

## ***Human Rights: A Modest Proposal\****

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### **ABSTRACT**

Human rights have become an enormously useful tool in our time, and this for a variety of reasons. Useful, yes: but are rights real? I propose first to examine the most significant philosophical attempts to justify human rights. A universally justified conception of rights I call ‘robust,’ since a successful rational justification would fully underwrite the real existence of rights. Alas, we have no such justification; the second part of my remarks sketches devastating objections to each proposed justification. But all is not lost for rights: a new pragmatic justification for rights talk is available, one that is modest. On the modest view rights are real; but then we should like to know whether rights are as useful as they are on the robust view. Not as useful, no; but a real tool of some use is superior to a fictional tool of putatively great use.

### ***1. Introduction***

Human rights have become an enormously useful tool in the last century, and this for a variety of reasons. Rights remain a moral bulwark against an overzealous utilitarianism: where the many would sacrifice the one, rights give reason to protect the one. The logic of cost and benefit is siren song to bureaucrats and administrators, promising an overly easy commensuration of conflicting values, lives, and choices. Rights talk can prevent grave moral harms from being swept under the rug of the ‘costs’ of some favored policy.

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\* For helpful comments and discussion, I am grateful to Jim Rice at Lingnan University, Hong Kong, to the participants of seminars at National University of Singapore, Singapore Management University, Chulalongkorn University (Thailand), Hong Kong University, and Hong Kong Baptist University, and especially to Peter Baehr at Lingnan University, who helped me clarify the structure of the argument. The research in this paper was supported by a Fulbright Grant.

In their political conception, human rights help us understand and normalize legitimate relations between nation states and their citizens. The language and logic of ‘collateral damage’ — a polite term for the allegedly unintended destruction and murder that would pass for a side effect of modern military actions — threatens to undermine a respect for persons, hiding them in blighted post-traumatic landscapes. Rights talk helps us identify such violations. The growing literature on human rights serves also as a guide to international relations, the cultivation of treaties, and the rhetoric of diplomacy. Concern grows worldwide about the effects of pollution, child labor, and related harms to people and their environments, in both developed and developing nations. Rights talk can be a useful propaedeutic to the resolution of such disputes.

Useful, yes: but why think rights are real? I wish to explore the question of how to justify rights. With so many competing theories of rights, it is a fool’s errand in a short space to try to address this question in all its complexity. Instead, I propose first to examine the most significant philosophical attempts to justify human rights. A *universally* justified conception of rights I call ‘robust,’ since a successful rational justification would fully underwrite the real existence of rights. Alas, we have no such justification; the second part of my remarks sketches devastating objections to each attempted justification. But all is not lost for rights: a new pragmatic conception of rights talk is available, one that is modest. Its modesty appears in declining to think that a single, universal argument can do the job and in refusing to assume a standpoint of universal rationality. The justification of rights takes place piecemeal and in a context of dialectical inquiry, and it is impossible to say in advance how that inquiry will go. I will not try to provide yet another robust justification of rights here — such an attempt would undercut my thesis that no such justification can succeed. Instead, I propose a picture of what resolving disputes about rights can look like once we abandon the standpoint of universal rationality. I am characterizing modest rights debates, not resolving them.

On the modest view rights are real; but then we should like to know whether rights are as useful as they would be if the justification could be robust. Not as useful, no; but a real tool of some use is superior to a fictional tool of putatively great use. My conclusion might disturb the friends of rights; but those friends ought to moderate their notion of what rights talk can do. My conclusion might also disturb the opponents of rights; those opponents might seek to justify oppression or discrimination, which rights talk can resist. The justification of rights is modest, not robust, and the

sooner our rhetoric takes account of that fact, the more adequate it will be to its tasks.

## *2. Robust View*

The human rights I will address are *moral* rights, not conventional. Conventional rights such as legal or political rights are those that some system of rules grants to some individuals. Legal systems grant rights to citizens and residents of the territory to which those systems apply. Political rights, such as the right to vote, are similarly granted to individuals in virtue of their meeting such criteria as age and residency. Rights to make and enforce contracts are also conventional rights. The central feature of moral rights, then, is that individuals hold moral rights independent of what other rights (if any) a legal, political, or other rule system might grant them. Moral rights are not granted rights; if not different in kind from conventional rights, moral rights must have a ground or justification independent of conferral by some system of rules. A political right can coincide with a moral right, for example if we have a moral right to education and a government explicitly legislates such a right. But the rights are still distinct: whatever grounds the moral right is distinct from, and conceptually prior to, the acts of government that confer the political right.

Nothing in my argument hangs on whether human rights are alienable, forfeitable, or prescriptible. My right is alienable if I can voluntarily relinquish it. My right is forfeitable if I can lose it involuntarily as a result of some wrongful act. My right is prescriptible if some third party can take it away from me, with or without my consent. On some accounts of human rights, some rights are alienable: for example, you might give up your right to an education at state expense in order to take a high-paying job in sports. Similarly, on some accounts a right might be forfeitable: my right to vote might be forfeit in case I commit a felony. And again, on some accounts a right might be prescriptible, as when a right to due process is suspended in wartime. I mention these rights as illustrations only; any list of human rights is controversial, and I will not need to endorse any particular list.

Human rights are *unconditional* and *high-priority*.<sup>1</sup> A right is conditional just in case the right holder must meet certain conditions (such as age, residency, occupation) before holding the right. Many conventional rights are conditional in this way. Human rights are unconditional, except in the minimal sense that one must be human to have them. Human rights are also high-priority inasmuch as they cannot easily be overridden by countervailing considerations, such as expense, inconvenience, or national security. If a theory permits human rights to conflict, then it owes an account of how such conflicts can be resolved. The point of calling a right high-priority is to emphasize that it is difficult, though not impossible, to override a rights claim.

