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In Defence of Traditional Theories of Human Rights

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In Defence of Traditional Theories of Human Rights

The label ‘traditional’ has recently been applied to those theories of human rights which understand human rights to be moral rights that all persons possess in virtue of some valuable aspect of their humanity.¹ Traditional theories of human rights can thus be said to possess two crucial components: an explanatory component which tells us that human rights are essentially moral rights; and a justificatory component which tells us that human rights are normatively grounded in some valuable aspect of humanity. One of the most well known traditional accounts of human rights is that provided by John Locke. Locke famously argued that natural or ‘human’ rights are possessed by all persons independently of their recognition by the state. According to Locke, we do not need government to furnish us with our rights, for we hold them irrespective of the state, and simply because we are rational persons. In fact, for Locke the state exists to afford protection to these rights, and so can be held to account as such.² While Locke’s metaphysical assumptions concerning the natural law have fallen out of favour somewhat, many contemporary theorists of human rights nevertheless hold on to his view that human rights are essentially moral rights possessed by all persons in virtue of some valuable aspect of their humanity.³

But traditional theories of human rights have been subjected to a number of powerful and important criticisms. Three critiques are of particular concern to this paper. Perhaps the most infamous and longstanding critique of the traditional conception of human rights derives from Jeremy Bentham and his positivist descendents. For Bentham, to say that there exists a set of rights independent of legal enactment and enforcement is nonsense: “...natural and imprescriptible rights, rhetorical nonsense, - nonsense upon stilts.”⁴ According to Bentham, there may be some set of goods that we desire and thus aspire to have as rights, but those desires and aspirations cannot

¹ Jean L. Cohen, “Rethinking Human Rights, Democracy, and Sovereignty in the Age of Globalization”, *Political Theory*, 36 (2008), 578-606 at p. 581; and Joseph Raz, “Human Rights Without Foundations”, forthcoming in *The Philosophy of International Law*, ed. J. Tasioulas and S. Besson (Oxford: Oxford University Press).

² John Locke, *The Second Treatise of Government in Two Treatises of Government*, ed. P. Laslett, (Cambridge: Cambridge University Press, 1988).

³ One author who keeps hold of Lockean ideas concerning the natural law basis to human rights is John Finnis. See John Finnis, *Natural Law and Natural Rights*, (Oxford; Clarendon Press, 1980). For two of the most important contemporary traditional accounts of human rights see Alan Gewirth, *Human Rights: Essays on Justification and Applications*, (London: University of Chicago Press, 1982); and James Griffin, *On Human Rights*, (Oxford: Oxford University Press, 2008). Two important recent examples of traditional accounts which resemble closely the type of theory advocated in this paper can be found in John Tasioulas, “Human Rights, Universality and the Values of Personhood: Retracing Griffin’s Steps”, *European Journal of Philosophy*, 10 (2002), 79-100; and Allen Buchanan, *Justice, Legitimacy and Self-Determination: Moral Foundations for International Law*, (Oxford: Oxford University Press, 2003).

⁴ Jeremy Bentham, “Anarchical Fallacies; being an examination of the Declaration of Rights issued during the French Revolution” in *Nonsense Upon Stilts: Bentham, Burke and Marx on the Rights of Man*, ed. J. Waldron (London: Methuen, 1987), pp. 46-76, p. 53.

themselves be meaningfully described as rights until they are recognised and enforced in practice. As Bentham stated, “...hunger is not bread”.⁵

A more recent criticism of traditional theories comes from those theorists who endorse a ‘practical’ theory of human rights.⁶ For these practical theorists, the attempt to provide some definitive normative justification for human rights is problematic. It is problematic in that it may be futile; but it is also problematic in that it will be divisive, thereby impeding the acceptance of human rights across the globe.⁷ Perhaps most importantly, however, these thinkers further claim that morally justifying human rights in this way is unnecessary. Proponents of practical theories claim that human rights are better promoted and justified not through some grand foundational claim about the ultimate value of human beings, but by showing what human rights do for human beings in the real world. Hence, it is claimed that traditional theories have been wasting their time by worrying about moral justification. Practical theorists claim that a culture of human rights is best promoted by sentimental manipulation, and not by rational justification.⁸

But the most prevalent of recent attacks on traditional theories comes from proponents of ‘political’ theories of human rights. These thinkers, greatly influenced by John Rawls’s account of human rights in *The Law of Peoples*, have attacked traditional theories for being parochial, inflationary and too far removed from the practice of human rights in international politics.⁹ As such, these thinkers argue we should do away with traditional understandings of human rights and get ‘political’. A political understanding of human rights starts not with a moral account of what is of value to human beings, but with an account of what human rights do in the real world. Following Rawls, all of the proponents of the political understanding of human rights see their primary function as placing limits on the sovereignty of states. In other words, human rights specify when it is permissible for outsiders to intervene in the affairs of another state.¹⁰ For political theories then, not all of our universal moral rights can properly be called human rights. Rather, human rights are a subset of those moral

⁵ Ibid.

⁶ Richard Rorty, “Human Rights, Rationality, and Sentimentality” in *On Human Rights: The Oxford Amnesty Lectures 1993*, ed. S. Shute and S. Hurley (New York: Basic Books, 1993), pp. 111-134; and Michael Ignatieff, “Human Rights as Idolatry” in Michael Ignatieff et al, *Human Rights as Politics and Idolatry*, ed. A. Gutmann (Princeton, N.J: Princeton University Press, 2000), pp. 53-98.

