding doubly universal negative duties (everybody owes their fulfillment to everyone). Furthermore, these

duties are perfect (which means that their content is determined). Positive rights are dependent on institutionalization since the content of corresponding duties and the determination of adequate duty-bearers presuppose institutional allocation. The counterintuitive point in O'Neill's conclusion seems to arise if we conceive of human rights as moral rights or justified moral claims that arise independent of institutional arrangements and have a critical potential in evaluating their legitimacy. If the foundation for the existence of human rights lies in their protection of necessary or basic goods or basic interests, to which all individuals have a right deriving from their moral status (their dignity), then it seems wrong to maintain that the existence of some of those rights is dependent on their institutionalization. It seems that negative and positive human rights can be derived from the combination of the equal moral status of all human beings (dignity) and their basic needs or interests for basic goods.

That is where Elizabeth Ashford's critique of O'Neill's position sets in (Ashford 2006). She holds that the determination of duty-bearers is not a condition for the *existence* of social human rights. By contrast, Ashford considers the institutional allocation of corresponding duties itself as a duty that corresponds to social rights. Even so, this notion does not solve the problem of the determination of corresponding duties. Negative and positive human rights may exist as moral rights, independent of their effective institutionalization, but they may nevertheless remain *unfulfilled* if their substance or content is not efficiently protected. And this can best be secured by a determination of corresponding duty-bearers as well as by a determination of the content of the rights-corresponding duties. What remains notoriously difficult in particular is the determination of rights-corresponding positive duties.

If we say that human rights protect basic goods by adequate institutional arrangements, the decisive question is: what if the institutional allocation of positive-human-rights-corresponding duties fails? In the world we live in today, institutions do not effectively secure social human rights everywhere. Institutions may be unjust or, in many cases, might not even exist yet. James Griffin's (Griffin 2008) proposal is to distinguish between primary duties that have the same content as human rights and secondary duties to promote human rights. In the case of negative duties this seems clear: I must not kill or torture others (primary duty with the same content as the human right not to be killed or tortured). In the case of social human rights it is, however, not clear what content corresponding primary duties would have. If there is a

human right to adequate housing or food or social security, it is not at all clear how I individually should directly provide for these things concerning poor people worldwide. The difference that Griffin makes between primary duties and secondary duties seems to blur here.

Again, Ashford's point would be that there are individual duties to institutionalization since it is not the existence but the fulfillment of human rights that is dependent on institutionalization. If human rights can be efficiently secured only by institutional arrangements and these are not in place, there are human-rights-corresponding individual duties to establish these institutions.

The question is: How strong are these individual duties? If they are the only social-rights-corresponding duties under given circumstances, they would have to be very strong if we would expect them to guarantee the fulfillment of human rights, just as we suppose that negative human-rights-corresponding individual duties (not to kill, not to torture) are very strong and that we commit serious moral wrongs if we violate these duties. What I am afraid of is this: Social-human-rights-corresponding individual institutionalization-duties are only weak, though this is not due to their being positive duties, but because they are underdetermined and might be overdemanding. It is in most cases simply unclear what individuals should do in order to establish better institutions worldwide.

III. World poverty as a human rights violation

Let us now have a look at the philosophical debate about the problem of world poverty with respect to human rights and the strength of positive duties.

As we know, Peter Singer starts from the idea that there is a strong individual positive duty to aid in the drowning child case. By analogy, Singer claims that there are strong duties to aid the poor, since poverty is life-threatening and we, the global rich, can help them without serious danger to ourselves. Now the objective neediness (a threat to life) is similar in both cases but they are different with respect to other morally relevant factors.

Firstly, there is a dissimilarity as far as accountability for the failure to render assistance in an emergency is concerned. For our considered moral judgments it makes a big difference whether a moral wrong is accountable to a specific person or not.

Furthermore, there is a dissimilarity concerning the probability of success. In the drowning child case it is clear what I have to do in order to save the child and we consider the problem solved if we give the child back to his parents. On the other hand, it is not at all clear what I have to do with regard to the problem of world poverty. If poverty is a social human rights issue, we need adequate institutional arrangements in order to guarantee that the substance of these rights is secured.

If our analysis of positive and negative duties in section I is convincing, the duty to help in the drowning child case is strong since it refers to an objective good, i. e. the objective neediness or basic interest of the child (condition one), it can be fulfilled at reasonable cost (condition two) and is clearly determined since it is clear who has to do what in order to save the child with a high probability (condition three). In the poverty case, condition one is fulfilled but conditions two and three are not. So, with unclear accountability for the failure to render assistance in an emergency, the content of the duty to help in the second case is normatively unclear, too. Furthermore, the cases differ concerning the kind of emergency, and this has consequences for the normatively relevant factors mentioned above. The drowning child case is an acute emergency whereas the poverty case is a structural emergency that can only be eradicated by institutional change in the long run (cf. Mieth 2008 and Kuper 2005).

If we have a look at approaches that are not utilitarian, like Singer's, but are instead directly human-rights-based, we come to the same conclusion. For example, Alan Gewirth holds that there are strong positive human-rights-corresponding individual duties. His argument is not built by analogy but leads to the same problem we found in the structure of Singer's argument. For Gewirth, human rights protect basic human goods (autonomy, well-being). Since these goods can be endangered by harming actions as well as by omissions of helping actions, there are strong positive individual duties to provide for the goods needed for well-being. Gewirth denies any decisive normative relevance to the asymmetry between positive and negative duties: The existence of positive human rights does not depend on the determinateness of corresponding duties (condition three) but solely on their protection of basic goods (condition one) and reasonable demandingness (condition two), whereby demandingness is directly considered to be a trade-off between basic goods and non-basic goods. As long as some have

more than basic goods and others lack them, those who have more do not even have a right to their additional property.[12]

This leads to what Pogge has called a "maximalist interactional understanding of human rights": "a human right to X gives you a moral claim against all others that they each do whatever is in their power to ensure that you have X" (Pogge 2005, 64). And this is, of course, problematic if we want to assume a duty to do something, since this duty might be too demanding. It seems that the problem of manifesto-to-rights diagnosed above has turned into the problem of manifesto-duties. They are proclaimed to be strong since they refer to human rights, but if strong duties are defined not only by reference to basic goods, but also by reasonable demandingness and by determinateness, these duties are not strong, since the other two criteria are not met.

We might now understand better why the classical assumption, which combines the Kantian with the Aristotelian tradition, was that the duties holding in the poverty case are only weak duties of virtue or of charity or benevolence since there is no determinate connection between a potential right-holder and a duty-bearer. However, from our analysis in section I it follows that, contrary to the idea that all positive duties are weak, we can stay with our intuition in the drowning child case: If a basic good is endangered and there is a determined connection between right-holder and duty-bearer, and aid is not overdemanding, there are strong positive duties to aid. Even so, this is not applicable to the poverty problem. As we have seen in section I, we can think of two factors that render a duty weak: First, it might be its reference to a minor good. Actions which refer to minor goods seem to be very good candidates for the category of the supererogatory. Actions which refer to basic goods but are overdemanding are also supererogatory. Saints sacrifice their own life-plan in order to help others and heroes risk their lives in order to save other people's lives. The interesting category is the one comprising actions which are underdetermined but refer to basic goods. The question is whether they are adequately described by the category of benevolence or charity.

One decisive assumption for the category of charity seems to be that the charitable person has not contributed, in any morally inadequate way, to the distress that charity is meant to alleviate from. Charity is above all previous-behavior-independent. Thomas Pogge considers the approaches mentioned up to this point as misleading. His main

12 Gewirth 1987 and 2007, see also Unger 1996.

point against Singer is that he implicitly suggests that the person helping in the drowning child case, and by analogy we, the citizens from the rich and powerful democratic countries, are not involved in the distress that we want to alleviate in others. By contrast, we, as Pogge claims, are involved in the existence and persistence of the problem of world poverty since we are contributing to and profiting from unjust institutions. Against Gewirth's interactional understanding of human rights, he defends an institutional understanding of human rights. There are, first of all, human-rights-corresponding institutional duties. Institutions are only justified if human rights do not remain unfulfilled in any avoidable way (the institutional account of human rights from § 28 of the UDHR). In addition, there are also human-rights-corresponding individual negative duties which are derived from the institutional understanding, "according to which a human right to X gives you a moral claim against all others that they not harm you by cooperating, without compensating protection and reform efforts, in imposing upon you an institutional order under which you lack secure access to X as part of a foreseeable and avoidable human rights deficit" (Pogge 2005, 67). The underlying idea is, again, that human-rights-correlative duties (called negative duties) are (other things being equal) strong or at least stronger than positive duties (e. g. duties to render assistance in an emergency, duties of charity).

The main question for the current debate is which human-rights-corresponding duties individuals have under given non-ideal institutional circumstances. There are two main proposals:

> A. Individuals have compensatory obligations corresponding to the amount of their contribution to or profiting from unjust institutional orders (Pogge).
>
> B. Individuals have duties of institutionalization according to which they have to establish institutional conditions that secure human rights (Ashford, Gosepath, Orend).

The underlying idea in both cases is that these duties are strong duties of justice (or negative duties, understood according to the normative definition) since they refer to human rights that are meant to protect basic goods. My thesis is: If the criteria of demandingness and determinateness together with the reference to basic goods make a duty strong, than these duties are not strong since they may refer to basic goods but they are not determined. Duties to compensate depend on previous behavior. This behavior must have violated a strong duty, or else we

lose the idea that a compensatory duty is also strong. Judith Lichtenberg argues that the "model of harm underlying the classic formulation of the harm principle – discrete, individual actions with observable and measurable consequences for particular individuals – no longer suffices to explain the ways our behavior impinges on the interests of other people" (Lichtenberg 2010, 559). The decisive point is that since the activities that might have bad consequences for others around the globe "are seamlessly woven into our normal routines, ceasing to engage in these 'New Harms' is not at all easy – not simply a matter of refraining from things we never would have dreamed of doing in the first place, like killing and raping and robbing. Not harming people turns out to be difficult and to require our undivided attention" (ibid., 558). And this, as Lichtenberg holds, might be overdemanding. The negative effects of our everyday activities cannot, in classical terms of rights and duties, be described as the violations of strong duties analogous to raping and robbing. The effects of our everyday behavior on others are, taken for themselves, too small to constitute harmful actions to specific individuals (cf. Shei 2005). Furthermore, it is not clear how we could avoid all problematic actions at a reasonable cost (cf. Lichtenberg 2010). Therefore, it seems impossible to derive strong individual duties from our involvement in unjust structures.

Duties of institutionalization according to proposal B seem to be positive duties that are independent of previous behavior and the involvement in unjust structures that produce negative effects on others. Here the problem is that individual duties to institutionalize human rights seem hopelessly underdetermined. Their structure resembles duties of benevolence that refer to basic goods but are underdetermined even if they meet the criterion of reasonable demandingness.

It seems that the price for avoiding a restrictive definition of human rights by a Kantian or O'Neillian criterion of corresponding individual doubly universal perfect duties is a multiplication of individual human-rights-corresponding duties. Unfortunately, some of the most relevant of them are weak since they are unspecified under the given circumstances. Although there are strong positive duties, social-human-rights-corresponding positive individual duties are much weaker under given institutional circumstances. From this point of view not all human-rights-corresponding duties are strong. Reference to human rights is not a sufficient normative factor for the determination of the strength of a duty. Hence some positive duties that refer to social human rights and that can only be secured within an adequate institu-

tional setting are dependent on institutional allocation. They would gain strength from such an institutional allocation, which would give them the determinateness required by the second condition. Therefore it is not positive human rights that depend on institutional settings but the strength of the corresponding duties.

The problem with this result is that it seems cynical, since it seems that the less secured human rights are on the institutional level, the weaker are the individual duties. On the other hand, my analysis of the strength of duties also entails that the moral desert of people furthering the development of human rights (without having a strong duty to do so) is very high. It is also fully compatible with this position that people who are in influential political or economic positions have stronger duties to further human rights development than average citizens of Western democracies; and it is compatible with this position that the strength of duties changes with the determinacy of what potential duty-bearers have to do in order to protect other people's human rights.

Another consequence of my analysis might be that the notion of duty is inadequate to cope with the problem of world poverty considered as a problem of institutional failure of human rights protection. Institutional change and human rights development seem to require the personal dedication of many people beyond what is simply their duty as conceptualized by common theories in moral philosophy. A duty, in this sense, is either something that I must categorically fulfill – this seems true for some duties (not to kill, not to torture, to rescue) under some conditions (that it is clear what we have to do and towards whom) – or a duty is something wide, such as some general maxim to further other people's well-being in general, leaving open by which actions one does this. Both these ideas we can take from the Kantian picture seem inadequate for the problems we are dealing with now. It also does not feel adequate to describe the rescue duty in the drowning child case using the category of a general weak duty to further another's well-being; nor does it seem adequate to consider human-rights-corresponding duties to contribute to the improvement of human rights in some way as strong negative duties that harm others if we do not fulfill them.

Furthermore, if we are involved in unjust political and economic structures and do profit from them, as I think Pogge correctly points out, it is also inadequate to consider our duties towards the poor as underdetermined duties of charity. Maybe, as I said above, the notion of duty, as we know it from the Kantian tradition, is no longer too helpful in this context.

As we saw, duties that emerge from our involvement in an unjust global order have the same structure as duties of benevolence in so far as they refer to basic goods but are underdetermined. The relevant difference is that duties of benevolence imply that the duty-bearer is not involved in the injustice she is trying to alleviate. If Pogge is right and we are involved in the injustice that individual human-rights-corresponding institutionalization duties and compensating duties refer to, these duties are stronger than duties of benevolence, other things being equal. However, this does not make them strong duties in the above-mentioned sense, since they are still underdetermined and it is not clear how we could avoid violating the negative duty in Pogge's picture that gives rise to compensating obligations. Pogge's attempt to show that what he labels a negative duty is stronger than positive duties to improve the situation of others is not convincing.[13] Ashford, by contrast, takes Singer's side by pointing out that we have simply far more and far more demanding duties than we want to admit. Still, it seems clear that the duties in question are not as strong as the duty not to kill or torture someone or the duty to rescue a toddler in case of emergency without cost to oneself. The point here is that we are facing a dilemma. Its first horn is that if we want to use the term "duty" as a trump in order to say that one really must do X, otherwise one is clearly doing serious moral wrong to another person, it is hard to apply this notion to the duties in question. The second horn is that if we weaken the concept of duty in the direction of duties of virtue or benevolence, it does not seem to adequately describe the fact that we are involved in moral wrongs as far as the underfulfillment of human rights in our world is concerned.

It seems no coincidence that recent papers shift the focus from the notion of duty to that of responsibility, even without explicitly spelling out why they do so (cf. Kuper 2005, Miller 2007). In closing, I will try to offer some speculative and unfinished ideas about why this could be an advantage.