Human rights are *universal*, in that they apply to all nations and all their citizens.<sup>2</sup> These rights are thus not culturally specific or culturally relative. They are not conventional in any way that would make cultural differences relevant to the assignment of rights. Human rights as treated in international law do, however, have a historical limitation. Many rights documents confer rights that would be silly if thought of as trans-historical: due process rights, for example, presuppose modern judicial systems. So whereas we might agree that slavery as practiced in ancient Greece violated a basic liberty right of the slaves, it would be odd to claim that their enslavement violated their due process rights. Still, many philosophical treatments of human rights apply them trans-historically as well as trans-culturally.

Human rights might include individual or group rights, though most accounts make individual rights basic. They might concern security, liberty, or welfare. They might protect freedoms, political participation, or due process. I leave open the substance of human rights, or the question of what human rights are rights *to*. Human rights talk is generally relevant in the context of relations between states and their individual citizens, but it might also apply in other contexts; I will not restrict its applicability. Human rights might or might not be Hohfeldian bundles (claims, liberties, powers, or immunities).<sup>3</sup> They might be negative or positive or some of each. Since the

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<sup>1</sup> These terms and the treatment of them here come from James Nickel's entry on 'Human Rights' in the Stanford Encyclopedia of Philosophy (<http://plato.stanford.edu/entries/rights-human/>).

<sup>2</sup> See Nickel, 'Human Rights.'

<sup>3</sup> See the classic discussion of rights in Wesley Newcomb Hohfeld, *Fundamental Legal Conceptions As Applied in Judicial Reasoning*, Yale University Press, 1919. Hohfeld was, of course, discussing legal rights and not moral rights; yet many of his fundamental distinctions have been carried over into discussions of moral rights. See especially Joel

dispute is about rights and not the substance of rights *per se*, nothing that I will say hangs on deciding substantive issues one way or another.

A central feature of human rights, however, is that they require *justification*. We should not follow the authors of the Declaration of Independence in thinking that rights are ‘self-evident’: human rights are widely disputed around the world, and such disputes give the lie to claims of self-evidence. The friends of rights claim that these justifications are robust and once-for-all.<sup>4</sup> Universal justifications of human rights fall into four primary types.

### 3. *Natural rights justification*

One approach to justifying human rights regards them as natural. Natural rights are built into human nature, perhaps having a ground in creation by a divine power. A curious feature of theories of natural human rights is that the proponents of these theories often fail to address the sense in which the rights are natural.<sup>5</sup> One kind of moral intuitionist might insist that natural rights are *sui generis* properties of human beings. On such a view, it is simply a brute fact about human beings that they have human rights. A more satisfying defense of human rights in this tradition will tie moral rights to the possession of a natural property (or bundle of them). Sumner defines a natural rights theory as ‘any moral theory which contains rights whose criterion is natural, and natural rights are any such rights.’<sup>6</sup> The details of such a theory need not detain us: it turns out that we have good reason to deny that any naturalistic approach to rights will provide sufficient justification of the robust view.

Beyond natural rights theories, the most common philosophical approaches to the justification of rights are the transcendental, contractarian, and utilitarian approaches.

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Feinberg, *Rights, Justice, and the Bounds of Liberty: Essays in Social Philosophy*, Princeton University Press, 1980.

<sup>4</sup> Nickel claims that human rights must have a robust justification, though he says that such justifications need not be ‘irresistible’; see Nickel, *op cit*.

<sup>5</sup> L. W. Sumner says, ‘Furthermore, it is a curiosity of the modern debate that only scant attention has been given to the question of what makes such rights *natural*.’ See *The Moral Foundation of Rights*, Oxford University Press, 1987, p. 94. Even the so-called classical writers on natural rights said little about why the rights were natural.

<sup>6</sup> *Ibid.*, p. 103.

### 3.1. *Transcendental justification*

A prominent recent friend of rights is Alan Gewirth. He has argued for basic human rights to freedom and well-being on the grounds that these are ‘necessary goods’ that constitute ‘the generic features of successful action.’<sup>7</sup> Gewirth makes two fundamental moves: first, each of us must possess an individual right to freedom and well-being, and second, each of us must accept that everyone else has these rights to the same degree as ourselves. It follows that universal moral rights, or human rights, exist (CR, 17).

Gewirth defends the first of these claims with the following argument:

I do X for end or purpose E.

E is good.

My freedom and well-being are necessary goods.

I must have freedom and well-being.

I have rights to freedom and well-being.

If you reject (5), then you must reject: ‘All other persons ought at least to refrain from removing or interfering with my freedom and well-being.’

If you reject the statement in (6), then you must accept that ‘Other persons may remove or interfere with my freedom and well-being.’

If you accept the statement in (7), then you must accept that ‘It is permissible that I not have freedom and well-being.’

Since (8) contradicts (4), we must reject it, which logically commits us to accepting (5), the first of Gewirth’s main claims.

The rationale for these claims might not be transparent. Gewirth calls our attention to the generic features of action in the first two premises. Whenever I act for reasons, I aim at some end or purpose which I take to be good in some respect, and the apparent goodness of that end is at least a major component of my reasons for acting. (3) follows from the fact that ‘freedom and well-being are the proximate necessary conditions of the agent’s acting to attain any ... purposes and thus any goods’ (CR, 17). ‘Well-being’ here refers merely to minimal conditions of being a person capable of acting in the world. Clearly, in order to be such a person, I must be at least somewhat free to choose my actions and I must be sufficiently well to act on such choices. Gewirth has identified minimal conditions of rational agency.

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<sup>7</sup> Alan Gewirth, *The Community of Rights*, University of Chicago Press, 1996, p. 18. Subsequent references to this text cite CR.

The move from (4) to (5) is the most controversial in the argument, and we shall return to it below. The remaining premises of the argument represent a *reductio* intended to support the inference from (4) to (5). To compromise freedom or well-being is incompatible with our own agency: to will that those conditions may be removed or interfered with would be to contradict ourselves in our every action. Hence, I must accept that I have a right to freedom and well-being. The argument is transcendental in that it defends rights as a condition of the possibility of human agency.

Yet this individual right falls short of being a universal moral right. The argument for the second main claim extends this conclusion to every human being. Every person must accept (CR, 18–19):

I have rights to freedom and well-being because I am a prospective purposive agent.