⁷ On futility, see especially Richard Rorty, “Human Rights, Rationality, and Sentimentality”; and, Florian F. Hoffman, “‘Shooting into the Dark’: Towards a Pragmatic Theory of Human Rights (Activism)”, *Texas International Law Journal*, 41 (2006), 403-414. In divisiveness see Michael Ignatieff, “Human Rights as Idolatry”.

⁸ Richard Rorty, “Human Rights, Rationality, and Sentimentality”; and see also Chris Brown, “Universal Human Rights: A Critique” in *Human Rights and Global Politics*, ed. T. Dunne and N. Wheeler, (Cambridge: Cambridge University Press, 1993), pp. 103-127.

⁹ See John Rawls, *The Law of Peoples*, (Cambridge, Mass.: Harvard University Press, 1999); Jean L. Cohen, “Rethinking Human Rights, Democracy, and Sovereignty in the Age of Globalization”; Joseph Raz, “Human Rights Without Foundations”; and Joshua Cohen, “Minimalism About Human Rights: The Most We Can Hope For?”, *The Journal of Political Philosophy*, 12 (2004), 190-213.

¹⁰ Ibid.

rights: a narrower set of rights which when violated warrant the intervention of outside agents.

In the face of these various and powerful attacks from proponents of positivist, practical and political theorists, this paper aims to provide a defence of traditional theories of human rights. Of course, it is important to note that the paper does not seek to provide a full blown normative defence of human rights *per se*. Rather, its aim is much more modest. It simply wishes to argue that amongst all the competing theories of human rights, and in spite of arguments to the contrary, traditional accounts of human rights remain the most plausible. With this caveat in mind, the paper defends traditional theories in two stages. First of all, it defends the *explanatory* component of traditional theories: that is, that human rights are essentially moral rights. Here it is argued that conceiving of human rights as essentially moral rights has three important advantages: it accords closely with the practice of human rights; it accords closely with the ordinary use of the term in the real world; and finally, it reminds us that our ultimate obligations in respect of human rights are moral.

The second half of the paper defends the *justificatory* element of traditional theories of human rights: that is, that they are grounded in some valuable aspect of humanity. In order to do this, the section first makes the case for normatively grounding human rights. Here it is argued that normatively justifying human rights gives them determinacy and provides a principled basis with which to persuade human rights sceptics and condemn human rights violators. Secondly, the section considers four criticisms of attempts to normatively ground human rights: that such attempts are metaphysically dubious; that they are parochial; that they result in an overly rigid set of human rights; and that they collapse the distinction between what we value and what we possess as rights. Here it is argued that when human rights are grounded in the basic interests of human beings, these criticisms have no force.

Human Rights as Moral Rights

Traditional theories of human rights consider human rights to be essentially moral rights. This is not to deny that human rights can sometimes be enacted legally and thus become legal rights. Rather, it is to say that the existence of a human right does not *depend* on it being established by law. As moral rights, human rights are held by all human beings on the basis of some normative justification, and irrespective of whether they live under a government which recognises those rights. To put the link plainly, all human rights are moral rights, but not all human rights are legal rights. As such, the essential ingredient of human rights is their moral basis. In this section I want to argue that there are three important advantages to conceiving of human rights as essentially moral rights.

Accords with Human Rights Practice

The first advantage of conceiving of human rights as moral rights is that it accords closely with human rights practice. This claim is in stark contrast to the position of recent proponents of political conceptions of human rights. For example, Joseph Raz has argued that moral accounts of human rights, “...offer a way of understanding their nature which is so remote from the practice of human rights as to be irrelevant to it.”¹¹ Similarly, Jean L. Cohen puts the argument as follows:

The key problem is that this approach abstracts away from the role that human rights discourses play in contemporary international politics and law, courting the risk that the philosophical enterprise becomes irrelevant or, worse, instrumentalized by the powerful for purposes that have little to do with ensuring the liberty, agency, integrity, capabilities, or dignity of persons.¹²

Hence for both Cohen and Raz, our account of human rights needs to get ‘political’. We need to start with an understanding of the way in which human rights are used in the real world, which is opposed to a moral account which starts by pointing to some valuable feature of human beings. Importantly, neither thinker is denying that there are universal moral rights of the sort I defend here. Rather, their claim is that not all of these moral rights can be thought of as human rights. This is because according to them, human rights have an importantly distinctive meaning in international politics. In effect, both Raz and Cohen follow John Rawls in endorsing a ‘political’ understanding of human rights, an understanding which Raz argues has become, “...the dominant trend in human rights practice...”¹³

Following Rawls 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.¹⁴

So for Rawls, Raz and Cohen, human rights are essentially about limiting the sovereignty of states. Human rights serve the function of spelling out the limits of state action, thus suspending the non-intervention principle when those rights are violated.¹⁵ We can thus see why these thinkers regard human rights to be a narrower subgroup of our universal moral rights. They do not believe that all violations of universal moral rights warrant international intervention.

But even if we accept that we should start our account of human rights with the way in which human rights are used in the political arena, it is simply not true that the only or

¹¹ Joseph Raz, “Human Rights Without Foundations”.

¹² Jean L. Cohen, “Rethinking Human Rights, Democracy, and Sovereignty in the Age of Globalization”, p. 582.

¹³ Joseph Raz, “Human Rights Without Foundations”.