First, the notion of responsibility is wider than that of duty. Duties in a narrow sense refer to certain actions or omissions that are obligatory. If they are supposed to be strong, they must be determined. Responsibility by contrast can refer to a whole context of actions, e.g. to the idea of how to fulfill a certain task or how to interpret a certain bundle of available actions. To try to meet the responsibility one has as a doctor

13 For this discussion see Satz 2005, Patten 2005.

implies a certain self-understanding that will direct actions and omissions on certain occasions, hopefully in the right way. This will overlap with the fulfillment or non-violation of duties, but implies more than that.

Second, the notion of responsibility is more sensitive to the fact that different persons are in different positions that give them more or less opportunity to influence other persons' interests for better or worse. Here, the notion of responsibility can build a bridge between strong and weak duties since it refers to the range of our opportunities of intentional behavior that can be realized by acting or omitting. It stands for the possibility of influencing the world by our conduct and for the possibility takeoff taking other persons' interests into account.

This may sound very weak and vague, but I am afraid that it is appropriate for the kind of problems we are facing in our world when we consider human-rights-corresponding duties on the level of the average citizens of our countries. Just like moral rights, human rights exist independently of institutional realization and independently of a clear imputability of all corresponding duties. They provide strong moral reasons to act in their favor that cannot, on every level, easily be spelled out in terms of duties. The history of improvements in human rights has already shown this: Some people were doing much more in favor of human rights than what might have been their duty, while others did much less. As I understand it, the interesting point in Pogge's and Ashford's reasonings are not their conclusions about our duties and their strength, but their analyses of the injustice of the global order. As moral persons we are all responsible for our conduct and must ask ourselves whether what we do is justified when confronted with the evils they point out. Whether we consider this our duty or a general question of our moral self-understanding, then, does not seem so decisive.

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The moral demandingness of socioeconomic human rights

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This paper addresses the question whether excessive demands for moral agents speak against a moral framework such as socioeconomic human rights. In other words, is an account of human rights that embraces welfare rights unsound if it turns out to be extremely burdensome for moral agents? Section 1 of the paper analyses the relationship between human rights and the corresponding, potentially overdemanding duties and argues that not only institutions but also individual agents are addressed by these duties. Section 2 introduces the moral demandingness objection (MDO) as a meta-theoretical criterion to judge the soundness of a moral theory and shows the different ways in which a moral theory might demand more than agents can do or can be reasonably expected to do, particularly in the context of human rights. In the paper I focus on the example of the presumed human right to adequate food and its corresponding duties. I argue that excessive demands mirror the current circumstances of extreme but in principle preventable world poverty. Hence extremely burdensome demands should be taken neither as an argument against the moral theory of human welfare rights nor as a pre-emptive exculpation for agents failing to live up to the duties corresponding to these rights. However, obligations corresponding to welfare rights are not the only type of obligations for moral agents; hence moral agents should not always and exclusively strive to fulfill them.

1. Positive human rights-corresponding duties

1.1 The human right to basic necessities

Human rights are widely accepted as an attempt to formulate a minimal moral framework, transcending narrow local settings and time frames, to govern the living together of humans. Basic human rights protect dimensions of human lives that are of special importance since they

touch upon fundamental interests and the welfare of human agents. Think for example of the right to be free from arbitrary coercion, the right to participate in society, the right to basic means for survival, or the right to chose one's own religion. All these rights protect important elements of an individual's life, namely the ability to act autonomously, to engage in social relationships, to have secure subsistence, and to be culturally active. Because of the general importance of what they aim to protect, human rights are said to be held by *all* human beings; and as such they are supposed to be binding for agents who potentially have an impact on someone's human rights. If human rights protect fundamental interests and the welfare of individuals, their violation constitutes a severe moral wrong.

Hence because of the nature of human rights and their prescriptive implications for moral agents, a theory of human rights is fundamentally a moral framework, setting rules which moral agents – be it individuals or institutions – must abide by if they want to act morally. Such a wider, interactional view about the scope of human rights that includes different types of moral agents – individuals as well as governments and institutions – is opposed to a narrower, institutional account of human rights that excludes individuals and exclusively addresses institutions and their representatives. While the institutional view dominates the current debate about human rights, later on I will engage with the interactional view.

According to the "generation account" of the history of human rights (which should only be seen as describing a historical sequence and not as providing an evaluative hierarchy), one can differentiate three generations of human rights (cf. Vasak 1977). The first generation includes basic liberty rights – freedom of assembly, freedom of expression, etc. – as well as civil and political rights of participation. The second generation stipulates welfare rights, or social, economic, and cultural rights; among them a right to basic necessities, basic education, etc. Often they are positive rights to assistance, contrasting with the presumably exclusively negative rights of the first generation. The third generation of human rights provides a diverse list of rights including collective and group rights, a right to sustainability, to a healthy environment, etc. In the following, I will focus on the second generation of human rights, because here my question about the moral demandingness of human rights becomes particularly salient: it addresses fundamental needs and interests of human beings which, however, go beyond the apparently

less controversial negative rights of the first generation without reaching the even more controversial dimension of the third generation.

One prominent example of a basic human right of the second generation is the right to an "adequate standard of living" found in article 25 of the 1948 Universal Declaration of Human Rights and in article 11 of the 1966 International Covenant on Economic, Social and Cultural Rights (ICESCR). Article 11 explicitly includes a right to basic necessities such as food. In the words of Jean Ziegler, the former UN Special Rapporteur on the right to food, this human right means

> "to have regular, permanent and free access, either directly or by means of financial purchases, to quantitatively and qualitatively adequate and sufficient food corresponding to the cultural traditions of the people to which the consumer belongs, and which ensures a physical and mental, individual and collective fulfilling and dignified life free of fear." (Ziegler 2001, 2)

This vision includes elements that are extremely unlikely to be widely realized any time soon for many people. Furthermore, to demand that food should match cultural traditions seems secondary given the extreme lack of food that would secure sheer survival. However, while it may be a challenge to properly define "adequate" food and while one might want to question certain specifications, "adequate" food undisputedly includes there being enough food available to guarantee survival. There is a strong fundamental interest for human agents to be adequately fed, because this seems to be a precondition for engaging into any kind of human activity and moreover a precondition for enjoying the first generation liberty rights. To be free from starvation is hence a particularly pressing and immediate human right.

In our current world, many human beings live under conditions of severe poverty. Every year, some 8 million humans die prematurely of hunger (Sachs 2005, 1) and taken together 18 million die prematurely of poverty-related causes (Pogge 2007, 51). Since the right to basic necessities is said to be a universal human right, held by all and not only by some humans or under certain conditions, in each individual case of hunger the human right to basic necessities is disrespected and a *moral wrong* occurs.

It is important to keep in mind that it is far from impossible to eradicate world poverty and world hunger (cf. e. g. Sachs 2005), given the amount of food available and both the organizational capacities of modern societies and their existing financial means. It would certainly involve financial commitment, intense preventive action and a long-

term engagement to be successful. Yet world poverty is not an unchangeable fact that has to be taken for granted, even if the demands and the challenges of eradicating it would be high.

1.2 Rights and corresponding duties

One prominent problem with declaring universal human rights is that it is often unclear who has to do what to secure these rights or who can be held responsible for preventing human rights violations from happening. Griffin argues in a straightforward way that there is a clear match between rights and obligations, though specifying exactly the content of a human right may be difficult:

> "The content of a human right is also the content of the corresponding duty. What one party may demand, as of human right, another party has some sort of obligation to supply. We have only to know the content of human rights. But deciding that, of course, is not always easy." (Griffin 2008, 97)

Yet even if we agree that there is, e. g., a human right to adequate food, the answer to the question about the corresponding obligation is more complicated than Griffin seems to suggest. After the initial intuitive reaction that *someone* should be doing *something* about world hunger, the difficulties begin. Often it is impossible to identify a human rights violator who directly causes the moral wrong in question. Think of structural human rights violations such as world hunger. While in some cases bad governance or financial speculations with basic food might be thought to have a substantial impact on food shortage, in most cases simple causal attributions of responsibility fail. Who has which obligation in these cases? This question is crucial, since without counterpart obligations, basic human rights seem to become futile.

If we stipulate human rights without being specific about corresponding duties, they turn out to be sheer manifesto rights, describing some ideal without attributing responsibility for how to realize this ideal (cf. Feinberg 1980). O'Neill, for example, is very critical of such manifesto rights and hence makes the determination of rights-corresponding duties and their holders a condition for a meaningful concept of universal rights. She argues that unless we are able to specify counterpart obligations, all talk of universal rights should be avoided (O'Neill 2005, 432–433).

To be as specific as possible about determining rights-corresponding duties, we have to inquire into the relationship between rights and duties. However, given the complexity of the web of human interaction in which human rights are located – and respected or violated – and given the generality of basic human rights, the answer to the question of who has which duty will certainly not be simple. There might be several layers of obligations, organized according to different potential agents. After all, human rights do not result from a precise contract made between two individuals about, say, purchasing something, which would be specifically about the parties involved and their rights and duties explicitly agreed upon. So it might be that only a basic degree of specificity is possible when it comes to defining the human rights-corresponding duties and the duty bearers.

So, how to further enquire into the duties that correspond to human rights? One influential general definition of a right has been offered by Joseph Raz:

> "'X has a right' if and only if X can have rights and, other things being equal, an aspect of X's well-being (his interest) is a sufficient reason for holding some other person(s) to be under a duty." (Raz 1986, 166)

Following Raz, the legitimate interests of an individual justify rights which in consequence justify the corresponding duties. "Typically rights are established by arguments about the value of having them. Their existence depends on there being interests whose existence warrants holding others subject to duties to protect and promote them." (Raz 2007, 17). For Raz the right is prior and consequently gives rise to a corresponding duty. Such a hierarchical account however is more specific about rights than it can be about the derived duties. An alternative account that puts rights and duties on the same level would instead stress their "correspondence", and take rights and duties to refer to different aspects of a single normative relation existing between human agents. Here one could say that rights and duties are correlative or corresponding conclusions of one moral argument made about a relation between a potential agent and a potential right (cf. Holmgren 1985).

So far, I have spoken about rights generally; talking about human rights specifically touches upon a somewhat different debate. Raz's own understanding of human rights, for example, is more specific than his general account of rights.[1] However, following a moral under-

1 According to his "political" view Raz "regards human rights as rights which are

standing of human rights, I claim that in the case of human rights as well the correspondence relationship between rights and duties should be understood as them being correlative conclusions of moral judgments about the legitimate interests of human agents.

But how to be specific about the corresponding duties, if one has already made the moral argument that some dimension of human lives is sufficiently important to justify a human right to it? Think for example about the right to the physical integrity of one's body. Here clearly no one is allowed to disrespect this right and, say, torture someone. Hence all agents have a clearly identifiable duty to refrain from doing something. No one whatsoever is allowed to interfere with this fundamental right to physical integrity, because the interest in physical integrity – as a precondition and an essential element of human lives – is seen as a sufficient reason to urge others to omit certain types of action.

Things are more complicated in the case of second generation human rights such as the right to adequate food. Here too the interest in being adequately fed is legitimate because not suffering from hunger constitutes a fundamental element of human well-being, but the identification of a corresponding duty bearer is less obvious. In some cases it is possible to identify someone directly causing the hunger of others – say through stealing or directly withholding available resources. However, only some cases are of this relatively simple form. Under the current global conditions of huge inequalities in access to food, the basic rights of some are clearly being violated while it is not so easy to determine whether someone has directly caused this shortage. Assuming that we are not able to identify anyone causally responsible for some people's shortage of food, what does the basic human right refer to in these cases? Does it point to nothing?

Following O'Neill, I start from the assumption that rights without corresponding duties are empty. So we should strive to identify duties in these cases as well where negative duties of omitting certain types of action will not suffice to stop the violation of a right from taking place.[2] What is needed here is positive action on the part of some

to be given institutional recognition, rights which transcend private morality" (Raz 2007, 17). This is a specific understanding of human rights, distinguished from other types of rights.

2 That negative duties alone may not be sufficient for ending problems is an important reason not to exclusively follow Pogge's important insight that indeed

other agents. If human rights were to exclude any such positive corresponding duties from their scope they would immediately become ineffective and futile.

The demand to include positive duties among the rights-corresponding duties is necessary not only for the welfare rights, but equally for first generation liberty rights. Although some have argued that liberty rights only correspond to duties of omission, in my view they also constitute positive duties. Securing freedom of assembly and speech demands in many cases positive action like providing a police force and a juridical system to guarantee that no one is unduly coerced (cf. Griffin 2008, 96). Relying on negative duties alone will fail.[3] Shue argues in the same direction when he suggests that generally "three types of duties correlate" with "every basic right", including liberty as well as subsistence rights like the right to food: "I. Duties to *avoid* depriving. II. Duties to *protect* from deprivation. III. Duties to *aid* the deprived." (Shue 1996, 52).

Nevertheless it is especially difficult to identify duty holders for second generation human rights. O'Neill has rightly argued: "It is plausible to think that rights not to be killed or to speak freely are matched by and require universal obligations not to kill or not to obstruct free speech; but a universal right to food cannot be simply matched by a universal obligation to provide an aliquot morsel of food" (O'Neill 2000, 135). With this she certainly stresses an important point, but no one has claimed that it would be a simple task to precisely identify the matching obligation for a given right. If one accepts O'Neill's criticism of sheer "manifesto" rights – well-meant formulations of admirable aspirations rather than claimable rights – and allows talk about basic rights only under the condition that we can specify counterpart obligations, the task of precisely identifying the holders of rights-corresponding duties and the exact extent of these duties only becomes even more urgent.

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we can identify many of the duties that correspond to rights violations as negative (Pogge 2008).

3 In fact, given the conditions of massive inequality of human beings – some are less privileged than others in potentially different ways – liberty taken alone will often turn out to be suppressive and only rights and entitlements will be liberating.

1.3 Duty bearers

One answer to the question of who bears the human rights-corresponding duties is given by the official human rights documents themselves. Article 11 of the CESCR claims that there is a positive duty to provide enough food and stipulates that the holders of this positive duty are the states who signed the covenant:

> "The States Parties to the present Covenant, recognizing the fundamental right of everyone to be free from hunger, shall take, individually and through international cooperation, the measures, including specific programs, which are needed: (a) To improve methods of production, conservation and distribution of food by making full use of technical and scientific knowledge, by disseminating knowledge of the principles of nutrition and by developing or reforming agrarian systems in such a way as to achieve the most efficient development and utilization of natural resources; (b) Taking into account the problems of both food-importing and food-exporting countries, to ensure an equitable distribution of world food supplies in relation to need."

So here, the states declaring the human right to adequate food take themselves to be responsible for positive measures that meet the needs of those suffering from hunger and lack of adequate food. However, are states the sole holders of human rights-corresponding duties? Are individuals only indirectly involved in securing these basic rights, e. g. by paying taxes to or working directly for governments who then constitute the international covenant? Or are there some rights-corresponding moral duties that affect individuals independent of institutional agreements?