It follows that all prospective purposive agents have rights to freedom and well-being.

Act in accord with the generic rights of your recipients as well as yourself.  
[Principle of Generic Consistency]

The move from (9) to (10) is sanctioned by the fact that the ground for asserting my own rights to freedom and well-being are shared by every other human being. We are all, or nearly all, prospective purposive agents. And so we reach a principle requiring that we respect the basic human rights of others, articulated as an imperative in (11). From these basic human rights, Gewirth has gone on to derive a range of other rights, including rights to productive agency, private property, economic democracy, and political democracy. Our focus must, however, remain on the initial justification of the basic human rights which ground the others.

### *3.2. Contractarian justification*

Contractarian justifications of rights take a distinctive form. The background of the argument typically takes for granted a subjectivity about goods that is both thoroughgoing and ineliminable. Rational debate cannot settle questions about goods, and so the best we can do is reach some social consensus concerning the right (and rights). If values were objective, we would have no need to resort to a contractual procedure to agree about them: chemists never do concerning the facts of chemistry. Moral consensus is to be reached by a two step process. First, we identify an initial position from which to negotiate the contract or bargain. Second, we move by fair procedures to an agreement concerning basic principles and rights around which to organize our society. One finds this kind of argument in Hobbes,

Locke, and Kant as well as in such latter-day representatives as Gauthier, Nozick, and Rawls.

Consider Rawls's contractarianism. Rawls describes the initial position as the 'original position,' whose most notable feature is the 'veil of ignorance.' This device is designed to ensure that negotiators choose genuinely fair principles by shielding from their deliberations all contingent facts about the material conditions of their actual lives. When we are ignorant about where we stand in society, the thinking goes, we are most likely to choose principles of justice that are fair for all.

According to Rawls, the parties in the original position are both rational and mutually disinterested: they aim to do best for themselves in choosing principles of justice while recognizing that, due to the veil, in important ways they do not know who they are. The principles of justice, Rawls concludes, are those that rational individuals would choose in the original position behind the veil of ignorance. These turn out to be the principles of equal basic liberty for all and the difference principle, according to which any inequalities in society (especially but not only material inequalities) should be arranged so that the least well-off benefit from them. Both principles ground rights in Rawls's theory.

These principles of justice are well-known and require little comment from me. I will instead call attention to two features of Rawls's argument. First, the deliberations of the parties in the original position are governed by a principle of rationality (called 'maximin') that aims to secure for each of them the best worst-case scenario. Rawls assumes that people are all risk-averse in a quite specific way: that when confronted with a choice under circumstances of uncertainty or ignorance, as the parties are, all will choose in order to make the worst outcome as good as possible, thus maximizing the minimum. This is, of course, an empirical assumption that turns out to be largely false: many people are not risk averse in this way.<sup>8</sup> But this empirical issue is not the crucial difficulty with Rawls's argument, nor is it a general feature of contractarian justifications of rights. A more serious problem arises from contractarians having to specify a conception of rationality and an account of an initial position, as we shall see shortly.

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<sup>8</sup> Tversky and Kahneman have demonstrated that people have a range of attitudes toward risk; see for example *Judgment under uncertainty : heuristics and biases*, edited by Daniel Kahneman, Paul Slovic, Amos Tversky, Cambridge University Press, 1982. Rawls arbitrarily dismisses this range of attitudes as being 'special psychologies' outside the scope of his argument; see *Justice as Fairness : A Restatement*, edited by Erin Kelly, Harvard University Press, 2001.



The second feature of Rawls's argument is that the parties in the original position take for granted a list of 'primary goods' which they seek to secure for themselves:

basic rights and liberties, also given by a list;<sup>9</sup>

freedom of movement and free choice of occupation against a background of diverse opportunities;

powers and prerogatives of offices and positions of responsibility in the political and economic institutions of the basic structure;

income and wealth; and finally,

the social bases of self-respect.<sup>10</sup>

These are goods which Rawls takes to be essential conditions or components of any successful human life. The Rawlsian procedure for establishing moral rights under justice takes this list for granted, and the success of the morally neutral procedure in yielding moral rights will depend partly on the correctness of this list. The agents in the original position who choose the principles of justice choose so as to secure these goods, including 'basic rights and liberties.' Rawls thus justifies human rights by appeal to what rational agents would choose behind the veil of ignorance.

### *3.3. Consequentialist justification*

Of all the major philosophical justifications of rights, the consequentialist views are the most conflicted. Consequentialism is the view that the moral rightness of acts is to be determined strictly in terms of their consequences. The consequentialist turns Rawls on his head, asserting the priority of the good over the right. As a result, consequentialism defines right action as that which yields the good, or at least the best feasible outcome. Since its earliest conceptions, consequentialism has had difficulty with the concept of rights: Bentham declares natural moral rights to be 'nonsense on stilts,' but John Stuart Mill devotes an inordinately long chapter of *Utilitarianism* to justice and the defense of rights.

A sophisticated consequentialist defense of rights comes from L.W. Sumner, who points to the distinction between a criterion of right and a decision procedure.<sup>11</sup> The former determines the best act in given

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<sup>9</sup> Rawls's treatment of basic rights as primary goods has a transcendental element to it: he defines primary goods as those required for the pursuit of any life plan whatsoever.

<sup>10</sup> John Rawls, *Political Liberalism*, Columbia University Press, 1993, p. 181.

<sup>11</sup> L. W. Sumner, *The Moral Foundation of Rights*, Oxford University Press, 1987; subsequent references to this work will cite MFR.

circumstances; but employing a consequentialist criterion as a decision procedure can require informational, cognitive, and other resources that we simply do not possess. So suppose that our criterion of right action is to maximize agent-neutral value; using that criterion to determine what we should do will require that we know: (a) all possible alternative courses of action, (b) the consequences of each alternative, (c) the likelihood of each consequence, given that we choose a specific alternative, (d) how much agent-neutral value each consequence yields, (e) the expected value of each alternative, expressed mathematically and weighted by its likelihood of occurring. The computational demands of a single choice would be staggering, and such demands suggest that straightforwardly seeking to maximize agent-neutral value is not a feasible decision procedure for deliberators like us.