¹⁴ *Ibid.*

¹⁵ *Ibid.*; Jean Cohen, “Rethinking Human Rights, Democracy, and Sovereignty in the Age of Globalization” p. 582; and John Rawls, *The Law of Peoples*, p. 79.

even dominant use to which they are put is to suspend the principle of non-intervention. First of all, it would be wrong to regard human rights as possessing only an *international* function. Human rights play a hugely important role in domestic settings, both legally through the courts, and of course in the campaigning activities of groups in civil society. It is quite wrong to think that human rights in practice serve only as some kind of foreign policy instrument, as can be implied by the political account.¹⁶ Secondly, even at the international level, human rights do not just mark out the permissibility of direct interventions in the affairs of states. As Charles Beitz and James Nickel have both rightly pointed out, human rights have other political functions: they can determine eligibility for development programmes; they can be attached to internationally sponsored financial adjustment measurements; they can be used to evaluate the policies of international financial and trade institutions; and of course – and crucially – they serve as a basis for standard-setting, monitoring, reporting, advocacy and criticism by states, NGOs, political movements and other actors.¹⁷ It would seem then that if we do want our theory of human rights to accord with the practice of human rights in the real world, we need a more nuanced understanding of those practices than that offered by current political accounts.

Of course, it might be responded that even the types of international action listed above place limits on state sovereignty. Standard-setting, reporting, criticism and the like may well fall short of direct military intervention, but they all involve some kind of oversight and interference in the affairs of individual states, thus limiting their sovereignty. Perhaps then we should say that the primary function of human rights in the international arena is to mark out when states can legitimately be *interfered* with, even when that falls short of full intervention. But if this is the case, then this accords extremely well with conceiving of human rights as moral rights. For if human rights serve to mark out when interference is permissible in the international arena, then human rights should not be regarded as a subgroup of our universal moral rights; instead, they must be equivalent. Quite simply this is because all violations of moral rights *do* warrant certain forms of interference. They warrant such interference because of the very fact that they are moral rights held by all persons. Granted, their violation might not always warrant sending in the troops, or the imposition of legal sanctions; whether these kinds of interferences are justified will obviously depend on the particular circumstances of each case. But in all circumstances, the violation of these moral rights will warrant *some* form of interference on state sovereignty, such as condemnation and the like. After all, when a moral right is assigned it imposes a corresponding obligation. If that obligation falls on the state, and the state fails to fulfil it, then it should be criticised as such. And as we see in the real world of human rights politics, this is precisely what happens.

¹⁶ Thanks to Margo Picken for emphasising this point to me.

¹⁷ Charles R. Beitz, “Human Rights as a Common Concern”, *The American Political Science Review*, 95 (2001), 269-282, at pp. 269-270; and James W. Nickel, *Making Sense of Human Rights*, (Oxford: Blackwell, 2nd ed., 2007), p. 101.

From all this we can see that contrary to the claims of proponents of political accounts of human rights, conceiving of human rights as moral rights accords very well with the practice of human rights in the international arena.

Accords with Our Ordinary Understanding of Human Rights

The second advantage of conceiving of human rights as moral rights is that it accords well with our ordinary understanding of the term. In particular it allows us to use human rights to criticise those that fail to uphold them. This is in contrast with 'positivist' theories of human rights which deny that human rights can be derived from normative justification alone. These positivist theorists argue that in order for a human right to be a human *right*, it must be morally valid *and* socially recognised and enforced by law.¹⁸ For these thinkers, it is this recognition and enforcement that makes a right a right: it is what differentiates a right from a mere morally valid claim. To illustrate, Rex Martin gives the example of an individual being refused permission to travel at a passport office. Martin supposes that this individual has a morally legitimate claim to travel. As such, the refusal on the part of the passport office is unjustified. Nevertheless, Martin claims that it would be wrong to claim that the individual possesses a *right* to travel: he may have a morally valid claim to travel, but in the absence of recognition of that claim, he has no such right.¹⁹

But if human rights must be socially recognised and enforced by law in order to be human rights, then human rights lack any critical power. For example, consider the case of dissidents in Burma who are prevented from protesting against the regime. Under this positivist conception of human rights, we cannot say that such dissidents have their human rights violated. Nor can we accuse the Burmese of human rights violations in this regard. Since a right to protest is not enforced by the Burmese government, then according to this account of human rights, those dissidents have no such human right. On this view then, we cannot criticise the Burmese regime for human rights violations quite simply because they have violated no rights. Furthermore, under this conception, human rights are not rights held universally by all human beings, but civil rights held in some societies. Thus Martin himself writes: "If there are any human rights at all, it follows that there are civil rights in at least some countries."²⁰

This positivist understanding of human rights is problematic because it is such a long way from our ordinary understanding of the term. The great advantage of conceiving of human rights as essentially moral rights is that it allows us to recognise that human rights are held by all human beings, irrespective of the government they live under, and

¹⁸ Rex Martin, "Human Rights and Civil Rights", *Philosophical Studies*, 37 (1980), 391-403; Rex Martin, *A System of Rights*, (Oxford: Clarendon Press, 1992); and Derrick Darby, "Feinberg and Martin on Human Rights", *Journal of Social Philosophy*, 34 (2003), 199-214.

¹⁹ Rex Martin, "Human Rights and Civil Rights", p. 393.