Some argue indeed that only official institutions bear human rights-corresponding duties. Such a political or official view of human rights has been defended e. g. by Charles Beitz, who understands human rights as "standards for domestic institutions whose satisfaction is a matter of international concern" (Beitz 2009, 128). From this point of view both negative and positive duties are held by institutions and, generally, there is no *personal* or *individual* human rights-corresponding duty to care for the needy or to guarantee fair trials for everyone. If a human rights violation takes place the responsibility to act lies with an official institution. "Nonofficial" individuals may – at best – have a secondary or indirect duty to support institutions in meeting their human rights-corresponding duty, e. g. through paying taxes or through exerting pressure on governments, or to help create institutions that in consequence

will be able to meet rights-corresponding duties.[4] However, the primary duty lies with the institution.

Others argue that – besides official institutions – individuals also have a human rights-corresponding duty for positive action. To talk of universal human rights means on this view that they are, as Griffin has it, "doubly universal", that they are claims "of all human agents against all other human agents" (Griffin 2008, 177). The difference between such an "interpersonal" or "interactional" view and the "political" or "institutional" view already mentioned is the disputed duty of individuals, while both views agree on the duty of institutions. Such a wider, interactional view that would allocate duties to both individuals and officials is also acknowledged, for example, in Nickel's definition of human rights. Generally a defender of the institutional view, he argues that human rights "are political norms dealing *mainly* with how people should be treated by their governments and institutions. They are not ordinary moral norms applying *mainly* to interpersonal conduct." (Nickel 2010, my italics). With this he stresses the primary focus of human rights and corresponding duties on states and institutions. However, the possibility that individuals might have human rights-corresponding duties too is not ruled out, even if it will be only in a non-ordinary way.

Also Thomas Pogge, generally an adherent to the political view that imposes duties on institutions, has prominently argued for individuals having indirectly *negative* duties of omission in the context of human rights violations (Pogge 2008, 67). In the following, I will take this a step further and engage with the not undisputed assumption that human rights also have corresponding individual *positive* duties.

I defend an interactional understanding of human rights, mainly because, even if they have a special status as codified rights, they ultimately strive to express a basic morality that is to be protected by legal arrangements. Another reason why individuals should also be seen as bearers of rights-dependent negative and positive obligations, especially in the context of the right to adequate food, is the following: Given the utter urgency of the matter – according to the frequent, ongoing, ex-

4 This is how argue e.g. Pogge 2008 or Caney 2007. "All persons have a duty to bring about and maintain institutions that ensure that persons can enjoy their human rights." (Caney 2007, 287). – Of course beyond human rights-dependent duties individuals also have *moral* duties e.g. not to kill or to help those in need, but the political account strictly differentiates between *moral* and *political* rights and duties.

treme violating of fundamental rights – the fact that one *can* do something to stop a severe moral wrong from going on may *prima facie* suffice to create a corresponding duty to do so. Ashford argues in a similar way that the responsibility for fulfilling both positive and negative obligations towards both compatriots and foreigners ultimately lies with every agent who is able to do so (Ashford 2007). In other words: sheer ability to stop moral wrongs from taking place generates under certain circumstances moral reasons that ultimately might take the shape of duties.[5] Another reason to see individuals as bearers of human rights-corresponding duties is that institutions are ultimately shaped by or constituted by individuals. They are never independent of the individuals who made and run them. From this perspective the difference between institutions and individuals would become a question of degree.

Against this, one might argue that an account of individuals bearing human rights-corresponding duties relies on an undue confusion of moral duties and human rights-corresponding duties; the first one simply being the result of some general moral theory directed at individual behavior, the second simply stemming from the particular human rights framework focusing on institutional obligations. However, this objection only makes sense within the narrower political view, where human rights are defined exclusively as a political instrument obligating institutions and their representatives. If alongside their undisputed political function one also wants to attribute to human rights a degree of universality that goes beyond the realm of codified statements, one has to allow for their extension to include individual agents as bearers of human rights-corresponding duties.[6]

5 Cf. Griffin, who argues for ability being one among several reason-generating considerations (Griffin 2009, 102) or Sen who claims: "Human rights generate reasons for action for agents who are in a position to help in the promoting or safeguarding of the underlying freedoms. […] In particular, the acceptance of imperfect obligations goes beyond volunteered charity or elective virtues." (Sen 2004, 319). Taking up insights from Young, one could also argue that being able to help and have a positive impact on someone's life already constitutes a sufficient degree of social connection, i. e. a relationship including moral obligations and responsibility (cf. Young 2006).

6 While I defend the interactional view about human rights, I do not claim that there is more truth in one view than the other. But if the ultimate measure for moral and human rights theories consists in improving our living together insofar as fundamental interests are respected and the well-being of human beings

However, if there are universal duties for individuals who are in a position to do something to prevent a violation of human rights from happening, and if the current violation of human rights is extreme, is the moral burden posed on the agents not too high? Can we, the relatively well-off in the affluent countries, – on the grounds of a doubly universal, interactional account of human rights that allows all agents to make claims on all other agents – reasonably be said to be the bearers of corresponding duties to the rights of the 30,000 people who die every day[7] from poverty-related causes? Would an account of human rights that puts such a high burden on individual agents not be overly demanding and hence unsound?

2. Overdemandingness and welfare-rights

When we seek to determine the exact extent of rights-corresponding obligations, one major concern in the background is the fear that a moral theory that poses unreasonably excessive demands may become itself unreasonable and hence unsustainable. Call this the Moral Demandingness Objection (MDO) against a moral theory. This objection, as a meta-theoretical criterion that evaluates the soundness of a theory according to its degree of demandingness, can also be put forward against a theory of welfare rights. In the following I will analyze the different ways in which a moral theory may demand "too much" from moral agents and ask what might result from this diagnosis for a moral theory like an account of socioeconomic rights.

The idea that it is unreasonable to demand more from a moral agent than she can possibly fulfill or can be reasonably expected to fulfill is a widely accepted principle in moral reasoning from antiquity – "ultra posse nemo obligatur" – to modern time – "ought implies can." The core idea of this principle is that it is a necessary condition of being morally obliged to do something that we are *able* to do it or can be *reasonably expected* to do it.

Most often, the MDO is discussed as an argument against consequentialism. Exclusively following an algorithm to maximize the good

is promoted, a too narrow political view does not exhaust all the possibilities for improvement.

7 And even more die under conditions of an acute famine like the one currently happening in Somalia and the neighboring countries.

is said to be no plausible and appropriate way (Williams 1981, 14–19; O'Neill 2009, 62–63)[8] of moral reasoning for human agents who live their lives embedded in complex and ambiguous social settings full of special relations of concern and particular obligations towards some (cf. also Scheffler 2010). Ultimately a maximizing consequentialism will result in implausibly high demands that even motivated agents will necessarily fail to fulfill. While the MDO has been mainly discussed in this consequentialist context,[9] it also proves important for evaluating the soundness of rights-corresponding duties in rights-based moral theories such as the one in question here.

2.1 Three types of the moral demandingness objection (MDO)

What does it mean to say that a moral theory is too demanding? The MDO can appear in different forms. A moral theory can be (1) technically overdemanding, (2) motivationally or psychologically overdemanding or (3) theoretically overdemanding.

Technical overdemandingness can result first from the epistemic challenge that our knowledge and understanding of a given complex situation or setting in which we have to act is insufficient to make a proper decision. The uncertainty resulting from indeterminate, complex real world scenarios makes moral obligations potentially overdemanding. If I just didn't know that I could have done something or if I am merely incapable of determining the proper moral action, a theory that asks me to perform the morally correct action can be said to be unreasonably demanding. Griffin for example argues that there are "limits […] to human understanding" and continues:

> "Sometimes we are able to calculate fairly reliable the good and bad consequences of large-scale, long-term social arrangements, but sometimes we are not. And our failures in understanding are often not peripheral to morality but at its centre and great enough to leave us with no belief upon which we should be willing to base our lives." (Griffin 2008, 98).

8 O'Neills position on the demands of maximizing consequentialism is even more radical, since she claims that the resulting demands in the end only appear to be overdemanding, while ultimately they are not demanding enough, since they are nothing but empty formalism (O'Neill 2009, 62).

9 For a critical discussion of this see Sobel 2007.

A second form of technical overdemandingness obtains when different actions that have been simultaneously identified as morally demanded are mutually exclusive and for this reason impossible to perform. Such contradictory demands could result from equally urgent moral claims made by several individuals e. g. to help them in severe distress in a situation where it is unfeasible for the agent to meet all of these claims simultaneously. If there were a moral obligation to help them all, this would place an excessive burden on moral agents that they would not be able to meet.

This second form of technical overdemandingness can also take the form of identifying an incommensurate task for an individual – such as saving the world from poverty. Here the overdemandingness consists in the setting of a goal that is incongruent with the abilities of an individual agent such that it seems to be unreasonable to place this moral demand on an individual.

A second type of moral overdemandingness is *motivational* or *psychological*. One form of this motivational or psychological overdemandingness can obtain if, for example, meeting some obligations would be extremely costly for moral agents and require huge sacrifices. To help people in severe distress we would have to abandon our private projects or some relationships of special concern to people nearer and dearer who happen to be much better off than those in severe distress. Yet as Scheffler has argued, there are several forms of "reasonable partiality", such as obligations resulting from personal relationships, membership in communities or personal projects (Scheffler 2010). It might be inappropriate and overdemanding to ask moral agents to jettison these reasonable forms of partiality to meet some moral obligation.[10]

Moral agents who did neglect special relationships in order to follow the duties stipulated by a given theory might become impersonal duty performers or utility maximizers (Williams 1981, 14). A moral theory requiring inhumane, machine-like agents would clearly not fit human psychology or human nature, because it would be motivationally incommensurate. It cannot reasonably be expected of a moral agent, so the argument goes, to give up all personal relationships and private projects simply in order to meet the demands of morality.

10 Another form of this argument might stress the marginal utility that is given in cases where an agent has to invest many resources or has to make huge sacrifices in order to realize a relatively small improvement for others.

Furthermore, it might be said to be psychologically overdemanding for an agent if *she particularly* should feel obligated to perform some kind of moral action that millions of other agents – who might be equally obligated – fail to perform. Under the conditions of general non-compliance with moral obligations the general obligations of individuals could become weaker and it might appear to be unreasonable to demand that individuals fully comply with moral duties under conditions of general non-compliance. Consider the following example: If many or most relatively affluent individuals do not donate (or do not donate enough), the general duty of helping the needy will certainly not be fulfilled. It would, from the point of view presented here, be motivationally overdemanding to ask moral agents to do more than their due share (in order to avoid overall failure); and it would be motivationally overdemanding for them to engage into the activity in the first place in order to do their share, since failure is certain.[11]

Moral theories can also be *theoretically* overdemanding, that is, self-defeating within the boundaries of the given theory. If by following the moral demands of a given theory the moral agent will experience or bring about consequences that contradict the presupposed values of this theory, the theory itself demands something of someone to avoid the same thing for someone else. If a right to adequate food asks all moral agents to engage in fighting hunger, a theory demanding actions that bring the agents themselves into severe poverty would be overdemanding because self-defeating. Another example of this pattern can be found in the above-mentioned cases of psychological overdemandingness, where agents might be asked to sacrifice their valuable relationships in order to meet moral duties. If the moral theory also attributes value to relationships (and not exclusively to brute survival) then sacrificing all relationships in order to dedicate one's life exclusively to fighting world poverty is at odds with the declared values of the theory.

Generally, the possibility of iteration of moral demands can point to another theoretical challenge for a moral theory. If an agent is obligated to perform some kind of action that can be reasonably expected from her such as donating 10 Euros to charity, why should she not be obliged to do so repeatedly? Once one duty has been fulfilled, the next one

11 Such claims have been discussed e. g. by Ashford, who argues that non-compliance with moral rules on the part of some make the obligations for others even more onerous (Ashford 2007, 211). See also the discussion in Murphy 2000 and in Miller 2011.

looms. In these cases the continuous application of a moral theory ultimately places very different and potentially excessive demands on agents.

2.2 The impact of the moral demandingness objection on socioeconomic rights

Do the different forms of the MDO speak against welfare rights and corresponding duties? Initially, one has to accept that much speaks in favor of the soundness of the MDO. If the existing moral duties are either impossible to determine or impossible to realize (technically overdemanding), alien to human lives (psychologically overdemanding), or self-defeating (theoretically overdemanding), this proves to be a problem for a moral theory like the account of welfare rights and corresponding duties. A theory generating excessive and unrealistic obligations might turn out to be empty insofar as it is little more than wishful thinking, a well-meant but futile formulation of remote and potentially even contradictory goals.

Indeed the different forms of potential overdemandingness seem to apply to welfare rights and corresponding duties. They all point to problems that regularly come up whenever one attempts to identify the duties corresponding to socioeconomic rights. It might be difficult to fully understand the complex connections that lead to human rights violations so that it becomes unclear exactly which relation of duty exists. The resulting responsibilities might exclude one another or simply go beyond what is realistically feasible for agents. The sacrifices demanded may be inconvenient or even excessive. The duties may have a negative impact on the range of "innocent" choices available, that is they may significantly restrict the options for acting in a morally acceptable way. They even may endanger other dimensions of our lives that we cherish or hold in high, potentially even moral esteem. All this shows why we do indeed have reason to say that the demands generated by socioeconomic rights are excessively demanding, at least *prima facie*.

If one thinks that excessive demands have to be avoided because they are fatal for a moral theory, there are different ways to respond to this diagnosis. I will mention several of them before showing which problems are connected with each of them. In conclusion I will argue for the claim that it does not necessarily speak against a theory that it generates certain forms of excessive demands.

First, one could restrict oneself exclusively to talking about rights. One would then simply stay agnostic and silent on the question of whether agents have any rights-corresponding duties. A second option consists in restricting the rights to such a degree that any corresponding duties do not lead to the MDO. If fighting world poverty would be too demanding for moral agents, this would exclude the existence of a human right to adequate food. A third possibility consists in granting the existence of rights while restricting the corresponding obligations to an acceptable degree. This would give human rights the status of goals, ideals or remote ends to be achieved – or perhaps not – at some later point in the future. In these cases the corresponding duties would be trimmed down to a technically, motivationally, and theoretically acceptable degree.

In all three cases – agnosticism about duties, restricting rights, restricting obligations – the MDO provides a *pre-emptive exculpation of moral* agents who are thus exempted from many moral obligations. But should we endorse such a practice of pre-emptive exculpation? Or does it generate problems we should wish to avoid by accepting the overdemandingness of welfare rights?