Sumner argues that to take our limited cognitive position into account, we ought to constrain our decision making by respecting rights. Doing so, he argues, is a better decision strategy than straightforwardly maximizing. ‘Our rationale for endorsing this pre-commitment [to respect rights], in advance of considering particular cases, rests largely on our lack of confidence that we will be able to project costs and benefits accurately in those cases’ (MFR, 192). In other words, given our limitations, we are more likely to maximize agent-neutral value by respecting rights than by merely aiming to maximize agent-neutral value. Sumner chooses an example from contemporary bioethics to support his argument (MFR, 182-85). Institutional Review Boards (IRB’s) — the bodies that oversee the ethical propriety of scientific and medical research at North American and many other universities — typically aim to ensure that scientific research does more good than harm. This objective is recognizably consequentialist, though the practice of such boards is more akin to satisfying than maximizing. In addition, IRB’s strive to protect research participants’ autonomy rights. This concern recognizes a defeasible right in participants to informed consent. The right is defeasible inasmuch as certain forms of deception research (to pick one example) can be justified even though the participants do not sign informed consent prior to participating. Yet the right does genuine work in constraining the researchers’ pursuit of knowledge.

The conclusion seems paradoxical: constraint is maximizing. Sumner’s example helps to show why. Merely seeking to maximize the benefit-to-risk ratio might lead researchers to undertake experiments in which the risk fell disproportionately on a small number of the participants. Such research might or might not maximize agent-neutral value; that is difficult for an IRB to foresee. A direct strategy of maximizing would be demonstrably superior

to a constrained strategy only for a committee that did not share our limitations. We therefore constrain our maximizing by respecting the rights of the participants. By constraining our decision procedure in this way, we expect to realize more value in the end. Or so goes the consequentialist argument for rights.

#### 4. *Mythical Rights*

The arguments proposed above fail to provide universal rational justifications of human rights. I do not pretend to have canvassed every possible justification for human rights, or even every possible kind of justification. But I have treated examples of the most sophisticated arguments available, and most other philosophical arguments fall into one of the kinds that I have sketched. The objections that I will develop apply to the kinds, and not only to the examples.

##### 4.1. *Natural Rights Arguments*

Theological arguments for natural rights seek to justify the existence of rights by appeal to divine activity, especially in creating human beings with a fundamental dignity that human rights protect. Such arguments, to be distinctively theological, appeal to scriptural or other theological premises. Only the faithful accept these premises. Consequently, these arguments are not sufficiently robust to defend human rights on universally rational grounds. Whatever appeal theological arguments might hold for religious believers, the friends of rights usually prefer to cast their nets wider.

The objection to intuitionist arguments is that they are not arguments at all. The intuitionist insistence that human beings have universal rights is just that: an insistence, not an argument. This kind of approach fails to justify rights. Furthermore, it fails to give opponents of rights any reason to believe that rights exist at all.

But the most famous objection to natural rights theories come from Bentham.<sup>12</sup> His argument is brief: there can be no rights without rules. There can be no natural moral rules, thus there can be no natural moral rights.

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<sup>12</sup> See Jeremy Bentham, *Introduction to the Principles of Morals and Legislation*, ed. J. H. Burns and H. L. A. Hart, Athlone Press, 1970. For a recapitulation of Bentham's argument, see Sumner, MFR chapter 4.

Sumner's gloss on this argument begins by explaining that rights claims generally exist in social settings and are constrained by social rules governing who may claim a right and under what circumstances. If there are natural moral rights, then these will require natural moral rules for their application. Second, we can elucidate the premise that no natural moral rules exist by contrast with natural (that is, non-conventional) rules such as rules of arithmetic and logic. These rule systems are real and natural, but they have no distinctively moral content and thus cannot confer rights. Physical causal laws are natural, but also confer no moral rights. A consequentialist like Sumner can even recognize the existence of moral rights, yet he would deny that rights are natural. They are conventional rights that achieve a certain status in virtue of their justification by moral theory. In sum, we should accept Bentham's second premise because no one can provide non-conventional existence conditions for a natural moral rule system. A prior commitment to a religious or moral system that recognizes universal natural moral rules provides at most conventional existence conditions. Thus we have no reason to believe in natural rights. And since a robust view of justifying rights is (or would be) a universal rational justification open to all, we should deny that natural rights can meet the standard of the robust view.

#### 4.2. *Transcendental Arguments*

The transcendental argument offered by Gewirth contends that, since freedom and well-being are necessary conditions of human agency, each individual must claim a right to these as a condition of the possibility of exercising that agency. Moreover, that claim is generalizable to every other agent. We may grant that freedom and well-being, as Gewirth defines these terms, are necessary conditions of agency. Alasdair MacIntyre has argued that it does not follow that each of us has a right to freedom and well-being.<sup>13</sup> Gewirth's argument is invalid.

To see why, note that if Gewirth is right about the necessary conditions of agency, then this fact is a quite objective state of affairs, independent of one's cultural or historical setting. One must have a measure of freedom and well-being in order to act, whether or not one's language has these concepts. But I cannot claim to have human rights unless I possess the relevant concept of a universal, role-independent right. For me to claim a human right to freedom

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<sup>13</sup> Alasdair MacIntyre, *After Virtue*, University of Notre Dame Press, 1984, p. 66. Subsequent references will cite AV.

and well-being I must also inhabit a social order in which claims of this sort are intelligible utterances and concepts such as freedom and well-being are available for framing them. To assert that I have these rights even when I cannot intelligibly claim them is to beg the question: Gewirth's burden is to justify the view that these rights are universal, not to assume it.

But the objection that Gewirth has to meet is precisely that those forms of human behavior which presuppose notions of some ground to entitlement, such as the notion of a right, always have a highly specific and socially local character, and that the existence of particular types of social institution or practice is a necessary condition for the notion of a claim to the possession of a right being an intelligible type of human performance (AV, 67).