²⁰ *Ibid.*, p. 402.

to criticise those governments that fail to uphold them. Of course, in reply these positivist scholars might point out that they are not dismissing moral criticism altogether. Their claim is only that moral criticism need not always be in the language of human rights. They might point out that we can and should still condemn the Burmese government for its actions, without calling it a human rights abuser: we can call it morally bankrupt, unjust, vile, vicious and so on. In other words, moral condemnation – and moral language in general – does not have to be conducted always in terms of rights.²¹

While it is of course true that not all moral criticism needs to be or should be conducted in terms of human rights, that still does not show that human rights should be stripped of their critical power. After all, it remains the case that most ordinary understandings of the term human right *do* involve a critical component. Most of us would say – and quite uncontroversially – that Burma does violate the human rights of dissidents. And most of us would also say – and in spite of Martin’s claims – that the passport official does violate the individual’s right to travel. We say that these rights exist even in the absence of social recognition and legal enforcement. Indeed, it seems that the very point of a right being a *human* right rather than any other type of right is that it is held by all human beings, irrespective of residence, nationality, race, religion, gender and so on. The ordinary understanding of the term ‘human right’ seems necessarily to have this moral core. Positivists may of course keep asserting that this ordinary understanding of the concept is wrong and should be amended. But we can legitimately question what purpose such a radical overhaul of the term would serve. For good or for ill, it must be recognised that the term ‘human rights’ has evolved in such a way that critical power is now central to it. Conceiving of human rights as moral rights can make sense of this; conceiving of them only as positive rights requiring enforcement through law cannot. Indeed, critical power is so central to an account of human rights, that any theory which ignores this and makes human rights contingent on legal recognition and enforceability can no longer be considered a meaningful account of human rights at all. As Martin himself admits, a positivist account of human rights is nothing of the sort: it is really an account of civil rights.

Reminds Us of Our Moral Obligations

The final advantage of conceiving of human rights as moral rights is that it imposes a *moral* obligation on actors to uphold and protect them. It is important to remember that our obligations in respect of human rights are primarily *moral*, and this is worth remembering for three reasons. First of all, it reminds us that our obligations in respect of human rights may not correspond exactly with our legal obligations. For example, it may be that our moral obligations are stricter than our legal obligations. For instance, the European Convention on Human Rights does not confer on member states of the

²¹ Derrick Darby, “Feinberg and Martin on Human Rights”, p. 210.

Council of Europe any legal obligation to uphold socio-economic rights for their citizens. But if socio-economic rights are genuine human rights, and if human rights are moral rights, then we can legitimately say that those states still have a moral obligation to uphold them for their citizens, and should be held to account as such.

Secondly, by conceiving of our obligations in respect of human rights as primarily moral, we are reminded that legally institutionalising those rights is not sufficient to fulfil our moral obligations. Human rights activists often regard the legal recognition of rights as a victory. But it is a pretty shallow victory if it does not result in those rights being upheld and protected in practice. Here we are reminded of the sad story of Irene Grootboom. Irene Grootboom won an important victory at the Constitutional Court of South Africa in 2000 which compelled the government to uphold her and other appellants' rights to adequate housing. Sadly, Mrs Grootboom herself died without housing eight years later. The point of reflecting on this story is not to say that the legal enactment of rights is pointless. Far from it, legalising these rights is usually an important goal worth aiming for. But nevertheless, such legalisation can only ever be just a part of our more demanding moral obligation. Our moral obligation in respect of human rights is to uphold and protect them, which always requires more than simple legal enactment.

Finally, by conceiving of our obligations in respect of human rights as primarily moral we are further reminded that legal institutionalisation is not the only tool at our disposal to fulfil our moral obligations. It is too easy for human rights advocates to concentrate solely on the goal of legal institutionalisation: to conflate human rights protection with their entrenchment in some constitutional document or international treaty. But of course, human rights can be protected in various ways apart from constitutional entrenchment and international treaty-making. Legislative action, economic development, cultural change, civil society activity, democratization, education, international intervention and so on, are all other crucial instruments in the protection of human rights. Indeed, it may be that in some or all situations these processes are *more* important in terms of fulfilling our moral obligation to uphold and protect human rights.²² It may also be the case that the best way to protect human rights will vary from context to context and situation to situation. For example, it might be that some states may require activist judges to best protect and uphold human rights, others may benefit from leaving it to the legislatures, and still others may require some deeper cultural change. Whatever the case, resolving these important and extremely difficult questions is not the issue at hand in this paper. What is important is that human rights are protected, not that there is a uniform model to ensure protection. Conceiving of human rights as moral rights reminds us that we have a broad moral obligation to uphold and protect human rights; an obligation that is not necessarily fulfilled by legal institutionalisation.

²² The inadequacy of and problems created by the legal institutionalisation of rights are well explained in C. A. Gearty, *Can Human Rights Survive?*, (Cambridge: Cambridge University Press, 2006), Ch. 3.

Grounding Human Rights in Some Valuable Aspect of Humanity

So far then I have defended the first element of traditional theories of human rights: that human rights are essentially moral rights. Because traditional theories conceive of human rights as moral rights, they have the advantage of according with the practice of human rights, according with our ordinary use of the term, and reminding us of our moral obligation to uphold and protect them. However, traditional theories do not just say that human rights are essentially moral rights. They also state that human rights are moral rights that all persons possess because of some valuable aspect of their humanity. In this section I argue that there are two advantages of providing this kind of normative justification for human rights: first, it endows them with determinacy, and second, it provides us with a principled basis for persuading sceptics and condemning violators. But is such a normative grounding for human rights either possible or plausible? Some theorists have provided important and influential arguments warning us to be wary about such foundational claims. This section of the paper goes on to consider and refute each of these objections. In particular, it argues that a traditional theory which sees human rights as grounded in the *basic interests* of human beings can defeat all of them. Grounding human rights in basic interests is of course not novel, with several prominent philosophers using interests to provide a foundation for their traditional theories of human rights.²³ However, these theorists usually spend most their time engaged with the important task of delineating which interests merit protection in the form of human rights. My concern, on the other hand, is one step behind this: to explain why grounding human rights in basic interests is plausible in the first instance.