2.3 Challenging the moral demandingness objection

In my view, the three possible responses to taking the MDO as a serious argument against the soundness of a moral theory lead to unacceptable consequences. *Agnosticism* about corresponding duties makes human rights claims nothing but empty talk. If we do not say a word about who might have which corresponding obligations, any talk about human rights would be empty and nobody who could potentially do something about it would feel "a call of moral duty". In looking exclusively at the rights-side of the two-sided relationship, we risk losing half of the picture. Hence agnosticism simply neglects an admittedly difficult but crucial element of the task of securing the legitimate interests of human agents. This, as a consequence, also makes the talk of rights idle.

Restricting the rights to make them fit an acceptable or convenient degree of obligations would be a revisionary approach. Imagine the following argument: "Striving to secure survival for all would place too extreme a burden on some. Hence there cannot be such a human right." This response introduces a hierarchy where instead we should show a correspondence between matching elements. It would be epis-

temically questionable to reduce rights in accordance with an external standard – external to the relation of correspondence between rights and duties – of what agents can do or can be reasonably be expected to do. The reason for accepting a right and a corresponding duty is the basic interest of a human individual in her fundamental well-being that has been accepted as legitimate, and not the convenience for a corresponding duty bearer nor the determination of how much can be reasonably asked of someone.

Of course, one has to enquire whether there are good reasons to change the understanding of human rights based on the interests and welfare of human agents and not on the convenience or realizability of corresponding obligations. One way out of this dilemma seems to be to focus on *first* generation human rights exclusively, which appear to be much less burdensome, and leave out any second generation human rights that call for more positive action. But, as already mentioned above, the seemingly undisputed set of liberty rights might also give rise to duties for individuals that go beyond duties of omission. Think for example of the duty to stop first generation human rights violations through humanitarian interventions or to secure a functional legal system in a country to guarantee individuals their right to a fair trial. If we were to avoid potentially excessive demands resulting from positive duties, then for the same reasons we would also have to object to first generation liberty-rights and not just second generation welfare-rights. Therefore we see that if we restrict rights for reasons of overdemandingness it potentially calls into question all human rights, independently of their generation, because a potentially overdemanding positive moral duty might correspond to all human rights.

The third approach to *moderate* rights-corresponding *obligations* also seems problematic. Trimming down the obligations to an acceptable degree would weaken the basic rights significantly and diminish them to the degree that they become incapable of securing basic elements of human welfare. If in cases where we think that it is overdemanding for potential agents to save someone in severe distress the right of the suffering person simply has no addressee or corresponding duty bearer, the right as such degenerates. The understanding of rights and duties as corresponding to one another means we cannot modify one without impacting the other.

Again, it is important to identify the epistemic standard we would be using if we were to cut down the degree of an obligation. The standard of convenience would again be external to the bipolar relation of

rights and duties. Hence a loosening of the correspondence between rights and obligations endangers the entire human rights project.

So in all three responses to the MDO we face the severe problem that human rights talk per se might become empty or vain if trimmed down to the degree at which it is not too demanding for moral agents. However, the degree of demandingness for a rights-corresponding duty holder might seem to be a secondary or even external standard compared to the initial goal of human rights talk, which consists in securing the welfare and basic interests of individuals that have been accepted as significant and important. Hence the adequate standard of judgment about human rights is not the degree of the resulting demandingness, but rather the importance of the protected dimension of a human life.

From the perspective of a welfare- or interest-based approach to human rights, the response to the MDO is twofold. On the one hand we have to accept that the demands of welfare rights can turn out to be excessive; on the other hand we cannot find a way to restrict the rights-corresponding duties without endangering the basic interests. That is why the challenge lies instead in finding an appropriate way of dealing with overdemandingness.

A general observation may be in order here. Evidently, moral theories essentially become extremely demanding under non-ideal conditions and under conditions of acute crisis.[12] In these circumstances overdemandingness might even be an inherent feature of morality: it could simply be "part of the game" that to act morally is an extremely demanding undertaking. Hence the reproach of being extremely demanding, and potentially too demanding, will be naturally raised against most types of moral theories. Maybe this is why in the history of ethics many proponents of different moral theories seemed to agree on the importance of the "ought implies can" principle. Restricting the demandingness of morality seems appropriate and important for most moral theories, as – in face of non-ideal conditions – all of them are in need of some moderating element if they are to avoid the consequence that even well-intentioned moral agents continuously fail.

12 Pogge has argued that the individual burden to fight world poverty, if distributed fairly among all possible agents, would be non-excessive (Pogge 2008). Whether this estimation is true is difficult to determine. However, under conditions of non-compliance the burden for the individual will surely be excessive.

The question, however, is what we should reasonably expect from a moral theory, e. g. from a theory of human rights, and whether the continuous moral failure of agents under non-ideal conditions really is a flaw of a theory. If the main task of a moral theory consists in defining what moral agents can be reasonably expected to do, the MDO might apply and an overdemanding theory might be said to be unsound. After all, the limits of human knowledge and human psychological and physical ability are somewhat fixed.[13] But if a moral theory is about protecting legitimate interests and needs of individuals and securing their welfare, the primary focus of concern lies not on what moral agents can be *reasonably expected to do* but on what moral agents *should do*. This view can be called an "ethics-first" approach, because it places the focus of concern on what should be done instead of on what human agents can be realistically expected to do.[14] In such an ethics-first account the MDO only comes up at a much later point, to a subordinate degree and in a different form.

In my view the ethics-first approach properly describes the primary task of a moral theory. I have argued that the moral demands for agents are somewhat independent of the given concrete abilities or reasonable expectations for the moral agent. The demands of morality are extremely high, often even unreasonably high. This however seems to be the result of the existence of distress in the world and not a result of flaws in a moral theory. I would rather put it the other way round: If the degree of moral obligations in a world like ours were convenient, or easy to meet, that would be all the worse for the theory. Hence overdemandingness in moral matters has to be accepted.

Perhaps others will have different feelings about this case. But if one were to accept the overdemandingness of moral theories, then the soundness of moral theories could be secured even if they were overde-

13 Nevertheless one should not underestimate the influence of e. g. education on the motivational capacities of individuals. Cf. Scheffler: "What morality demands depends on the state of the world in morally relevant respects, and what people are motivated to do depends on how they have been educated and socialized; and these factors in turn are dependent, in obvious ways, on the structure and functioning of society." (Scheffler 1994, 4).

14 The term "ethics first" is from Raymond Geuss, who is critical of such an ideal theory approach (Geuss 2008, 8). My position is somewhat different from his: While I agree with much in his critical diagnosis of ideal theory, I am nevertheless convinced that legitimate moral claims and rights are independent from the question of their realizability.

manding. The only price to pay is the perhaps undesirable but probably apt insight that even engaged and well-intentioned moral agents are not perfect and continuously fail in moral regards. Yet, should this be a problem for a moral theory? For several reasons – that go back to my prior arguments about the different dimensions of the MDO – I do not think so.

Some say that *motivational* or *psychological* overdemandingness and the corresponding bad conscience of moral agents make morality unattractive and scare away potential moral agents from following the demands of morality. This seems to be a debatable empirical question about the motivational attitude of agents towards an extremely challenging task.[15] One could also argue – quite contrary to this claim – that lowering the standards of demandingness impedes existing motivations to act. However, as an empirical question this is not of prior theoretical concern for moral philosophy, which tries to identify demands of morality not primarily according to the motivational capacities of given agents but according to what one reasonably identifies as the morally right or wrong action.

Others would argue that permanent psychological and motivational overdemandingness shows how a given moral theory is not fit for human agents. Again, I would say that this does not provide a substantial problem. Overdemandingness only shows how much need for moral action currently exists in the world. Hence, instead of claiming that such a moral theory would not be fit to human beings, one could argue that an overdemanding theory fits the state of affairs in our current world particularly well. After all, under current conditions of world poverty, e.g., we cannot expect a moral theory to be convenient. This however might change in a different world. So *motivational* overdemandingness can be seen as an acceptable because appropriate feature of a moral theory in the face of the moral wrongs in our world.

How about *technical* overdemandingness? Do conditions of uncertainty or the problem of unfeasibility really speak against a moral obligation to do something? This of course depends upon what you understand a moral obligation to be. According to my view, the question "Who should do what?" is reasonable even if it cannot be answered with perfect accuracy. In many cases there may be insurmountable epistemic difficulties in determining the right action, but the idea that there

15 Psychological research about external influences on motivation and decision-making will be necessary here. Cf. e.g. Ryan/Deci 2000.

is only one morally right action is generally misleading. Instead, there may be different sets of morally demanded actions that – while being mutually exclusive – nevertheless are morally demanded, maybe even to the same degree. However, I cannot see why this form of epistemic uncertainty should speak against a moral theory as such. For the subject matter of ethics, only a lower degree of precision and unambiguousness can be reasonably expected, as Aristotle had already argued. Furthermore, if one is incapable of performing some of the demanded actions, this does not affect whether they should be done. Incapability only gives a moral agent a reason or an explanation for not doing them. In these cases the agent would fail to perform a morally demanded action; however, she might not fail – or fail again – concerning another morally demanded action. If one takes a moral obligation to be a moral judgment about the moral quality of an action in question, then the actual unfeasibility of this action does not affect this quality. The unfeasibility – as the uncertainty mentioned before – does not provide a substantial argument against the soundness of a moral theory.

Now what about *theoretical* overdemandingness? Can a moral theory reasonably demand that people sacrifice things of equal moral value in their own lives in order to fight a moral wrong somewhere else? This objection has to be carefully scrutinized. No moral theory I am familiar with explicitly demands something like this. Even Peter Singer's extremely demanding suggestion about moral obligations in face of world poverty does not say that a moral agent should cause himself to sink below the level of well-being that he is attempting to remedy. The underlying distinction to be made here is between a moral obligation on the one hand and actually doing something on the other. Being morally obligated to do something is having a moral reason for performing some action. Certainly we have good reasons to act in order, say, to fight world poverty, and this obligation is extremely demanding, given the extreme suffering of others. Regarding the theoretical overdemandingness it is important to see that the moral obligation to help, that is, the existence of a moral reason to help, persists even in cases where we would have to sacrifice our own lives and well-being or neglect our other obligations. But it will be *one* reason among many that is generated by the (human-rights-secured) needs of others, *not the only* reason we have to guide our lives. And it has not been claimed that we should always follow each of the moral obligations we identify in the complex lives we lead, even if each of them constitutes a strong reason for doing so. Theoretical overdemandingness may be an acceptable, even a neces-

sary feature of a moral theory that is based in a world of severe, preventable suffering in which moral agents nevertheless are engaged in many different relations and activities. What we have to avoid is focusing all our moral concern and reasoning on only one dimension of our multidimensional, active human lives.

3. The demandingness of morality

I have argued that some obligations resulting from a moral theory of welfare rights are extremely or even unreasonably demanding. Rights-corresponding duties can be technically, psychologically, and theoretically overdemanding. I take such overdemandingness of welfare rights to be rather a result of the state of the world in which massive violations of human rights take place and cause hunger, poverty, and suffering. Overdemandingness under these conditions matches the excessive distress and should not be seen as a flaw of a theory of human rights. Hence the options of being silent on rights-corresponding duties, restricting these duties or even restricting the rights are not sufficiently supported by the MDO.

Yet, accepting these extreme, even unreasonable obligations is only one element in the general undertaking of moral reasoning in order to allow for considered moral action. These obligations are reasons that speak in favor of some action. However, different obligations arise in complex human lives and will have to be weighed against one another. That is why even under the condition that my argument is sound and that excessive human rights-corresponding obligations are justified, I have not argued that moral agents should always and exclusively follow this call of duty or jettison all other obligations, plans and activities in their lives in order to dedicate all energy exclusively to fighting hunger, poverty, and suffering. While we have to make our reasoned moral choices, the moral obligations corresponding to ongoing human rights violations persist and are neither diminished nor eliminated by the fact that they may be extremely or unreasonably demanding.

All restrictions of human rights-corresponding obligations to a more convenient or more "reasonable" degree disrespect the legitimate claims of those whose important basic interests are violated and question the status of these interests as protected by a human right. Hence the appropriate response to a diagnosis of overdemandingness is to listen to the multiple obligations one may have and deal with them as well as possi-

ble. It is certainly not appropriate to deafen oneself or, in calling it a flaw of a theory, to pre-emptively exculpate oneself for failing to live up to them. Being incapable of fulfilling all duties does not disburden us from trying, even if in the end even well-intentioned moral agents will necessarily have to accept their at least partial, ongoing failure.

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III.
Universality

Common humanity as a justification for human rights claims

Simon Hope

I

Anyone familiar with the modern language of human rights will have heard the phrase *human rights are held in virtue of our common humanity*. In this chapter, I want to examine this phrase further; or rather, one sense thereof, for the claim under consideration is ambiguous – in virtue of the "in virtue of" clause – and this ambiguity must be cleared up. The claim might be deployed in a *descriptive* sense: human rights track certain features of our common humanity, but are justified on entirely different grounds (by, say, appeal to what would be chosen under certain constraints in an idealized thought experiment.)[1] However, the claim that human rights are held in virtue of our common humanity has appealed to many defenders of human rights as a *justificatory* claim: we can identify features of our common humanity that count as reasons for some conception of human rights. It is the justificatory claim that I consider here.

More precisely, my target is the following thought, basic to many philosophical conceptions of human rights: that, by appealing to the moral significance of features of human nature that all of us – of course – share, human rights can be justified by a conception of the human good that is accessible to all. My complaint will be that these bold invocations of common humanity idealize away the depth and breadth of moral diversity, and so cannot give a satisfactory account of the intelligibility of moral reasons in the face of this diversity. My argument proceeds as follows. In section II, I highlight the constraint on ordinary moral reasoning that applies when the domain of agents to whom moral reasons must be offered is an unbounded one. Then, in sections

1 For an excellent and far more thorough discussion of the various ambiguities in the phrase see Gardner (2008).

III and IV, I discuss two versions of the bold appeal to common humanity, and argue that neither can account for the constraint on moral reasoning. Finally, in section V, I argue that reasons for human rights claims can be grounded in common problems humans face: in particular, problems stemming from our vulnerabilities.

Two further preliminary points are in order. Firstly, the claim *human rights are justified in virtue of our common humanity* raises more philosophical questions than those I am asking here.[2] I hope the reader will allow me one simplifying assumption. I shall assume that the claim "human rights are held in virtue of our common humanity" implies that human rights are held *equally* by all human beings. That need not be the case, as §57 of Nietzsche's *Antichrist* reminds us. One could say that which rights one holds depends very much on the sort of person one is: "a right is a privilege. The privilege of each is determined by the very nature of his being" (Nietzsche 1968, §57). The question of whether anyone has given good reasons for a Nietzschean-inspired view will not, however, concern me here.