So if a society lacked the relevant concepts of universal claims, then these notions could not function intelligibly in that social order. To insist that people from such a culture must claim human rights when they lack the concepts that would enable them to make those claims is to presuppose the very universality of rights that Gewirth seeks to prove.

MacIntyre overstates the case against rights, as I will argue in the third part below. He is right to say that claim rights do not follow logically from mere necessary conditions for agency. Gewirth's robust justification fails. But it is possible to attribute claims to people who are unable to express those claims: if torture is a form of cruelty that is always and everywhere wrong, for example, then it might be intelligible to say that everyone has a right not to be tortured, even if not everyone is in a position to claim this right.

### 4.3. *Contractarian Arguments*

Contractarians regard human rights as conventional rights that have attained special status in virtue of being justified by a hypothetical agreement, in the form of the social contract. The structure of that justification always includes two moments: an initial position from which people negotiate the contract, and a set of morally neutral procedures for determining the substance of the contract.

Many difficulties attend contractarian arguments. Among those that need not detain us is concern about why a hypothetical agreement among members of society should actually bind anyone. I *might* have signed a contract to buy a car, but that fact alone does not obligate me to buy it. In fact a far more serious and devastating objection awaits the contractarian, as Sumner has pointed out (MFR, 160). For if the contractarian's goal is to justify human rights, and the procedures for determining the substance of the contract are morally neutral, then the moral content must come from

somewhere. Typically, it appears in the initial position: when it does, the justification of rights must be quite circular. Yet where no moral content appears in the initial position, it seems impossible for the procedures to justify the moral constraints imposed by recognizing rights.

This dilemma confronts Rawls, as it does every other contractarian. In his case, the procedures for determining the principles of justice and corresponding rights are those of rational choice theory, which we may grant to be morally neutral. The fairness of the resulting principles is guaranteed by the fairness of the original position. By depriving parties to the original position of any information about their actual identity and social status, Rawls intends to model impartiality with the original position. The parties seek to secure for themselves as great a share of the primary goods as they can, consistent with not knowing their identity. Since basic rights and liberties are among the primary goods, the parties will rationally choose principles that protect these rights. But the standard of fairness built into the original position by the device of the veil of ignorance itself receives — and can receive — no contractarian justification. Rational choice never justifies the impartiality and fairness of the original position; rather, Rawls installs them. Thus his contractarian justification of rights impales itself on one horn of Sumner's dilemma.

Other contractarians fare no better. Rights are moral constraints. The moral justification of these constraints must stem from the moral content of the initial position. If the initial position is not itself fair, or impartial, or equal, or otherwise morally contentful, then we cannot expect a contract generated by morally neutral rules to yield genuinely moral constraints. If the initial position has moral content, then the contract fails to justify the moral content of the constraints. In no case can the contractarian claim to have justified human rights.<sup>14</sup>

#### 4.4. *Consequentialist Arguments*

The difficulty with any consequentialist attempt to justify human rights is that it always runs the danger that respecting human rights will not in actual practice bring about the best outcome. In other words, respecting human rights might on occasion be morally wrong. Sumner's strategy seeks to overcome this difficulty in two ways. First, he emphasizes that rights are defeasible: yes, we have a right to autonomy in a medical research context,

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<sup>14</sup> Add note here about foundationalism and reflective equilibrium.

but that right can be overridden in cases where the research promises important benefits, the risk to the participant is negligible, and the researchers debrief the participants afterwards as a component of the protocol. This emphasis on the defeasibility of rights reminds us that rights function as constraints on maximizing, but that those constraints are not absolute and need not get in the way of doing the right thing.

The second central feature of Sumner's argument is his relocation of the constraint, from a constraint on what counts as the right action to a constraint on how we pursue our consequentialist goal. By having rights constrain our decision procedure rather than the criterion of right, Sumner finesses the issue about whether respecting rights can be wrong. In fact, it can be wrong, according to the criterion; but, he argues, in our cognitively limited position we will be most likely to bring about the best outcome if we constrain our choices by respecting rights. Hence, consequentialists can expect to do best in the long run by respecting rights.

But what neither of these innovative ideas can correct is consequentialism's incapacity to permit any distinction between what James Nickel calls a high-priority goal and a right.<sup>15</sup> Sumner's treatment of rights makes them a kind of high-priority goal within the consequentialist's decision procedure: we seek to protect research participants' autonomy to a great extent. And for many kinds of defeasible right, this approach will work just fine. Yet it seems to miss what Nickel calls the *mandatory* character of some rights: it is at least possible that some rights are not defeasible, or are defeasible only in certain quite limited ways, and that otherwise the claims embodied in those rights are mandatory.

Even high-priority goals can be pursued in various ways and can be deferred when prospects for progress seem dim or when other opportunities are present. Rights, however, are more definite than goals; they specify who is entitled to receive a certain mode of treatment (the rightholders) and who must act on specific occasions to make the treatment available (the addressees)... Rights are also distinctive not only in their high priority and definiteness but also in their mandatory character. It is these three features—high priority, definiteness, and bindingness—that make the rights vocabulary attractive in formulating minimal standards of decent governmental conduct. This character would be lost if we were to deconstruct rights into mere goals or ideals.<sup>16</sup>

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<sup>15</sup> James W. Nickel, *Making Sense of Human Rights*, University of California Press, 1987.

<sup>16</sup> *Ibid.*, p. 17f.

We might insist, for example, that torture is never morally justifiable; that everyone has a right not to be tortured. Such a mandatory right seems at least possible. Yet consequentialism's treatment of human rights as high-priority goals makes it impossible for anyone to have such a right. By flattening out the distinction between rights and high-priority goals, Sumner's view cannot reach a crucial corner in the conceptual space of rights.