Determinacy

The first obvious advantage of having a normative justification for human rights is that it endows them with a principled determinacy. That is to say, because human rights depend on some principled moral justification, we have some basis for determining what counts as a genuine human right and what does not. In a time when more and more groups are seeking to enshrine their causes in some type of human rights declaration or treaty, it is important that we have some principled basis for saying what

²³ Some explicit interest-based theories of human rights can be found in John Finnis, *Natural Law and Natural Rights*; John Tasioulas, "Human Rights, Universality and the Values of Personhood: Retracing Griffin's Steps"; Allen Buchanan, *Justice, Legitimacy and Self-Determination*; Simon Caney, "Global Poverty and Human Rights: The Case for Positive Duties" in *Freedom From Poverty as a Human Right: Who Owes What to the Very Poor?*, ed. T. Pogge, (Oxford: Oxford University Press, 2007), pp. 275-302; and John Mahoney, "Liberalism and the Moral Basis for Human Rights", *Law and Philosophy*, 27 (2008), 151-191. But interests are also important parts of the theories of James Griffin, *On Human Rights*; and James W. Nickel, *Making Sense of Human Rights*. The interest-based understanding of rights obviously has its roots in J.S. Mill's theory of rights, for a discussion see H. L. A. Hart, *Essays on Bentham: Jurisprudence and Political Theory*, (Oxford: Clarendon Press, 1982), Ch. 14. But it has been most famously elaborated in Joseph Raz, *The Morality of Freedom*, (Oxford: Oxford University Press, 1988).

counts as a genuine human right and what does not. After all, it is important that the whole discourse of human rights does not become debased by say, being at the whim of those who shout the loudest, have the most resources, or employ the best lawyers.

And yet, while this point may seem obvious, it is controversial. Some accounts of human rights deny that there is any point in engaging with this kind of justificatory work. For example, Richard Rorty claims that ‘no useful work’ is done by foundational claims on the basis that human rights have emerged as an important ethical discourse not through any consensus over their moral justification, but through the telling of sad stories and thus increased sentiment and sympathy for others.²⁴ As such, he claims that in order to promote human rights we should get practical, and concentrate on the manipulation of sentiments, thus doing away with debates about moral justification altogether.

But if we are to promote human rights by manipulating sentiments, we need some idea of what human rights are. And in order to determine what they are, we surely need some rational basis for deciding what counts as a genuine human right and what does not. For it is crucial to remember that the proper content of human rights is contested.²⁵ In terms of the legal documents, we see that regional instruments differ greatly in terms of the rights they protect, as do the constitutional documents of individual states.²⁶ At the level of theory and activism we also see lively debates over the proper content of human rights. Many strongly object to the fact that the Universal Declaration lists a human right to paid holiday, for example. But can any socioeconomic rights really be considered genuine human rights? And what about group rights, the rights of the unborn, the right to development, and the right to an adequate environment?²⁷ The battles over what should be included and what should be excluded as genuine human rights are fiercely fought. By eschewing normative theory altogether, Rorty gives us no possible means of resolving such disputes, and thus with no idea of exactly what these human rights are that should be promoted. But if our understanding of human rights requires them to have a normative justification, we do possess some principled basis with which to determine what counts as genuine human right and what does not.

²⁴ Richard Rorty, “Human Rights, Rationality, and Sentimentality”, pp. 129-130.

²⁵ John Tasioulas, “Human Rights, Universality and the Values of Personhood: Retracing Griffin’s Steps”, p. 82.

²⁶ Compare, for example, the European Convention on Human Rights with the African Charter on Human and Peoples’ Rights. Also compare the Bill of Rights of the United States with Chapter 2 of the Constitution of South Africa.

²⁷ For a sceptical view on socioeconomic rights see Onora O’Neill, *Constructions of Reason: Explorations of Kant’s Practical Philosophy* (Cambridge: Cambridge University Press, 1990) Ch. 12; for a sceptical view on group rights see Jack Donnelly, *Universal Human Rights in Theory and Practice*, (London: Corenell University Press, 2nd ed., 2003), Ch. 12; for a positive view on the right to a decent environment see James W. Nickel, “The Human Right to a Safe Environment”, *Yale Journal of International Law*, 18 (1993), 281-295; and for a sceptical view on the right to development see Rosalyn Higgins, *Problems and Processes: International Law and How We Use It*, (Oxford: Clarendon Press, 1993), p. 103.