Secondly, my argument takes place at one remove from the main philosophical battlefields in the current human rights literature: on the one hand, the debate over the concept of a right (are rights necessarily claimable, for example); and, on the other, the debate between natural rights theorists and Rawlsian-inspired 'political' conceptions of human rights over the broader philosophical approach within which the concept of a right should be embedded.[3] This chapter will make no contribution to the debate over the concept of a right. The questions "In what sense are human rights held in virtue of our common humanity?" and "In what sense are human rights *rights*?" are too complex for me to address both adequately here; accordingly, I focus only on the issue of justification by appeal to some feature of common humanity, i.e. on the "human" rather than the "rights" aspect of human rights.

Nor shall I comment directly on the debate between defenders of natural rights and "political" conceptions of human rights, although my conclusion has implications for that debate. The strongest argument offered in defense of a 'political' conception of rights is that moral reasoning breaks down within a sufficiently broad domain of agents, so that human rights must be seen as artifacts of various United Nations declarations, and their justification rests on nothing more than the way in

2 For discussion of some of these other questions, see ibid.

3 For an excellent overview see John Tasioulas's chapter in this volume.

which the UN declarations function as a widely recognized and effective mode of legitimation in international and domestic politics (Beitz 2009, ch. 3 and 4).[4] Against this, defenders of natural rights conceptions, such as John Tasioulas, have argued that "ordinary moral reasoning" about morally important features of human beings can provide a philosophically robust justification for a conception of human rights.[5] As will become clear, I do not disagree with Tasioulas's claim; what I shall argue is that ordinary moral reasoning must take a *specific form* if it is to be intelligible to the domain of agents to which human rights claims must be justified.

II

John Dunn once splendidly remarked that "no adequate political philosophy can simply take the form of a theory of what is intrinsically desirable". Dunn explains the point as follows:

> At the very least any such theory must also offer an account of what sort of claims in the face of what sort of costs the intrinsically desirable can rationally levy upon individual historical agents or groups of such agents. If these claims constitute at all a heavy burden, it must add at least a sketch of the reasons why such agents would themselves be epistemically well-advised to regard the claims as valid (Dunn 1985, 38).

The first point Dunn registers, which for my purposes addresses the demandingness of a conception of human rights, will not concern me here. My focus is on the second point – the sketch of a justification – and the difficulties one faces in giving one for human rights.

Salient to any plausible justificatory argument must, I think, be the fact that reasons are among the many things people exchange with one another. If we go in for moral argument at all, we must go in for the claim that we must justify our moral principles to all agents we expect to comply with those principles – to insist on compliance without adducing moral considerations that count in favor of compliance is to enter an amoralist's worldview, where reasons are grounded in force or deception. At the core of a plausible justificatory argument, therefore, will be an appeal to considerations that all agents the argument ad-

4 See also Rawls 1993, 54ff, for the terminology "political".
5 Tasioulas, "On the Nature of Human Rights", in this volume.

dresses can find intelligible as points in favor of the principles one is trying to justify.[6]

What makes it difficult to sketch out a justification for a conception of human rights is that the content of that conception – like any universal moral principle – applies to, and thus must be justified to, an *inclusive* domain of agents. The practical activity of justifying oneself to others typically operates well within the confines of a set of safe assumptions – we justify propositions to friends and fellow citizens whose own ensemble of convictions we (often, but not always, rightly) take to vary little from our own, and we construct reasons accordingly. But when the domain of agents to whom principles apply is not *exclusive* – is not limited to the holders of a specific worldview or set of worldviews – it becomes much harder to determine the contours of a shared ensemble of convictions, should any even exist.

One is dealing, rather, with a limit case where philosophical questions of objectivity in ethics coincide with questions about the limits of interpretation (Williams 1995). Our respective standpoints for understanding the world and evaluating actions are constructed out of the resources made available to us by the web of concepts and beliefs that constitutes a cultural worldview (or conceptual scheme or, in a Wittgensteinian frame of mind, a "form of life"). As Clifford Geertz once splendidly put it, "no one lives in the world in general" (Geertz 1999, 62). One upshot of this fact is that we should see an inclusive domain of agents – the domain to which justifications of human rights must be addressed – as an *indefinitely varied* domain of agents; and we are, accordingly, entitled to make as few assumptions as possible about settled agreement on moral claims within that domain. The broader the domain of agents in question, the more assumptions about shared values or intuitions appear as unjustified and unhelpful idealizations. Philosophically, this makes things harder, but not impossible. It all depends precisely how human rights are taken to be justified in virtue of our common humanity.

My target is the following feature of many philosophical conceptions of human rights: the appeal to common humanity is intended to justify, to an inclusive domain of agents, obligations that we owe to others in virtue of some features of our common humanity that bear absolute moral value (couched in terms of *status* or *interest*). Two well-known examples illustrate this tendency. Martha Nussbaum has

6 I say more about intelligibility below. The basic idea of a reason as a point in favor of something is taken from Scanlon 1998, ch. 1.

sought to justify a rich account of human rights by appealing to properties of human beings that confer rights-bearing status on individuals – in particular, to our "architectonic functionings" of *practical reason* (working out one's own life plan) and *affiliation* (our various social ties to others). These "architectonic functionings" confer on all human lives a sense of dignity and worth.[7] To treat people with appropriate dignity just is, on Nussbaum's view, to see them as holding a rich conception of human rights (Nussbaum 2006, 174). Jim Griffin, by contrast, claims that human rights are grounded in 'personhood'; in particular, the three aspects of normative agency: *autonomy* (choosing one's path through life), *liberty* (freedom from interference), and *minimal provision* (sufficient information and resources to be able to enact one's chosen path) (Griffin 2008, 32–33).[8] The morally weighty interests embedded in human powers of rational agency provide the substantive core to a conception of human rights. Nussbaum's and Griffin's positions are fundamentally similar: both appeal to a rich conception of human nature that takes into account the rational structure of human life, and both ground the justification for human rights in the our common powers of rationality and sociability (Griffin's notion of "normative agency'" seems of a kind with Nussbaum's "archtectonic functionings").

I want to question whether these conceptions of human dignity and personhood can indeed be justified to an inclusive domain of agents. Nussbaum's and Griffin's appeals to the moral significance of human powers of rationality and sociability differ, primarily, in the following respect. Nussbaum appeals to the value of those properties *themselves:* the fact that the architectonic functionings are part of human nature confers dignity and worth on all human beings, regardless of their actual powers of reasoning and sociability (Nussbaum 2006, 285 and, further, ch. 3 passim). This intuitive "species norm", as Nussbaum calls it, invokes a *range property* claim about equality: although humans differ in degree of both rationality and sociability, all humans are nevertheless equal with respect to these powers.[9] Griffin's features of personhood

7 I take the phrase "architectonic functionings" from Nussbaum 2006, 162.

8 Griffin does not, it must be noted, *solely* appeal to the powers of personhood. Part of what makes any particular human right "determinate enough in sense […] to be an effective, socially manageable claim on others" will typically come from "practicalities" concerning social structures, psychology, and the natural world. See Griffin 2008, 37–39.

9 See, for more detail on range property claims and their logic, Waldron 2002, 44–82.

are scalar in the same way (Griffin 2008, 45). But for Griffin, the moral importance of our rationality and sociability is grounded in a set of basic human interests. The threshold above which a being is within the category "person" is defined by the plausible recognition of that being's basic interests in *autonomy*, *liberty*, and *minimal provision*.[10] We cannot, for various reasons, plausibly attribute an interest in all three interests to infants, the severely disabled, and persistent coma victims, and so they fall below the threshold of personhood (although the common interests they *do* have still create duties towards them) (ibid., 92–95). These three interests are not to be understood as *merely* preferences present in agents' psychological states (which may wax and wane by degree). One either has the interest or one does not. And it is these interests, rather than powers of rationality and sociability, that ground human rights claims.

III

Do Nussbaum's and Griffin's positions denote routes by which ordinary moral reasoning about valuable features of human beings can justify human rights claims? I shall consider Nussbaum's appeal to intuition first. Nussbaum asserts that we all intuitively value complex organisms, and intuitively respond differently to different degrees of complexity, so the moral importance of our rationality and sociability *just is* clear.[11] That is to say, ordinary moral reasoning is guided by intuitions about human dignity that reasonable agents will simply not find controversial; and it reveals a substantive form of ethical life shared by human beings.

Yet to say something is intuitive is to say nothing unless a robust account of intuitive warrant is given. That account of intuitive warrant *cannot* take the form of a simple appeal to recognition of our common humanity. Now, of course agents with very different classificatory schemes for natural kinds can and do mutually recognize common humanity (on some level). It would be as implausible to deny *that* as it would be to deny that reasoning cannot take place between the bearers

10 Here I am reading between the lines somewhat, but see Griffin 2008, 116 for the link between common human interests and the elements of personhood.

11 See, especially, Nussbaum 2006, ch. 6. Note that Nussbaum actually asserts that her *position* "has" the intuition in question. I am not sure what this means (theories are not possessors of intuitions), other than that the position assumes an intuition that is commonly (universally? It seems so) shared.

of historically distinct cultural worldviews. Indeed, these two points are connected. As Donald Davidson pointed out long ago, if a conceptual scheme really were radically different to mine, it could not be recognizable by me *as* a conceptual scheme, and so differences between conceptual schemes must be intelligible differences (Davidson 2001, 183–198). For me to be in a position to judge that you bear a different conceptual scheme to mine is for me to be in a position to accurately (to a degree) interpret the content of your scheme (or enough thereof) such that points of difference between your scheme and mine can be accurately (again, to a degree) registered. There has to be common ground for interpretation to take place. And this, as Clifford Geertz has remarked in turn, invokes in some way a common humanity: "to see others as sharing a nature with ourselves is the merest decency" (Geertz 1983, 16), essential to seeing others as they themselves see themselves. But very little, in moral terms, hangs on this. At best, in doing so we identify others as agents who could conform to moral principles, and thus identify others to whom we need to justify the principles we think they should conform to.

Recognition of common humanity does not, itself, constitute any substantive agreement on the limits or moral salience of human rationality and sociability. A *prima facie* more promising account of intuitive warrant for intuitions about human dignity could take the following form: substantive moral claims are universally intuitive in the sense that they constitute grounds for the successful interpretation of differing ethical outlooks. Nussbaum and Michael Walzer have offered arguments on this score: in order for us to recognize different ethical outlooks at all, there must be a common substantive set of "moral facts" that are "immediately available to our understanding", against which moral disagreement is intelligible (Walzer 1987, 23–29; cf. Nussbaum 1993, 242–269). If this view is plausible, we cannot deny the existence of a common 'framework', as Walzer puts it, of moral intuitions that are only *fully* substantiated in historically contingent cultural ways of going on.

This line of argument appears to have good Davidsonian roots. Davidson's basic point – that "the more basic a norm is to our making sense of an agent, the less content we can give to the idea that we disagree with respect to the norm" (Davidson 2004, 50) – is surely correct. One might then conclude that some *values* must be shared if we are to identify moral disagreements at all. Davidson himself claims that "since the objects of your beliefs and values are what cause them, the

only way for me to determine what those objects are is to identify objects common to us both, and take what you are caused to think and want as basically similar to what I am caused to think and want by the same objects" (ibid., 36). Everything depends here on how the phrase "basically similar", and the related notion of what it is to share a value, are understood. Nussbaum and Walzer understand this in terms of substantive agreement among all reasonable agents. Yet that understanding is hard to sustain. Although I do not have room to review it here, suffice to say that the anthropological evidence concerning depth and breadth of ethical diversity across cultural conceptual schemes forecloses the possibility of *any* existing agreement that is both substantive and universal. In addition, while the concept "human being" denotes a natural kind, the limits of that natural kind are contested within the broad array of spiritual, totemic, genealogical, animistic, or scientific classificatory schemes that exist (Prinz 2009, 167–189).[12]

Just as the anthropological evidence does not support the existence of globally shared substantive moral intuitions, nor do Davidsonian considerations. Arguments of the sort deployed by Nussbaum and Walzer depend on an overly demanding notion of "sharing" a value. For me to accurately interpret your ethical outlook, I need to locate the concepts that, for you, are integrally bound up with specific evaluative attitudes such that they provide immediate moral reasons for action ("Don't do *that* because it is *unfaithful*", etc.), within the context of your wider worldview (Geertz 1973, ch. 1). But first I have to be able to recognize those concepts as concepts that are integrally bound up with evaluative attitudes. Thus, inevitably, I have to "match up" (Davidson) your ethical concepts with ethical concepts familiar to me (Davidson 2004, 36); to see your concepts as directed, in part, to the same objects (psychological kinds, natural events, basic human needs) that some ethical concepts familiar to me are directed to. But none of this implies any substantive agreement on values.

Why not? There is no reason that the concepts and values available to me are limited to those I consider well-justified. (I'd guess that a fairly reliable foothold into any culture's scheme of value is to examine the social advantages men have over women). And furthermore, even when the matching up involves concepts and values I consider well-justified, the similarities typically remain schematic. To observe that your

12 See also Descola 1996, 82–102, for further evidence on disagreement about classificatory schemes for natural kinds.

concept *X* is directed *in part* to the same objects (natural events such as birth and death, etc.) as my concept "dignity" is *in part* directed to, is enough to get some grip on the evaluative nature of your concept *X*. But I cannot move from that observation to the conclusion that you and I share any substantive view of the value of the dignity of human life – the differences between our concepts also have significant bearing here.

Davidsonian considerations thus give us no warrant to generalize across, rather than within, cases; and so give us no warrant to conclude that global substantive values must exist. The common ground necessary for the recognition of different conceptual schemes is not constituted by any substantive moral agreement; including agreement on the range properties that constitute morally important features of human beings. Nussbaum's and Walzer's appeals to globally shared intuitions elide the crucial justificatory step. By idealizing away moral disagreement, it remains unclear how reasons in favor of according humans equal dignity can be made intelligible to the bearers of diverse cultural conceptual schemes.

IV

One need not, however, hold that the justification for human rights is grounded in common human intuitions, or a commonly human form of ethical life. Jim Griffin's position is an exemplary instance of an alternative approach, where the justification of the range property in question is not grounded in features of the property itself. For Griffin, as for Nussbaum, the justification is still firmly located in a rich picture of the rational structure of human life. This picture reveals certain basic human interests that carry moral weight. Some of these interests, such as an interest in avoiding pain, are attributable to human beings in virtue of biological nature. Other, more esoteric interests, such as an interest in "achievement", are embedded in the rational side of human nature (Griffin 2008, 117). It is the moral weight of three such basic interests – our interests in *autonomy*, *liberty*, and *minimal provision* – that justifies the ascription of human rights to persons.