Sumner might bite the bullet here and try to show that all rights are defeasible, but his argument suffers another serious defect. For we should notice that he does not in fact provide a consequentialist defense of human rights. Sumner offers a consequentialist defense of *respecting* rights, which is altogether different. When he shifts the defense of rights into the sphere of decision-making rather than the criterion of right, Sumner treats rights instrumentally. It does not matter on his view whether anyone has any rights whatsoever. For all he says about them, human rights might be quite fictional. It is one thing to argue that people have rights, and quite another to argue that we should treat them *as if* they had rights. Sumner does only the latter, giving us no grounds whatever for believing that people in fact have rights. This objection might not concern a consequentialist, who after all is more concerned with maximizing value. But it will concern friends of human rights who seek a robust justification of them.<sup>17</sup>

Given the structure of consequentialist moral theories, we can expect one or both of these issues to infect any consequentialist attempt to justify human rights. Consequentialists might, of course, attempt to build into their conception of value the idea that protecting rights is good; a Parfitian objective list consequentialist could do so, for example. But this move clearly collapses the space between a right and a high-priority goal, since it defines the protection of rights as a high-priority goal. On the other hand, attempts like Sumner's to provide a consequentialist defense of respecting human rights simply fail to justify their existence. Either way, the consequentialist defense of human rights fails.

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<sup>17</sup> I am grateful to Michael Pelczar at National University of Singapore for pressing me on this last point: consequentialists might wonder why the friends of rights would not be satisfied with the state of affairs in which rights are not real but society respects everyone's rights. On that view, rights talk should be strictly eliminable; I consider the value of continuing to talk about rights below.



## 5. *Modest View*

MacIntyre notes dryly that the argument for the claim that human rights do not exist takes exactly the same form as the argument for the claim that witches and unicorns do not exist: no one has provided an adequate justification for thinking that they do exist (AV, 69). That is an impossibility claim, of course, and impossibility claims are notoriously difficult to establish. I certainly will not undertake to establish it here. I have taken some of the strongest representatives of attempted philosophical justifications of rights, and shown that these attempts are subject to devastating objections that affect the entire species of argument that each represents. Defenders of these arguments strive to overcome these objections, but no such attempt to date seems as compelling as the objections. In light of these arguments, we have a strong *prima facie* case against a robust justification of rights.

I state this conclusion with some care, since I believe that human rights talk looks different once we stop seeking a robust justification of them. We could, for example, follow Jeffrey Stout in adopting what I call a modest view of justifying human rights.<sup>18</sup> Stout briefly characterizes rights this way: ‘All rights are normative social statuses. To have the status of a right is to have a legitimate claim on others for the enjoyment of a good’ (DT, 204). So far, of course, the friends of human rights can agree: the issue between robust and modest views concerns precisely the question of legitimacy.

### 5.1. *Rights holders and rights*

Stout explores the historical development of rights talk and examines the social contexts within which we determine the legitimacy of rights claims. The history of rights talk links rights claims—not initially universal human rights—to the going social order: kings, lords, serfs, parents, children, and so on all have legitimate claims in various social orders, and the claims that individuals may legitimately make depend on which roles they happen to occupy. Prior to the Enlightenment, when rights talk began to take its distinctively modern shape, rights were strictly role-specific and not

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<sup>18</sup> Jeffrey Stout, *Democracy and Tradition*, Princeton University Press, 2004; subsequent references will cite DT. Stout refers to the discussion of rights and responsibilities in Annette Baier, *Moral Prejudices*, Harvard University Press, 1994, especially chapter 11, ‘Claims, Rights, Responsibilities.’

universal: a central constituent of occupying a given role in a given social order was that one could legitimately claim some goods and that one could not legitimately claim others. Obligations were similarly role-specific. Few people have any objection to this conception of rights as the legitimate claims of social-role holders. Stout discovers the emergence of the modern conception of human rights in the emergence of a new kind of social role: that of a rights and responsibility holder as such.

Stout argues that we might have *unconditional obligations* and responsibilities of a sort characteristic of universal human rights. The example he singles out concerns torture: I have an unconditional obligation not to torture anyone. Torture is always and everywhere wrong. That certainly sounds appealing to the friends of rights: if I have such an obligation, then presumably we may acknowledge that everyone has the right not to be tortured. Stout *attributes* to everyone an unconditional obligation not to torture (and a corresponding unconditional right not to be tortured), even as he recognizes that not everyone will accept such an obligation or even understand it.

Suppose that a monk participating in the Spanish Inquisition tortures someone. Stout argues that such a monk might be quite blameless in not accepting a norm unconditionally prohibiting torture; based on all his available evidence, concepts, and norms, he might reasonably (though falsely) conclude that torture is permissible in certain instances. In this situation we should be inclined to hold the monk *justified* given his evidence, but nonetheless *wrong* about torture. That stance would be comparable to the stance we take with regard to ancient astronomical views: people might have been justified to think that the sun went around the earth, but they were wrong about it. Stout suggests that this case would be quite different from that of a contemporary dictator who used torture as part of a widespread campaign to suppress dissent and opposition. The dictator would, if ignorant of the norms that prohibit cruelty, very likely be culpably ignorant. And in that case we should condemn his actions differently, since it makes a difference if the monk could not have known better.

If Stout is right and the monk has an unconditional obligation not to torture, then the monk was wrong to do it. Yet as we have described the case, the monk *could not have known* that he was in the wrong. Stout insists that the scope of unconditional norms or obligations is universal, even though their statement and rationale is couched in the particular language of a historically situated individual.

I need not suppose that the monk (given his social perspective) would in fact be able to acknowledge the force of the reason I acknowledge. There can

be such a reason, and it can be a decisive reason when placed in the context of my collateral commitments, even if the monk and various others have no reason to treat it as such (DT, 196).

What is Stout saying? The monk has obligations of which he could know nothing, and he would not accept Stout's justification for those obligations even if he did know of them? When I recalled MacIntyre's argument against Gewirth, I raised similar considerations for rejecting Gewirth's argument. MacIntyre resists the idea of universal claims on the grounds that not every culture supports the kinds of claims that we recognize as human rights. How is it that I can regard MacIntyre's point as telling against Gewirth and yet support Stout?