Persuasion and Condemnation

The second important advantage of having a normative justification for human rights is that it provides us with some principled basis for persuading sceptics and for condemning violators. After all, Rorty's call to do away with theory and get on with promoting them raises the concern about what to do with those who refute human rights. Pointing to the fact that they exist in some legal document is one thing, but how do we know that the rights enshrined in that document carry any ethical weight? It is important to remember that human rights are controversial, not just in terms of their content, but also in terms of their normative power. Many scholars - Marxists, feminists, communitarians, relativists and so on - have all provided coherent and serious criticisms of human rights. For example, they have claimed that human rights cement unjust power structures or promote egoism.²⁸ Furthermore, these criticisms do not just come from scholars. Political leaders have condemned human rights for being part of some Western imperialist project serving to undermine their own particular values and ways of life.²⁹ If we are to persuade those who are sceptical of human rights, and condemn those that fail to uphold them, it is absolutely crucial that we have some principled normative justification for human rights. For without it, it is difficult to see on what grounds such persuasion and condemnation could take place. Without it, our promotion of human rights would simply be a coercive imposition of our will.³⁰

But even if it is agreed that a normative justification for human rights has these advantages of endowing them with determinacy and allowing us to persuade sceptics and condemn violators, that does not decide the matter. As pointed out above, a number of important problems with actually *providing* a normative justification of human rights can be delineated.

Dubious Foundations

Some scholars have eschewed traditional theories of human rights because they are sceptical over the very *possibility* of a moral foundation for human rights. For these thinkers, there are no universal moral facts upon which to found human rights. And there is certainly no universal human nature.³¹ As such, a moral foundation for human rights - while perhaps attractive for the reasons given above - is entirely futile.

²⁸ The classic critical statement in this vein can be found in Karl Marx, "On the Jewish Question", in *Karl Marx: Selected Writings*, ed. D. McLellan, (Oxford: Oxford University Press, 2000), pp. 46-70. One more contemporary critique can be found in Costas Douzinas, *Human Rights and Empire: The Political Philosophy of Cosmopolitanism*, (London: Routledge-Cavendish, 2007).

²⁹ For a discussion of these arguments see Joanne R. Bauer and Daniel A. Bell (eds.), *The East Asian Challenge for Human Rights*, (Cambridge: Cambridge University Press, 1999).

³⁰ This point is excellently made in Brian Schaefer, "Human Rights: Problems with the Foundationless Approach", *Social Theory and Practice*, 31 (2005), 27-50, at pp. 40-45.

³¹ See Richard Rorty, "Human Rights, Rationality, and Sentimentality", p. 117; and Florian F. Hoffman, "Shooting into the Dark", p. 404.

Scepticism about foundations is certainly understandable when we consider that many traditional accounts of human rights have often relied on God or the existence of some eternal natural law to ground their justification for human rights.³² These foundations certainly derive from some rather contestable metaphysical assumptions. However, such scepticism is less understandable when it comes to more recent traditional theories of human rights which are grounded in human well-being.³³ For what is so dubious about grounding human rights in the concrete interests of human beings? The foundational claim, or moral fact, of such theories is simply that human well-being matters morally. The acceptance of that claim hardly seems to require belief in some ethereal or magical metaphysics. And yet, problems might nevertheless remain. Indeed, one problem with this ‘welfarist’ grounding of human rights, is that a set of *objective* and *universal* human interests simply does not exist. Perhaps interests are too subjective, and too relative to individual preferences and cultural context to be a plausible basis for human rights. What are we to make of such a claim?

In order to address it, we need a clear understanding of the types of thing that interests are. Simply put, interests are components of well-being. As Feinberg states, to have an interest in x is to have some kind of *stake* in x; and to have a stake in x is to stand to gain or lose depending on the condition of x.³⁴ In order to determine whether there are any universal and objective human interests then, we need to ask whether there are any goods that make the lives of all human beings go well as a matter of fact. Manifestly, the answer to this question must be yes. At the very least, all human beings have certain biological needs that must be satisfied in order to live well: to have enough to eat; enough room to exercise; clean air to breathe; and so on and so forth. I for one would want to go further than this and claim that human beings also share certain social interests that when satisfied make their lives better: such as in education, employment, free religious practice, and so on. Or rather, I would endorse the claim of Amartya Sen and Martha Nussbaum, that it is not so much *achieving* these goods that is in our interests, but the *capability* of achieving them.³⁵ After all, and as Sen points out, an individual who has chosen to be malnourished through religious fasting cannot be deemed to have the same well-being as a victim of famine.³⁶ But in any case, the exact content of what objectively makes the lives of all humans go well is not the concern of this paper. Some might only want to go as far as a very minimal list focusing on our biological needs; others might want a more expansive list encompassing our social

³² The classic example being John Locke, *The Second Treatise of Government*. A more contemporary natural law theory comes from John Finnis, *Natural Law and Natural Rights*.

³³ See those especially of John Tasioulas, “Human Rights, Universality and the Values of Personhood: Retracing Griffin’s Steps”; and Allen Buchanan, *Justice, Legitimacy and Self-Determination*.

³⁴ Joel Feinberg, *The Moral Limits of the Criminal Law: Vol 1 Harm to Others*, (Oxford: Oxford University Press, 1984), p. 33-34.

³⁵ Amartya Sen, *Inequality Re-examined*, (Oxford: Clarendon Press, 1992); and Martha C. Nussbaum, *Women and Human Development: the Capabilities Approach*, (Cambridge: Cambridge University Press, 2000).

³⁶ This example is borrowed from Amartya Sen, “Well-Being, Agency and Freedom: The Dewey Lectures 1984”, *The Journal of Philosophy*, 82, (1985), 169-221, at p. 201.

capabilities. The simple point is that it is both plausible and meaningful to talk of some goods that are required by all of us in order to live well as a matter of fact. As such, universal interests are ‘universal facts’ and offer a perfectly plausible moral basis on which to ground human rights.