The question now arises whether these three morally weighty interests can be intelligibly justified as such to an inclusive domain of agents; and the answer, again, comes in Davidsonian terms. "Certain values", Griffin writes, are "inevitable features of our conceptual framework"

(ibid., 113; 125). Yet these values are rough and formal only. They are grounded in a list of basic human interests that we can read off from the rational structure of human life; interests the recognition of which is *thick* with a corresponding set of value judgments.[13] But – crucially – there is no suggestion of agreement on the moral weight of these interests. Seeing someone else as a human being is, in part, to see them as a rational being bearing a conceptual scheme that shares some basic formal evaluative concepts – such as *quality of life* – with one's own conceptual scheme. The recognition of the interests, and the fact that lives are thought to go worse when the interests are unmet, gives us a grip on the *prudential* weight of these interests, and so a grip on a shared concept of quality of life. The moral weight of such interests is justified by a further move. Griffin insists that we do not grasp these primitive evaluative concepts in a first-person way: we grasp that "pain is bad" or "autonomy is valuable"; and not *"my* pain is bad" or *"my* autonomy is valuable". This, Griffin says, is part of "our grasp on how 'autonomy' [and so on] works as a reason for action": to see something worthwhile is to see it as worthwhile for all normal human beings to pursue (ibid., 134–135; see also 115 and 125).

One might think an element of stipulation enters into this last point – can I not see something worthwhile for some specified in-group only? Griffin would, I imagine, reply that the interests which ground human rights are not those limited to a specific in-group, so it is the elitist who, unless the restricted scope is justifiable, is guilty of stipulation. Furthermore, Griffin's claim that the common ground on which interpretation is built does not constitute substantive moral agreement, but can underwrite the intelligibility of certain moral reasons, seems to me the right way to take Davidson's point. For Griffin, what is common is, in the first instance, the recognition of certain prudential values; and, via these, the intelligibility of how such values are deployed as reasons in moral argument. The moral weight of the three interests that underpin the range property of personhood can be intelligible to others in virtue of how lives go worse when the interests are not met.

Yet I think a doubt should remain about Griffin's identification of the sort of values that are intelligible to all. In order to bring out this doubt, it is necessary to say something more about criteria for intelligibility of moral reasons. In light of the constraint on ordinary moral rea-

13 For example, my grasp of the concept "pain" gives me reason to think a life goes worse the more pain is in it. See Griffin 2008, 123.

soning I am concerned with, what is at issue is the intelligibility of reasons *to* the domain of agents we offer such reasons to (questions about the existence of reasons in the abstract can be bypassed). The concern here is with a practical function of reasoning: norms of reasoning purport to coordinate behavior *among* a plurality of agents (in the sense that they explain why certain action-guiding principles are ones we should identify with and act upon), and (where categorical, as with human rights) *across* different spheres of life.[14] This is complex. Take, first, the case of coordination *within* an ethical outlook. Different considerations bear normative weight within different spheres of life, such that some norms of practical reasoning agents use will be parochial to distinct spheres. The intelligibility of norms of reasoning that coordinate action across spheres of life turns on their establishing connections between considerations within the distinct spheres that are followable in thought as points in favor of action-guiding maxims of appropriately wide application.[15]

Inclusive norms of reasoning aim, further, to coordinate action among the bearers of different outlooks. Again, such norms must identify considerations that are followable in thought, by the bearers of different outlooks, *as moral points in favor of action*. The intelligibility of a reason, here, depends upon establishing a connection between the considerations the reason picks out and considerations that are already in view as possible considerations with moral weight. At this level of abstraction the points I am making may seem trivial, but they rule out any view where the reasons that justify human rights claims are not in view to all agents one expects to conform to human rights, where "in view" denotes that, within an agent's conceptual range, the considerations appealed to can be conceived as constituting a moral reason. (Here "in view" is modal: it is not the case that the consideration must be *congenial* or *convincing* or *motivating*). A norm is capable of coordinating behavior if it is one that the bearers of different outlooks *can* intelligibly accept: the considerations the norm identifies as points in favor of action

14 Talk of "coordination" here is not intended in the sense of a solution to specific collective action problems (e.g. those modeled by various sorts of prisoner's dilemma), but rather in a much more garden-variety sense: a moral principle or requirement picks out an act type which is prohibited/permissible/mandatory, and the justification of that principle aims to coordinate behavior by providing agents with a reason to act in the appropriate way.

15 O'Neill 1996, 57–59. I believe I dissent from O'Neill in how I expand upon the immediately following point, however.

are followable in thought by agents as *moral* points in favor of action, in virtue of the connection between these considerations and considerations already in view as morally significant. Failure to act in accordance with a norm of reasoning is not necessarily evidence of unintelligibility.

To rephrase Griffin's position in these terms, the appeal to the basic human interests that constitute personhood allows human rights to be justified to an inclusive domain; with the relevance of such interests to the shared concept of *quality of life* providing the intelligible connection. My doubt about Griffin's position is whether *basic interests* are the sorts of consideration that can plausibly play a coordinating role. I see no difficulty in locating certain basic interests in a rich conception of the rational structure of human nature. But what must be kept squarely in view is that the notion of 'rational structure' denotes a diverse array of inherited conceptions of the world that constitute cultural forms of life. The specification of a list of basic human interests must take place at a level of considerable abstraction if it is to capture morally weighty features of human life across the diversity of ethical outlooks. What an agent identifies with, however, is a specific substantive understanding of what "autonomy" or "achievement" (for example) involves; an understanding shaped in each case by the cluster of concepts that surrounds the concept of the relevant interest in whichever historically contingent outlook the agent in question bears.[16] This surrounding cluster of concepts will not only include thick moral concepts, but also elements of the classificatory scheme that delimits a specific understanding of personhood or humanness and so shapes the nature of the relevant powers of rational agency.

Given these observations, it is quite unclear what reason an agent has for seeing, in the specification of a morally weighty human interest, anything other than a consideration that tells in favor of a right that protects *their own substantive* understanding of the interest in question. The abstract specification of an interest in "achievement" or "autonomy" is rendered unhelpfully schematic and shapeless, and unable to provide reasons for action, when detached from the cluster of concepts that surrounds it and determines both its extensions and moral relevance in any particular form of ethical life.

The objection I am pressing reaches further than Griffin's interest-based conception of human rights to include other welfarist justifications. John Tasioulas has, for example, urged that:

16 See further Geertz 1973, 52.

> we need to go back, beyond the Enlightenment to an Aristotelian tradition of thought about the human good and the special protection it merits. In other words, what is standardly thought of as the distinctly 'modernist' doctrine of human rights needs to be nurtured by roots that are, as a matter of intellectual history, pre-modern (Tasioulas 2007, 100).

Again, such a conception of the good will consist of a list of abstract act-types (e.g. "pleasure"; "religion"), which allow us to assimilate different outlooks' goods onto one list. But what actual individuals identify with are substantive understandings of these goods – understandings in which the concept in question (e.g. "pleasure") is shaped by a cluster of surrounding concepts particular to a given historical outlook. That someone identifies with one particular substantive understanding of a good does not *at all* entail that they see the effective attainment of other types of the same item on an abstract list as in any way worthy of protection.

To summarize, then, a serious difficulty plagues justifications for human rights that appeal to features of human beings (powers of rational agency; morally significant interests), embedded in a rich picture of the rational structure of human nature. We must reject the thought that the idea of a *human* form of life gives us anything very useful: there are, to quote Geertz, only "examples of the forms human life has locally taken" (Geertz 1983, 16). Our ability to locate points of difference in this array does not entitle us to the conclusion that certain substantive values are shared by all. In addition, a conception of human powers of rational agency is always deeply embedded in the practices and conceptual schemes of particular cultures, and thus these powers register very differently in the different schemes of value those cultures contain.[17] A welfarist conception of reasons, such as Griffin's, thus fares little better than an intuitive conception of reasons. As I've argued, the intuitive conception implausibly idealizes away the breadth and depth of moral diversity. A welfarist conception, by contrast, make the intelligibility of moral reasons conditional on the common recognition of the value of certain goods; and yet, at the same time, must operate with an extremely abstract specification of those goods. It is not clear how such an abstract

17 To again quote Geertz: "the Western conception of the person as a bounded, unique, more or less integrated motivational and cognitive universe, a dynamic centre of awareness, emotion, judgment, and action organized into a distinctive whole and set contrastively both against other such wholes and against its social and natural background is, however incorrigible it may seem to us, a rather peculiar idea within the context of the world's cultures". Geertz 1983, 59.

specification avoids being too schematic to provide intelligible reasons for action.

V

The argument I have pressed against Nussbaum and Griffin may seem to support what I earlier referred to as the "political" conception of human rights: human rights are artifacts of various United Nations declarations, and their justification must be grounded in aspects of the mode of legitimation created by those declarations. Recall that the key justification for the "political conception" is the claim that ordinary moral reasoning breaks down among an inclusive domain of agents. It may seem, from what I have argued so far, that I also endorse that claim. Yet all I have argued so far is that *welfarist* and *intuitive* conceptions of moral reasoning break down among an inclusive domain of agents. I now want to suggest that, *contra* defenders of the political conception, at least some aspects of ordinary moral reasoning do not break down at the global level.

The picture of ordinary moral reasoning I want to briefly outline has two levels: firstly, the specification of a set of duties that can be intelligibly justified to an inclusive domain of agents; and secondly, the specification of which of these duties support corresponding rights. I shall focus only on the first level here.

Ordinary moral reasoning, I have said, aims to coordinate action among a plurality of agents. And it aims to do so in a reasonable way – the moral criteria proposed as action-guiding are proposed as principles/demands agents could and should on reflection endorse.[18] "Could", here, denotes what is intelligible: the considerations appealed to in favor of the principles/demands in question are followable in thought, within an agent's conceptual range, as considerations that bear moral weight. (This does not mean that thought is congenial or convincing.) To propose a principle/demand as one that agents could and should reflectively endorse is, among other things, to propose a principle/demand that agents can *identify with* – one that they can make their own, and deploy in practical reasoning. It strikes me that a

18 I take this to be true even of outlooks involving revealed divine commands: while one must obey the stipulation unquestioningly, the revealed existence of the deity constitutes a rationally compelling point in favor of obedience.

promising way to arrive at an account of intelligible moral reasons is, therefore, to investigate the grounds on which an agent could intelligibly refuse to make a principle their own.

To make a principle one's own is to identify with it, and "identification", here, must involve some substantive sense of self, with an associated set of needs and vulnerabilities. This conception of self will, of course, be culturally and historically peculiar, and the reasons one might find within one's ethical outlook to refuse to identify oneself with a proposed moral principle/demand will typically be intelligible only within the worldview of which this peculiar conception of self is an aspect. However, the material circumstances of that self's existence will be determined, in part, by certain basic features of a common human condition: the basic needs which we cannot help but have, and the way in which conventions of social interaction impact upon these basic needs.[19] These, too, could intelligibly enter in as considerations one can appeal to when refusing to identify with a proposed principle; and, as the existence of such considerations is presupposed by any culturally peculiar conception of self-hood, intelligibility holds for an inclusive domain of agents.

More precisely, ordinary moral reasoning can appeal to a set of basic *vulnerabilities* embedded in the human condition: vulnerabilities concerning an agent's capability for effective action. I take effective action to be determined by both *a set of basic human needs*, which we cannot help but have, and *a degree of influence over the shape of the social institutions and conventions* under which action to meet these needs must occur.[20] Any agent, faced with a purported justification for adopting some principle of action (or belief), will judge whether to adopt it (identify with it) in light of the commitments, conceptual bundles, and modes of explanation that constitute their sense of self. One reason they could offer in rejecting the principle is that, if the principle was one that coordinated action among an inclusive domain, our agent's vulnerability with respect to basic human needs would be exacerbated or exploited (or rendered more easily exploited), or the tenuousness of the agent's provision

19 As John McDowell puts it, "the innate endowment of human beings must put limits on the shapings of second nature that are possible for them… [as] part of what reflection takes into account". McDowell 1998, 190. See also Wiggins 1998, 31–36, for an expanded argument on the same point.

20 For reasons of space, I can only stipulate this here: the full argument will appear in forthcoming work.

of basic needs would not be reduced, by modes of interaction or institutional arrangements required by the principle. What makes this reason a strong one is that any practical reasoner – anyone reasoning about how to act – *cannot overlook the scope they have for effective action*; and that scope is determined in part by how they must meet the needs they cannot help but have.

As a reason to reject the principle, this appeal to vulnerability is intelligible, to an inclusive domain of agents, in a way that that claims about the good or morally significant features of human beings cannot be assumed to be. As ethical outlooks purport to coordinate behavior in a reasonable way, each must leave some criteria by which an agent can claim that certain ways of pursuing the common good do them an injustice (Wiggins 1998, 31–32). These criteria, I suggest, will be connected to what an agent, within that ethical outlook, can reasonably identify with. And whatever culturally peculiar conception of self is in play, it will imply a set of basic vulnerabilities that determine, in part, an agent's scope for effective action. Earlier I claimed that a consideration will be intelligible as a moral reason when there is a connection that is followable in thought between the consideration in question and considerations already in view as morally significant. Here, the "considerations already in view" is the conception of self, and the connection to basic vulnerabilities is the fact that any conception of self implies the existence of these vulnerabilities. The appeal to vulnerabilities is not, therefore, intelligible only at the prudential level – we can establish a connection to explicitly moral considerations.

Here, the reader might object that, surely, some conception of flourishing underwrites the moral significance of basic vulnerabilities and effective action.[21] Yet this need not be the case. Note that evaluations of vulnerability can be both individuated (the degree to which someone is vulnerable to this or that agent with respect to *x*) and holistic (how *vulnerable* all-things-considered an agent is). There need be no question of choosing between these two types of evaluation: individuation is necessary to quantify an all-things-considered assessment of vulnerability, and an all-things-considered assessment is capable of delivering criteria for assessing the qualitative nature of individuated vulnerabilities. That is to say, individuated vulnerabilities can be ranked in terms of how seriously they impact on all-things-considered vulnerability – there is no need to appeal to considerations independent of the

21 Thanks to John Tasioulas for pressing this objection.

concept of vulnerability itself. In this way, the conception of vulnerability I am advancing is unmediated by any conception of the good.

It is true that the conception of vulnerability I appeal to is shaped by an account of basic human needs. So one might then ask why the appeal should not simply be to the moral salience of basic needs? Emphasizing the importance of vulnerability rather than need has the advantage of a sharper focus. Vulnerabilities, when individuated, are relational – I am vulnerable to *this* or *that* agent with respect to *x* (cf. Goodin 1984, 112) – whereas claims of need, when individuated, are not *typically* so.[22] Claims of vulnerability therefore allow, to a greater extent, an abstract claim of right to be related to specific institutional structures: one is not simply identifying a genuine lack, but identifying specific relationships of dependence embedded in specific institutional structures that create that lack. This seems to me an advantage when considering rights claims – it allows one to give a more precise formulation of the duties that correspond to rights.

If all this is plausible, ordinary moral reasoning can be intelligibly addressed to an inclusive domain of agents, provided the reasoning takes a specific form. The principles that can be justified to an inclusive domain will be a set of *prohibitions on permissible modes of interaction*. Certain principles of action can be intelligibly rejected as principles that coordinate action among an inclusive domain of agents, when those principles, for any member of that domain, exacerbate, exploit, or fail to reduce the tenuousness of basic vulnerabilities with respect to effective action. Consequently, corresponding principles that prohibit the exacerbation (exploitation, etc.), of basic vulnerabilities can be intelligibly justified as creating moral duties that apply to an inclusive domain of agents. Principles that prohibit the exacerbation or exploitation or the failure to reduce basic vulnerabilities are principles that are capable of reasonably coordinating action among an inclusive domain of agents.