The difference lies in what we should count as universal. Stout says, 'an obligation can be universal in the sense of applying (as we see it) to everyone, without requiring a supposedly universal point of view ... for its justification' (DT, 195). In this claim lies the basis for distinguishing modest justifications of rights from robust ones. The putative justifications for human rights that we have examined so far have required a universal point of view. The transcendental, contractarian, and consequentialist modes of justification are all universal in Stout's second sense, as they propose to be trans-cultural and grounded in universal reason. Stout's view of the justification of human rights is modest: he speaks of genuine universal rights, yet without giving them a robust, universal justification. MacIntyre's objection to Gewirth works because Gewirth is committed to thinking that the rights possessors themselves must assert a *universal* claim to freedom and well-being. They must therefore already possess the concept of such claims in order to make them. Nothing in Stout's view commits him to saying that the holders of human rights must claim them, and so he escapes MacIntyre's objection.

What is modest about the modest view is not the rights themselves, but rather the mode of justification we can deploy in support of their existence. The friends and opponents of human rights make the same error: they both assume that human rights stand in need of a robust justification, grounded in a transcendent, universal point of view. I have argued that the best examples of such justifications fail; but I resist MacIntyre's conclusion that these failures should lead us to deny the existence of human rights. Rather, they should lead us to question the need for such justifications. But without such a justification, how could we persuade others that human rights exist?

## 5.2. *Justifying rights*

Stout's 'universal rights without universal justification' move might seem doubly suspicious. First, Stout helps himself to the concepts of universal human rights and obligations, clearly intending for these to do some kind of important philosophical work (we will explore the work he expects them to do shortly). But without some kind of universal justification, why should opponents of those rights accept that they exist? Why should anyone? Second, Stout's approach might seem to be mere assertion: granting that no universal justification of rights succeeds, Stout now seems merely to assert the existence of such rights. But mere assertion is no argument.

We might finesse the question of the universality of norms by describing them as responsibilities attaching instead to a specific social role.

Instead of saying that unconditional obligations apply to everyone (period), we could say that they apply to all holders of the (democratically basic) role of norm user. A norm user is anyone who possesses the expressive resources to exchange reasons for and against explicit normative claims. Then democrats can be seen as committed to conscripting everyone they can into this role: the young by educating them, the foreign by offering them reasons and asking them for reasons, the dead by imagining ourselves in conversation with them (DT, 197).

Stout seems to be suggesting that we treat unconditional norms as applying in principle to anyone, or at any rate to everyone capable of giving and getting reasons. A 'norm user' is anyone who thinks about what they will do—everyone who judges right and wrong. This category is 'democratically basic' because it includes the *demos*—the people; Stout observes that a constitutive element of recognizing universal obligations and rights is a commitment to expanding the scope of democracy as widely as possible.

How does all of this bear on the issue of justifying rights? When Stout claims that a ruthless dictator violates people's rights by torturing them, Stout commits himself to 'conscripting' the dictator and his subjects into the role of 'norm user.' Conscripting them into this role, in the case of foreigners, requires among other things engaging them in dialectical inquiry concerning the acceptability of torture. That inquiry must be governed by norms of reaching the truth concerning rights, and it will aim to bring the interlocutor to a contradiction. Nothing guarantees that Stout would win the debate with the dictator; Stout might come away convinced that, in fact, some rare instances of torture are acceptable. Or the dictator might come to share Stout's view. Or the dialogue might break down—or never get off the ground—for any number of reasons. But moral justification in Stout's vision

of the democratic tradition is a process of exchanging reasons, with the practical aim of reaching agreement on what to do. The modest view of justifying rights is committed by the universal scope of universal human rights to a kind of moral outreach. Since this view holds that everyone (or at least every norm user) has rights and obligations, merely *qua* norm user, friends of human rights must attempt where appropriate to convince people that they have such rights and obligations.

Notice that this argument does not offer us a single overarching justification of rights. Stout's own belief that torture is wrong depends on his concept of cruelty and the wrongness of that. My view is that violating human rights prevents us from flourishing by precluding us from realizing a range of values and virtues that would constitute a good human life. You might have a still different story. The justification of rights to specific others proceeds ad hoc and provisionally, and no single argument can demonstrate to everyone that unconditional rights merely as such must exist. Stout's project is really more about what the modest view of justifying rights commits itself to when it accepts that unconditional rights and obligations exist. Human rights talk requires the democratic practice of exchanging reasons in support of our attribution of rights and obligations. Stout's argument thus defends the modest *possibility* of human rights: he explains how we might be justified in believing that unconditional rights exist without first accepting a universal justification of such rights. We will *actually* believe in rights, of course, only if and insofar as we have reasons to do so—if we find torture intolerably cruel, for example. But that state of affairs is the end of a debate that must begin with engagement between opponents in a context of dialectical inquiry. To give that inquiry point, it is worth asking why we should continue talking about rights at all.<sup>19</sup>

## 6. *Why rights talk?*

Stout's position might seem odd in another way. A modest view of justifying rights could seem ... well, boring. Human rights seem to demand a lot of talk: if we wish to defend people against torture, we have to engage their torturers in dialectical argument, seeking sufficient existing or nascent common ground

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<sup>19</sup> I thank an anonymous referee for pointing out that Raz has published recently on the idea of rights without foundations. See Joseph Raz (2007), "Human Rights without Foundations," *Ragion Practica* 29: 449.

with which to enrich their concepts of ‘cruelty’ and ‘norm user’, say, and steering them toward the conclusion we accept. The shape of that conversation cannot be determined in advance, because it will depend on the specific differences between us and them. So we cannot expect a standpoint-neutral or universal justification of unconditional rights and obligations, though we can have local grounds for attributing such rights and obligations. If no universal justification is possible, why bother talking about human rights at all? What crucial role does rights talk fill?