Parochialism

Other scholars have worried that attempts to normatively ground human rights necessarily rest upon some parochial moral theory that not all individuals and groups can be expected to endorse. As such, it is claimed that these types of normative justification are divisive and impede the acceptance of human rights norms across the globe. One important proponent of such a view is Michael Ignatieff, who writes as follows:

Foundational claims of this sort divide, and these divisions cannot be resolved in the way humans usually resolve their arguments, by means of discussion and compromise. Far better, I would argue, to forgo these kinds of foundational arguments altogether and seek to build support for human rights on the basis of what rights actually *do* for human beings.³⁷

As such, Ignatieff argues for a practical rather than a traditional account of human rights, focusing on what human rights can do for people in the world, rather than the moral values they are grounded in. This, Ignatieff believes, will permit individuals with a diversity of religious and moral outlooks to support human rights.

The first thing to note is that Ignatieff’s account of human rights is itself far from uncontroversial. In terms of what human rights actually *do* for human beings, Ignatieff claims that they protect human agency, and are valuable as such.³⁸ He argues that, “Human rights matter because they help people to help themselves. They protect their agency.”³⁹ Ignatieff claims that this account is non-foundational, practical and uncontroversial. But in reality, it is a familiar liberal and moral justification for human rights: prizing as it does the autonomy of the self-governing agent. Ignatieff may desire to avoid controversial foundations for his account of human rights, but in reality he does no such thing.⁴⁰

Of course, while Ignatieff’s own attack of moral accounts of human rights may be flawed, the essence of the criticism remains. Must all attempts at normative justification necessarily be too controversial and thus incapable of achieving the kind of support to

³⁷ Michael Ignatieff, “Human Rights as Idolatry”, p. 54.

³⁸ *Ibid.*, p. 57.

³⁹ *Ibid.*, p. 57.

⁴⁰ Amy Gutmann makes the same point in “Introduction”, in *Human Rights as Politics and Idolatry*, pp. vii-xxviii, p. xviii. So too does Brian Schaefer, “Human Rights: Problems with the Foundationless Approach”, p. 32.

make them realisable? On the one hand, it must be acknowledged that many traditional accounts of human rights have been grounded in comprehensive moral doctrines that are some way from achieving universal assent. Joshua Cohen writes:

So we should avoid saying that, for example, human rights are preconditions of the autonomous moral agency prized by Kantians, or for fulfilling divinely imposed obligations, whether the preferred statement of the obligations is found in Thomistic or Lockean natural law theory, or some formulation of the shari'ah.⁴¹

Instead, Cohen argues for 'justificatory minimalism': a normative justification of human rights that is independent of any particular religious or philosophical theory. Cohen's own proposal is to justify human rights on the basis of their role in protecting *membership or inclusion* in a political society. Cohen argues that human rights are justified on the basis that they ensure that the interests of all members are considered by the basic political institutions of a society.⁴²

Cohen's call to justify human rights on minimalist grounds is certainly sensible. Grounding human rights in such ideas as natural law or the divine will of God is surely a divisive move that will prevent human rights from standing any realistic chance of gaining widespread support. I argued above that a normative justification for human rights has important advantages, but that justification must offer at least the possibility of agreement, and it must therefore avoid the types of controversial premises prevalent in many traditional accounts. But while Cohen's call for justificatory minimalism is persuasive and plausible, his own particular attempt at it is not. Cohen claims that human rights are justified on the basis that they protect individuals' membership in a political community: they ensure that the interests of all members are included in decision making. But not all of our human rights are about our membership of a political community. Indeed, the least controversial and most basic human rights seem to have little to do with community membership at all, and be more about the basic requirements of a decent human life. When push comes to shove, human rights to life, security, and against torture, genocide, slavery and so on surely relate to the fundamental interests of human beings, rather than their inclusion in a society. Cohen acknowledges this fact and responds:

But the guiding thought behind the more capacious list seems to be that an acceptable political society – one that is above reproach in its treatment of individuals – must attend to the common good of those who are subject to its regulations, on some reasonable conception of that good, and ensure the goods that people in the territory and subject to political rule need in order to take part in the political society.⁴³

⁴¹ Joshua Cohen, "Minimalism About Human Rights: The Most We Can Hope For?" p. 197.

⁴² Ibid.

⁴³ Ibid., pp. 197-198.

However, Cohen's stipulation that the 'guiding thought behind' such basic human rights as life, security and so on is a view about an 'acceptable political society' can be questioned. For surely the guiding thought behind such rights is not a view about an acceptable political society at all, but a view about the basic requirements of human well-being. Without doubt, we use these basic human rights to make judgements about what counts as an acceptable political society; but that is not to say that these human rights *derive* from a conception of an acceptable political society. Rather, the rights come first. After all, individuals lacking membership in a community – whether they be stateless refugees or travellers on the hippy trail – still possess these basic human rights, in spite of their lack of inclusion in a particular political community. They possess them quite simply on the basis of their shared human interests.