Precisely which of these duties support the existence of corresponding rights is a further, and complex, question. As noted at the outset, considerations of space prevent me from addressing the question

22 The exceptions being needs that are embedded in certain relationships. It might be possible, appealing to background institutional conditions, to see all basic needs as relational (the satisfaction of all requires the existence of an institutional scheme). But this is simply to establish the necessity of *institutions in general*, and not the necessity of *specific* institutional structures to which duties can be targeted.

"What is a right?" here. I have assumed that human rights claims are claims made in moral argument, and therefore – if we take them to be justified by ordinary moral reasoning – that we can get at least some grip on what a justified conception of human rights would be by considering how ordinary moral reasoning can be capable of coordinating action among an inclusive domain of agents. In concluding that ordinary moral reasoning can only play this coordinating role when it takes the form of a set of constraints on permissible modes of interaction, rather than of a welfarist conception of interests or the good, I do not mean to suggest that the only human rights are negative rights. What the principles that reject forms of exacerbation (etc.) of basic vulnerabilities give us is a complex set of moral duties, some of which will in Kantian terms be perfect and some of which will be imperfect (the reduction of vulnerabilities which leave effective action tenuous may require duties of care, concern, and vigilance that each can do for some, but not for all) (O'Neill 1996, 148). Whether these duties can support rights to positive assistance is not something that can be settled simply by the fact that the principles in question take the form of constraints. Which of these duties correspond to human rights is a further issue; but if *any conception of human rights is to be well-justified by ordinary moral reasoning, it will be one that is centered around protecting the vulnerable.*

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Universal human rights and moral diversity

Gerhard Ernst

1. Introduction[1]

A main feature of human rights, as they are usually conceived, is that they are *universal* rights. You don't have them in virtue of being a Christian or a Jew, an Englishwoman or an Inuit. You don't even have them in virtue of being a decent member of society or a morally respectable person. Rather, you are endowed with these rights simply in virtue of being human. So, everyone, if she or he is a human being, has these rights.

Human rights are not universal as legal rights, although *in word* they are almost universally accepted. Many human beings are subject to legal systems which do not contain effective legislation and regulations to protect even basic human rights. Neither are human rights universal in the form of actually shared norms of human societies, which means that even *if* everyone behaved according to the accepted norms of his or her society not everyone would honor all human rights. But taken as moral rights human rights seem to be universal:[2] Even if you are not protected in your human rights by an adequate legal system, you still *should* be so protected; even if the society you live in does not honor human rights properly, it still *should* honor them. It is this moral point of view I shall adopt throughout this paper when I speak of "human rights".

In my opinion there are three pivotal tasks for the philosophy of human rights in this sense. The first is answering questions like these: How are human rights to be conceived exactly? Which rights are human rights? Maybe: What does the term "human rights" really mean? This is what I will call the *issue of content*. The second task centers

1 The present paper is based on Ernst 2010. I would like to thank the Kohlhammer Verlag for the permission to draw on that material.

2 Jack Donnelly calls this the "*moral universality* of human rights". Cf. Donnelly 2003, 1.

around another group of questions which might include the following: How are human rights to be justified? Can they be justified at all? Or might there be several mutually exclusive ways to justify them? I will call this the *issue of justification*. I don't mean to say that these two issues are independent of each other. They are not, as will become apparent in due course.

Although these two issues constitute the fundamental tasks of a philosophy of human rights, there is a third issue of hardly less importance. I will call it the *issue of universality*. What I have in mind is this: Human rights are, as I said, usually thought of as universal rights. They apply to all human beings. Nevertheless, the shared norms of some, or maybe even many, actual human moralities do not include these rights, at least not all of them or not as rights or not as fundamental rights anyway. This is a problem because we seem to be confronted with two equally vexing options here: Either all these moralities are seriously misguided or human rights are not universal in the relevant sense after all.

I will comment briefly on the first two issues, the issue of content and the issue of justification, in the next section. But the main topic of my paper will be the issue of universality.[3] I want to describe the quandary generated by the conflict between universal human rights and diverse human moralities in more detail and then suggest a way out of it. In order to explain my suggestion I will also have to say something about the nature of moral relativism.

2. The issue of content and the issue of justification

Both, the issue of content and the issue of justification, are large issues, and I don't want to settle any disputes in these domains within the confines of the present paper. Nonetheless, I have to register some convictions of mine concerning these issues in order to make my account of the issue of universality intelligible. Let me start then with the issue of content.

3 One might think that there is a fourth project worth pursuing in the philosophy of human rights: the project of clarifying the *status*, i. e. the objectivity or otherwise, of human rights. But since the status of all norms and values needs clarification this project, in my opinion, is not specific to the philosophy of human rights. It is rather a project within general metaethics. For my own metaethical position cf. Ernst 2008.

Like many other philosophers I don't think that conceptual analysis will help us much when it comes to answering the question of what human rights are. Probably it is part of the concept of a human right that it is a right you have in virtue of being human. But this does not get us anywhere. Maybe the concept of human rights even includes the concepts of certain more specific rights. For a policeman, it might be conceptually confused to say things like: "Yes, I know that Peter has human rights (in the moral sense), but there is no reason whatsoever not to torture him just for the fun of it." Still, this, at most, gives us a small list of more specific rights. Almost any dispute about the content of human rights, for example the dispute about whether social or group rights are human rights, cannot be answered with conceptual means alone. Someone who claims that it is not a human right to be protected against severe poverty might be wrong, but I very much doubt that he is subject to conceptual confusion.

What we have here is a phenomenon quite familiar from other moral concepts. Maybe it is part of the concept of social justice that everyone should be given her due. But that is neither here nor there when it comes to disputes about the nature of justice because what is at issue in these disputes is precisely what everyone's due might be. And this is a normative rather than a conceptual question. Or rather: This is a normative as well as a conceptual question. What is called for here, I think, is a conception of justice that is suited to figure in our best normative theories. The question is therefore simultaneously what the best normative theory is and what concepts we need in order to construct it.

I can't argue for this claim in detail here, but the picture I have in mind is this: In science we mould our concepts so that they are well-suited to figure in the best scientific theories we have. To give a trivial example: It is a good idea not to count whales among the fish because this would make a mess of zoology. We find an adequate conception of fish not by conceptual analysis, but by formulating biological classifications and by developing concepts fit for the task. Something very similar, I think, is or should be our method in ethics. We formulate normative theories and we specify the concepts we need for this. What justice is and what human rights are is only partially determined by the concepts we have in virtue of being competent speakers of the English language. It is rather within the framework of a normative theory that these concepts get their adequate specification.[4]

4 Compare Carnap's "Begriffsexplikation" (Carnap 1959, 15) and Rawls's meth-

What would be an adequate specification of the concept of human rights? I don't venture to say. The only thing I will assume in what follows is that it is a bad idea to use the term "human rights" more or less synonymously with the term "moral rights". If the concept of a human right can do any work in a normative theory at all it should be more specific than that. It must not comprise the whole of morality or even the whole of ethics. Jack Donnelly, for example, is right when he says: "Most good things are not the objects of human rights" (Donnelly 2003, 11).

James Griffin, for instance, tries to specify human rights as rights which protect human agency (Griffin 2008). This is an important but not the only function of moral rights, and so human rights claims are a proper subset of all moral claims for him. In my opinion, this is as it should be. Maybe Griffin's conception of human rights is still too inclusive. He includes some moral claims on a private level as human rights claims. Many philosophers reserve the term "human rights" for the moral sphere generated by the relation between an individual and a political authority. They think that the concept of human rights belongs not so much to a moral theory for individuals but rather to normative political philosophy. There is an "official" dimension to human rights (cf. Pogge 1995). I don't want to take sides in this dispute. I simply want to say that both parties are right in not making human rights identical with moral rights.

On the other hand, there is a tendency to make the concept of human rights all-inclusive. The reason for this, I think, is obvious. Human rights talk is not only important for normative ethicists. The concept of human rights is a political and legal concept as well – and a very powerful concept at that. Nobody within the international community can afford to simply neglect human rights claims. Therefore, whatever you manage to include among these claims has a very strong standing. If you can convince everybody that social justice is related to human rights, it might be much easier to enforce social justice on a legal level. Still, enforcing rights is not the task of a philosopher. From a theoretical point of view it is always better not to mix up different things. "Nothing is gained by confusing human rights with justice, fairness, limited government, or any other values and practices" (Donnelly 2003, 87). Indeed, conceptual clarity is lost. Hence, in moral philoso-

od of "reflective equilibrium" (Rawls 1973, 20). For a more detailed account of my moral epistemology cf. Ernst 2008, ch. 3.4.

phy, we should reserve the term "human rights" to designate a proper subset of moral rights. And, of course, we should emphasize that there might be other moral rights which deserve to be taken seriously, maybe just as seriously as human rights when it comes to designing political or legal systems. This point will be important later on.

Let me turn briefly to the issue of justification. I want to say even less concerning this issue than concerning the issue of content. The only thing that is important for what is to follow is that human rights claims are usually considered to be very fundamental moral claims. Therefore, there isn't much leeway for justification. Justification can only proceed from the more fundamental to the less fundamental. Actually, I doubt that there is any leeway at all to give a proper justification of human rights. As soon as the basic content of human rights is made clear, for example as rights the purpose of which is to protect human agency or as rights the purpose of which is to preserve human dignity, you will hardly find anything more fundamental to justify those rights. Why is it a good thing to protect human agency or to preserve human dignity? It just is. That is where the spade turns. Of course, if you don't think that human rights are basic moral rights, you can justify them, maybe by pointing to their utility for advancing the greatest happiness for the greatest number. But I don't think that this will do justice to the content of human rights. As usually conceived these rights have moral authority in their own right and not just as means for some purpose or other. Hence, there is a dilemma concerning the justification of human rights: Either these rights are basic moral rights or they are not. If they are, you cannot justify them with something more fundamental. The only thing you can do is to clarify or rather specify their content. If, on the other hand, they are not basic, it might be possible to justify them. But then it will be difficult to maintain that human rights have moral authority in their own right. And this seems to be part of their content.

Nonetheless, I don't want to put too much emphasis on this. As I said already, specifying the content of human rights and building a normative theory go hand in hand. Therefore, the issue of content and the issue of justification are deeply intertwined. What I would call specifying the content of human rights, some philosophers may want to call a justification of human rights.[5] Nothing important hinges on this.

5 And they might point to the possibility of anti-foundationalist, coherentist

The upshot of this first section, then, is this: I take human rights not to exhaust the whole of morality but to be fundamental moral rights the specific content of which depends on the normative theory in which they figure. This sets the stage for the issue of universality to which I shall now turn.

3. The issue of universality

The purpose of a normative theory is to give a *systematic* account of what to do. It tells us not only what to do but also *why* we should do what we should do. It states the norms which should guide our actions, and it makes perspicuous which of these norms are basic and which are derived from more fundamental norms. It is the philosopher's task to formulate normative theories. But something very similar to a normative theory exists even before the philosopher sets to work. We all have a more or less considered opinion about what is and what is not important when it comes to deciding what to do. That is to say: Each of us has what I will call a *moral code*. The difference between a normative theory and a moral code is that the former is, while the latter is not, explicit, well thought through, consistent, comprehensive, etc. Nonetheless, it seems to me to be justified to say that in having moral codes we all possess something approaching a normative theory. Moral codes are proto-theories, as it were, and they provide the starting point for the (hopefully) more sophisticated normative accounts of the philosopher.

It is much more problematic to say that a society as a whole or a culture, whatever that might be, has something like a normative theory as well. Whose moral opinions, for example, are relevant in determining what the moral code of a society looks like (cf. Moody-Adams 1997)? Still, there seem to be differences in moral opinion that transcend differences in moral opinion among individuals. It has often been said that there is a difference between Western and Asian values, and this difference seems to be more than a difference between some members of Western societies and some members of Asian societies. There seems to be a difference in the way the individual moral codes of people are structured in different societies. It is the task of empirical

forms of justification. Thanks to Jan-Christoph Heilinger for reminding me of this.

sciences to investigate these differences, and I think there are indeed significant results available from empirical psychology which show that there are fundamental differences in the way people organize their moral codes (cf. Schwartz 2004).

If human rights do get their content from the normative theory they figure in, and if different societies accept different normative theories (or something near enough), different societies have more or less different conceptions of human rights. It might even be the case that what we call "human rights" does not figure in the moral codes of some societies at all. Of course, it is very unlikely that there is any society in which there are no norms whatsoever concerned with the goods protected by human rights. But it might very well be the case that these goods are not protected by subjective rights in the way they are according to our moral code (cf. Donnelly 2003, ch. 5).

For example, to torture the innocent seems to be prohibited by any moral code. So there probably is an "overlapping consensus", as Rawls has called it, and this consensus is the reason why almost anyone can accept and does accept the Universal Declaration of Human Rights. From the politician's point of view this might even be good enough. When it comes to enforcing human rights as legal rights it may not matter much if there are differences in the justification of those legal rights. Different moral codes with different conceptions of human rights, or maybe even without a recognizable conception of human rights, might be suitable to justify similar legal systems. But from the normative ethicist's point of view a problem remains: Not everyone can be right about the proper justification of those legal rights. Pointing to shared legal norms or even to a middle level of moral norms everyone can accept does not make the conflict between moral codes disappear: The shared legal norms might be accepted for very different reasons within different societies. The "overlapping consensus" is a political rather than a moral consensus. In fact, diversity begins at home. There are considerable differences in the way a communitarian, a social democratic liberal and a libertarian conceives of human rights. Even if they reach similar results concerning adequate legal prescriptions (which they often do not) there is a very real conflict on the level of moral theory. The farther you stray from home the deeper this conflict becomes.

So from the point of view of the normative ethicist we are confronted with two options. Either the moral codes of some, maybe many, societies are seriously defective (because they don't give pride of place to human rights as conceived by us), or human rights in our

sense are not universal after all. Neither option seems to be particularly attractive. It seems to be implausible to assume that our Western culture has a privileged access to moral truth. On the other hand, it seems to be morally repulsive to assume that human rights are not universal. We are in a quandary here.

There are several strategies available to deal with this issue of universality. Some philosophers just bite the bullet and maintain that some or even many societies are seriously wrong about the essential nature of human rights (even if they accept them as legal rights). As moral claims human rights may have been discovered by members of Western societies. But now that they have been discovered, everyone should accept them. The situation is similar to that in the sciences. Quantum theory was developed mainly by European physicists. Nevertheless, it is not a European theory or a Western theory. It is just part of the best physical theory we – that is: mankind – have today. Every rational scientist should therefore take it as the starting point of further investigations. Likewise with human rights: Maybe someday we will even have a better normative theory than we do today. But for the time being human rights figure in the best normative theory there is. Therefore, every rational philosopher should accept these claims as a starting point for further investigations. Even if it sounds arrogant, concerning the moral codes of other societies we have to say: "Sorry! We are right and you are wrong."