MacIntyre concludes that believing in rights is akin to believing in witches and unicorns, and he proposes that we eschew rights talk altogether and return to the tradition of virtues. Stout notes that

The practical worry about such proposals can be expressed in the question, ‘When the powerful try to shut us out or hold us down, what are we supposed to do, beg?’ In a democratic culture begging and certain other expressions of deference come to seem responses unbecoming of a human being or fellow citizen. The language of rights arises in such a culture as an alternative to begging, on the one hand, and to certain kinds of coercion, such as torture and religiously motivated warfare, on the other (DT, 206).

Stout is not here trying to justify rights, I think, so much as to explain the role that rights talk seems to fill better than anything else. Nothing in what Stout says guarantees that rights talk or claiming rights will win over the powerful who ‘try to shut us out or hold us down.’ Some states today still require citizens or subjects to beg or to show deference; rights talk is not ubiquitous. But begging and submission have been largely displaced in democratic regimes by the recognition that anyone might be a norm-user, anyone may stand up to the powerful and demand reasons, anyone can criticize the going social and political orders. At their best, people claim their rights and recognize the rights of others. And the rituals of domination and submission that go back deep into our evolutionary past subside also into our sociopolitical past.

A right is a *legitimate* claim to certain goods—how do we know that any given claim is legitimate? For Stout, this issue is up for grabs: it is the business of democratic political life to answer this question in all the concrete instances where it arises. To leave this question open does not undermine the idea that some claims are legitimate: in his analogy, factual claims are about what is the case. Many of these are legitimate, but many are still in dispute. Where the available evidence settles a dispute beyond a reasonable doubt, then we have grounds for denying that all fact claims are arbitrary. The same logic applies in the sphere of rights.

Rights involve legitimate claims *to* the enjoyment of certain goods. We know that there are claims to the enjoyment of certain goods. People make such claims all the time. If some such claims are legitimately made on behalf of everyone—such as the claim not to be tortured and the claim to be free from humiliation—then there *are* human rights, and human rights are not *essentially* arbitrary. For rights are just statuses conferred by legitimate claims of this sort (DT, 207).

Stout goes on to grant that the legitimacy of this kind of claim can be difficult to determine, but that is no different from the sphere of factual claims, some of which are also difficult to verify. The difficulty of establishing the legitimacy of any particular claim seems to be no ground in itself for skepticism or subjectivism in that domain. Again, this is an argument for the *possibility* of universal rights without universal rational justification.

Rights talk serves several unique functions. It signals like nothing else a refusal to beg or submit, and thus symbolizes a democratic commitment to equality. Although the substance of rights talk is, in view of what Stout says, an open question, this stance reflects the fact that democracy is after all a political mode of resolving disputes in a pluralistic culture. As such it holds open even highly significant questions like those concerning the substance of human rights. Finally, rights talk imposes a responsibility on those who engage in it, namely the task of extending the role of ‘norm user’ (and, loosely speaking, ‘democrat’) to everyone. To recognize universal human rights is therefore to commit oneself to a kind of democratic evangelism, a spreading of the good news to all corners of the globe. This task is fraught with difficulty, given the suspicion with which many people in the world regard the political regimes of the West today. Yet here too rights talk serves a crucial function, allowing us to focus on local conditions of cruelty and terror that ground our own objections to torture and abuse, and to insist that these modes of justification are quite independent of the voracious appetites of the global multinational corporations and the aggressive and short-sighted policies of this or that Western political regime. These considerations do not go far at all toward telling us which rights to recognize. But they do offer reasons for continuing to talk about universal human rights, even when we acknowledge the failure of universal justifications of them.

## 7. Conclusion

I began by articulating a very rough conception of human rights: they are moral rights, not merely conventional; they are unconditional, universal, high-priority norms or normative statuses; and their application is most useful perhaps in governing the relations between states and their citizens. The friends of human rights assert that we can provide a robust philosophical justification for these rights, whereas the opponents of rights assert that no such justification is forthcoming. Both sides of this dispute assume that the existence of human rights depends on whether such a robust justification is available. To paraphrase MacIntyre: one might agree with Dworkin that the absence of a robust justification of human rights fails to show that they do not exist, but the same line of argument can be used to defend the existence of witches and unicorns.

I have tried to canvass some of the dominant perspectives on human rights and to explore their proposed justifications. The four main traditions of providing a universal justification for human rights include the natural rights, transcendental, contractarian, and consequentialist traditions. Each of these perspectives mounts a case in favor of human rights. In each case, decisive objections to the tradition's approach to rights seem to undercut the likelihood of a universal, robust justification of them. An *a priori* demonstration that no such justification is possible seems unlikely; but a strong *prima facie* case exists for thinking so.

The opponents of human rights should not rejoice, however, for human rights might well exist even if no *robust* demonstration proves it. That is my modest proposal. On a modest view, we might recognize human rights in the sense used in this paper, especially acknowledging their unconditional and universal character. Yet this view declines to offer a *universal* justification for rights, insisting that justification is, unlike truth, always a local matter, couched in a culturally and historically specific language. The modest view is prepared to attribute human rights to those who will not or cannot recognize that they have them; and in doing so it undertakes a commitment to try to justify those rights to their opponents. Recognizing human rights signals an unwillingness to beg and a limit to submission and submissiveness; in the place of these conflict-avoidance strategies, a commitment to rights substitutes an insistence on exchanging reasons through dialectical inquiry.

Human rights are not the same tool, given the modest view of their justification, that many friends of human rights would like to have. On the robust view, to fail to recognize human rights in the face of a robust rational justification of them is pig-headed irrationality. The friends of human rights



might miss being able to claim the moral high ground in this robust way. On a modest view, the best we can do is to share our local justification of human rights and to hope that our audience is sufficiently virtuous to engage in the dialectical exchange needed for that audience to understand and accept that justification. My reasons for respecting human rights might not make sense to you, or they might not persuade you, and we might have to talk together for a long time, with great patience and good will, to reach agreement. The demands of consensus-building can be onerous, and many forces conspire to undermine these conversations about human rights, and they often fail. Still, the best we can do will have to be good enough. It will not make the task of defending rights any easier to pursue a universal rational justification that does not exist. Much better will be to rely on our own reasons, local and culturally specific though they be, for at least they are real.