This would be an extreme strategy. I don't want to deny that there is progress in moral theory. I am even quite sympathetic to the idea of moral discoveries. But what could justify the claim that the moral code of Western societies is or approaches the best normative theory we have today? What reason is there to think that Western normative thinking is more advanced than, say, Asian normative thinking? Surely, the case for claiming privileged access to moral truth would be a very difficult one to make.

But what is the alternative to saying that the moral codes of other cultures are seriously misguided? Moral relativism seems to be the answer. Before I turn to arguing that it is indeed the correct answer, I have to explain in a bit more detail what moral relativism is.

4. Moral relativism[6]

In my opinion the discussion about moral relativism has been befuddled by the fact that at least three different *kinds* of positions are called "moral relativism".[7] Although many philosophers accept the distinction between descriptive, metaethical and normative moral relativism, when it comes to arguing against moral relativism people tend to run the arguments for and against each form of relativism together. So let me start by stating as clearly as possible what moral relativism is and what it is not.

Descriptive moral relativism is relatively easy to characterize. A descriptive moral relativist holds that different societies, different cultures and/or different social groups, etc. accept fundamentally different moral codes. It is important to emphasize that the conflict between these moral codes really has to be fundamental. Of course, different circumstances demand different norms of conduct. (It would be cruel for me to put out my parents on an ice floe; it might not be cruel for Nanouk to do so.) The only interesting difference between normative systems is a difference in the very roots. If descriptive moral relativism is true, there is a difference in *basic* values or norms. As soon as this is pointed out, it becomes far from obvious that descriptive moral relativism is a tenable position. It takes sophisticated empirical research to prove the point. Nonetheless, most people seem to accept descriptive moral relativism in a more or less extreme form, and so shall I.

What is metaethical relativism? The metaethical relativist provides answers to the four main metaethical questions. These are: Firstly, are there moral truths or facts, and if so what is their nature? (This is the metaphysical dimension of metaethics.) Secondly, what is the nature of moral beliefs? (This is the dimension of philosophy of mind and the theory of action.) Thirdly, is there moral knowledge, and if so what is its nature? (This is the epistemological dimension of metaethics.) Fourthly and finally, how can we analyze the meaning of moral sentences? (That is what philosophers of language ask.) The most straightforward form of metaethical relativism – there are more sophisticated forms like truth relativism (cf. Kölbel 2004) – can be characterized by a seman-

6 This section partly coincides with Ernst 2011.

7 In the context of the human rights debate not only foes but even friends of moral relativism often don't bother much with a differentiated characterization of this position; cf., e.g., Rorty 1993. There are, of course, praiseworthy exceptions; cf. Tesón 1985.

tic thesis. From this semantic thesis it is then easy to derive answers to the four metaethical questions (cf. Ernst 2006). A typical metaethical relativist could endorse the following thesis:

> The sentence "Everyone should have a fair trial" has the same (context-dependent) semantic content as the sentence "According to the moral code of my society everyone should have a fair trial".

The semantic content of the second sentence is context-dependent for obvious reasons: It contains the indexical expression "my". Therefore, its semantic content is speaker-relative (cf. Streiffer 2003, 3–6). Accordingly, this kind of relativism is often called "indexical relativism". In my example moral claims are relative to the moral code of the speaker's society. Different forms of relativism ensue if we consider the moral code of the speaker's culture, tribe, social class, etc. as relevant. Answers to the other three fundamental metaethical questions immediately follow from the semantic thesis of the metaethical relativist. This need not concern us here. Let us turn to normative relativism instead.

It is not at all easy to characterize the position of a normative relativist. Often the only claims that are considered as pertinent here are either truistic (and therefore not worth discussing) or clearly false (and therefore not worth discussing either). I will try to do a little better. Just like any other normative ethicist, the normative relativist tells us what to do, i. e. which kind of action is right or wrong. And, of course, he wants to answer the question what to do for *every* person and for *every* situation in which it might arise. At least in this respect he makes a universal claim, and you can hardly blame him for that because making a universal claim in this sense is what proposing a normative theory amounts to. If you want to say that normative relativism is inconsistent because there is a universal claim at its heart, in my opinion this only shows that your terminology is defective.

As a normative relativist one adheres to the principle that the context of an action determines whether that action is right or wrong. It is difficult, though, to say precisely which aspects of the context are relevant here. That there *are* aspects of the context which make an action right or wrong is quite uncontroversial, and not a relativistic thesis at all. Obviously, it is, for example, only right to guide a blind man across the street if the blind man *wants* to cross the street, at least ceteris paribus. What he wants to do is a crucial part of the context in this case. The thesis, on the other hand, that *every* aspect of the context is relevant for the rightness or otherwise of an action is not a relativistic thesis ei-

ther. No-one wants to say that. So, the normative relativist claims that aspects of the context that the universalist takes to be irrelevant make an action right or wrong.

It is quite tempting at this point only to consider forms of normative relativism that are obviously untenable. An *extreme* normative relativist, for example, might claim that it is always right to do what is right according to the moral code of the society one lives in. This is cavemen relativism, as it were. A universalist would surely deny such a claim, but any sensible normative relativist should do likewise. He has to make room, for example, for criticism of one's own society. But as soon as the relativist improves his moral theory the universalist might claim that he has given up on relativism. So the crucial question is this: What is the specific point the normative relativist wants to make? I can only make a tentative suggestion here: In my opinion, the important insight of normative relativism is that there is a deeply contingent element in every acceptable normative system. What is and what is not important and valuable in our lives depends on decisions we make (and sometimes even on decisions which are made for us, by circumstances or other people), and these decisions are not forced upon us by reason alone. Such decisions, I take it, provide a context which is relevant according to the relativist but not according to the universalist. According to the utilitarian, for instance, what is valuable in life is maximizing utility, let's say: pleasure. This does not depend on what we decide. The relativist, by contrast, takes our decisions to be decisive when it comes to determining what is valuable for us. I will try to make this idea clearer in section 6.

Let me finish this section on moral relativism with an important corollary: Normative relativism is independent of metaethical relativism.[8] One can even be an adherent of cavemen normative relativism while being a metaethical objectivist. The normative relativist need not believe that the sentence "Everyone should have a fair trial" means "Everyone should have a fair trial according to the moral code of my society" (although he can do so). In particular he can take his own main thesis to be a totally objective moral truth. In what follows I will assume that the normative relativist by default is a moral objectivist in this sense.

8 I have argued for this independency thesis in detail in Ernst 2011.

5. The relativist's solution to the problem of universality

Let us return to our quandary concerning the universality of human rights: On the one hand, different societies have different and mutually incompatible moral codes. On the other hand, there is no reason to assume that one society – our own – has privileged access to moral truth. So, concerning human rights claims we have a problem: If there are universal human rights in our sense many moral codes are defective, i. e. we do have privileged access to moral truth in this. Or human rights are not universal after all. Prima facie, both options are unattractive.

Given our description of moral relativism we can see that the metaethical relativist suggests one way out of that quandary, while the normative relativist suggests another. The metaethical relativist basically rejects the first premise of our argument. He maintains that, contrary to first appearances, different conceptions of human rights (or even the lack of such conceptions) in different societies are not really incompatible when properly analyzed. When we say that human rights claims are universal, according to the metaethical relativist we say something like: "Human rights claims are universal according to the moral code of our society." And this is true. When some member of a different society says that there are no human rights, at least not in the Western sense of the term, she might be equally right because what she is really saying is something like "There are no human rights according to the moral code of my society." Everyone can be right. Hence, we need not assume that anyone has privileged access to moral truth.

Unfortunately, the price we have to pay for this solution to our problem is exceedingly high. Everyone, indeed, can be right. But noone is right about what she thought she was right about. It may be true that human rights are universal according to the moral code of our society. But this, I think, was not what we wanted to say. We wanted to say that human rights are universal – full stop. Or, to put it differently: We wanted to say that human rights are universal according to our moral code *and* that our moral code is the right moral code. According to the metaethical relativist all of this does not even make sense. If we want to say that human rights are universal – full stop – we are like someone who wants to say that Big Ben is on the right hand side of the river Thames – full stop. There is no such thing as being on the right hand side of the river Thames without any perspective being specified.

And according to the metaethical relativist, there is no such thing as a moral truth without any moral code being specified either.[9] In my opinion the metaethical relativist throws out the baby with the bath water. In trying to make everyone right in moral matters he really abandons the idea of being right in moral matters.[10]

The normative relativist pursues an altogether different strategy. He takes the different moral codes of different societies at face value (at least if he is an objectivist, which I have assumed). There really is conflict, then, and therefore not everyone can be right. But everyone, of course, can be wrong. When the member of a Western society claims that everyone should honor the human rights of everyone and a member of an alien society claims that no-one should honor the human rights of anybody (because there are no such rights), both can be wrong. And that's basically what the normative relativist claims. But, again, this looks like throwing out the baby with the bath water. We wanted to deny that one society has privileged access to moral truth. And what we have now is that no society at all has access to moral truth. But the normative relativist not only sees everyone at fault. He also thinks that everyone is right about something essential as well: According to him, everyone is seriously wrong about the *scope* of his own moral code although everyone could be right about its *content*.

I think this is the basic idea behind even the form of normative relativism I dubbed "cavemen relativism". Our cavemen relativist claims that it is right to do what the moral code of your own society demands. That is to say: The moral code of every society is right but it applies only to the members of that very society and not to everyone else. This is a very crude position because it fails to make room for criticizing the moral code of your own society, it might not even be fully consistent because it might lead to contradictory prescriptions when it comes to actions affecting different societies, and so on. All of this has to be kept in mind when formulating a decent form of normative relativism.

9 What about the moral code itself? Can it be true or false? – According to the metaethical relativist a moral code cannot be a system of moral truths (or falsehoods) because there are no such. So, surely, it has to be given in non-normative terms, as a system of sanctions for example.

10 I discuss more problems for the metaethical relativist in Ernst 2006 and 2008, 103–114.

And I cannot do so now.[11] But still, I think basically normative relativism is on the right track, and I now want to indicate why.

6. Moral diversity

The normative idea behind normative relativism is, or at least should be, the claim that every society, just like every individual person, is entitled to pursue a moral project, as I will call it, and this involves a genuine decision about what is valuable and what is not. Let me explain this idea by way of an example.

Consider the following question: Is friendship more important than intellectual achievements? I don't think that there is an answer to this question. You can decide to live a life in which spending time with your friends is much more important than developing your intellectual skills. But you might just as well decide to live a scholarly life which does not allow you to have an extensive social live and to maintain many friendships. (Of course your talents might speak in favor of one option rather than the other, but maybe you are equally well-suited for both kinds of life.) It might be that a life without friends or a life without intellectual achievements is a poor life. But, to a certain degree, you can make up for the loss of one good by realizing another. Not everything that is worth pursuing in a life can be pursued. Life is short. And so we have to make a choice. What is important in our life depends of which life we choose. And we can do so within a wide range of options without being irrational. To be sure, if you choose a life of watching daytime TV over a life of friendship or intellectual achievements, you are making a mistake. But there are also many rational options available for anyone. – I would like to emhasize two points here. The first one is this: What is and what is not important in our life depends, to a certain degree, on our decision. The second point worth noting is that these decisions are not themselves determined by reason alone. They can be (partially) a-rational, as it were, without being irrational.

I think that pretty much the same considerations apply to whole societies. There are many values we can realize only in society. We are social animals after all. But just like in individual life, each society can and has to decide which values it wants to realize and to what degree.

11 But cf. Ernst 2009. See also Scanlon's benign relativism (Scanlon 2000, ch. 8) and Wong's relativism (Wong 2006).

And there is leeway for different decisions. To provide a simple example: Personal security and personal liberty are both valuable things to have in a society. But they are, to a certain degree, mutually exclusive. In order to maximize personal security you often have to limit personal liberty, and vice versa. A society without personal security or without personal liberty is not worth living in, but again, within certain limits, you can make up for a loss of one value by realizing the other. And just like in the individual case there might not be any compelling reason to choose one way rather than the other. What is important in a society nevertheless depends on such a-rational decisions. These decisions define a moral project for a society. More often than not these decisions are not made as the result of extended social deliberation. Rather they may be implicitly established by contingent historical events. Neither a moral project in a society nor our plan of life are totally under our control.

The normative moral relativist can capitalize on these thoughts. He should not maintain that it is right to do whatever is considered right by the society one lives in. But he can maintain that it is right to participate in the moral project of one's own society (or, if that is an option, to change societies) if the moral project is itself morally acceptable. And there might very well be different and mutually exclusive but still morally acceptable moral projects for a society, just as there are different and mutually exclusive but still morally acceptable ways to live one's life. A society can choose among those projects without being irrational (or immoral). Just as in the individual case, what it is right to do depends on such choices. There is, therefore, a deeply contingent element in the moral code that should govern our behavior, and this is what the normative relativist wants to emphasize.

If this is plausible, and I think it is, there might be some relativity even with respect to human rights. To honor human rights can be and is part of the moral projects of most human societies.[12] But it may not be part of the moral project of every human society. And, at least in principle, this might not be a sign of the moral depravity of that society. If there are things worth realizing that balance out the

12 Cf. Donnelly 2003, ch. 6. This, of course, is not to say that human rights are *in fact* honored properly in most human societies. But this, I think, is due to the fact that most people (individually and collectively) are not living up to their own moral code. In violating human rights, a corrupt regime, for the most part, is not acting in accordance with the moral code of any society!

lack of human rights, a society without human rights in our sense might be acceptable. It is, of course, hardly imaginable that the main goods protected by human rights do not form part of the moral project of a morally acceptable society. But it is imaginable that these goods are not protected, for example, by subjective rights but rather by other moral norms. And there might even be leeway for a trade-off between those goods which are and those which are not protected by human rights in our society. Human rights, as James Griffin puts it, are resistant to trade-offs, but not too resistant (Griffin 2008, ch. 3). And if there is room for trade-offs, there is room for different moral projects with respect to human rights. One should contribute to the moral project of a society because this is the only way to realize some goods. But if there are different and mutually exclusive moral projects, this does not entail that everyone has to honor human rights in the same way.

I have to admit that my way of dealing with the issue of universality is highly theoretical. There *might* be morally acceptable moral projects which do not honor human rights in the way we do. Whether there really are such projects depends on the results of a comparison between different moral projects. This kind of comparison is very difficult indeed. It is so hard even to understand the moral projects of alien societies, let alone evaluate them. But trying to do so is the only way to honor human rights and moral diversity at the same time.[13]

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