But if we have basic interests as our justification of human rights, does this take us away from justificatory minimalism, and towards the type of controversial and parochial justification present in other traditional accounts of human rights? I do not believe that it does. After all, there is surely nothing in the interest-based account of human rights that makes it *necessarily* parochial.⁴⁴ The interest-based account is not grounded in any comprehensive moral doctrine or religious faith. It only asks us to accept that human well-being matters morally. This is surely something that all reasonable individuals can agree on, and thus provides hope for a possible basis for support for human rights. Of course, the interest-based account can quickly become controversial when one starts fleshing out just which interests are genuinely sufficient to actually ground human rights. Do we keep the account very minimal, and focus only on biological needs, or do we open it up to include more social and political interests? Do we focus on only one category of interests, such as those related to personhood, or do we adopt a more pluralistic interest-based account?⁴⁵ As pointed out above, there are debates within interest-based accounts on just such issues. However, the purpose of this paper is not to resolve these disputes, important as they are. My simple point is that the interest-based account of rights is not especially controversial in and of itself. Indeed, it seems to offer just the type of justificatory minimalism that Cohen proposes. It provides the starting basis for a reasonable agreement on the justification of human rights: human well-being. It thus provides the basis for a dialogue across groups as to which human interests are sufficient to merit protection in the form of human rights.⁴⁶

⁴⁴ Allen Buchanan, "Taking the Human out of Human Rights" in *Rawls's Law of Peoples: A Realistic Utopia?*, eds. R. Martin and D. Reidy (Oxford: Blackwell, 2006), pp. 150-168, p. 159.

⁴⁵ This is the debate between James Griffin, *On Human Rights*; and John Tasioulas, "Human Rights, Universality and the Values of Personhood: Retracing Griffin's Steps".

⁴⁶ My position then is that it is possible to have a 'cross-cultural consensus' on the justification for human rights. On a cross-cultural consensus on human rights, see Charles Taylor, "Conditions of an Unforced Consensus on Human Rights" in *The East Asian Challenge for Human Rights*, pp. 124-144; and Abdullahi Ahmed An-Na'im, "Problems of Universal Cultural Legitimacy for Human Rights" in *Human Rights in Africa: Cross-Cultural Perspectives*, eds. A. Ahmed An-Na'im and F. Deng, (Washington: Brookings Institute, 1990), pp. 331-367.

Rigidity

The third problem with attempting to ground human rights in some valuable aspect of human nature is that it has the potential to 'fix' human rights for eternity. After all, if there is a valuable essence to humanity that merits protection, then surely this essence is not only unchanging across space, but also across time. If correct, then the human rights we have now are the same as those possessed by our hunter-gathering ancestors, and are the same as those that will be possessed by the last members of the species *Homo sapiens*. This is problematic because this fixed notion of human rights seems quite implausible. After all, it certainly seems obvious that some of the uncontroversial human rights we possess now simply could not have been enjoyed by previous generations.⁴⁷ Take for example, the human right to seek and enjoy asylum in other countries, and the right to take part in the government of one's country. Quite obviously, such rights would have been meaningless to our ancient human ancestors who did not exist within the context of sovereign nation states.

However, an interest-based grounding for human rights seems perfectly able to provide a more flexible understanding of human rights. Under an interest-based account, human rights can indeed change over time. For example, interest-based accounts would deny that individuals living in ancient times had the right to seek and enjoy asylum in other countries, or the right to take part in the government of their country, on the basis that such individuals had no interest in these things. They had no such interests because these goods depend upon the existence of particular forms of political organisation that had not yet emerged: sovereign nation states. We can see then that interests allow a certain degree of flexibility into the grounding of human rights. Rather than pointing to some fixed and eternal aspect of human nature that merits protection, interest-based accounts point to those important human interests that merit protection, interests which can of course change over time. Indeed, as we look into the future, it may be that new technologies create new universal interests which merit protection in the form of human rights. For example Allen Buchanan has suggested that developments in biomedical technologies may well radically alter what we take human well-being – and a minimally decent life – to actually entail.⁴⁸ And so it seems that as changes in the world affect the nature and content of our interests, so too will they change the nature and content of our human rights. Conceiving of human rights as grounded in the basic interests of human beings allows for just this type of flexibility.

⁴⁷ James Griffin uses this same example in favour of his 'social manageability' test for human rights. See James Griffin, *On Human Rights*, p. 37.

⁴⁸ Allen Buchanan, "Equality and Human Rights", *Politics, Philosophy and Economics*, 4 (2005), 69-90, at p. 76.

Distinguishing Between What We Value and Our Rights

I have argued then that grounding human rights in some valuable aspect of our humanity need not be dubious, parochial or rigid. If human rights are grounded in the basic interests of human beings, a persuasive normative justification of human rights can emerge. However, one important problem with basing human rights on interests is the obvious fact that we have lots of interests in lots of different things. Moreover, many of the interests we have do not seem to correlate sensibly with human rights. For instance, it would be odd to translate my interest in having a glass of beer this evening into a human right to have a glass of beer. Such arguments have led some theorists to worry that traditional theories in general, and theories based on interests in particular, collapse the distinction between what is of value and what counts as our rights.⁴⁹ As such, some claim that grounding human rights in interests will lead to an ever-increasing number of human rights claims, and thus a cheapening of the discourse as a whole.

However, an interest-based theory of human rights need not – and indeed should not – assign rights to protect each and every one of our interests. Interest-based theories of human rights can and should discriminate between interests. Indeed, Joseph Raz’s famous analysis of what it means to possess a right can be used as one way of discriminating between interests in this way. Raz’s analysis 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.⁵⁰

So we see then that under this understanding of rights, not all interests become rights. Only those interests that are sufficient to impose duties on others, other things being equal, translate into rights.

Of course this raises the question of which interests count as a sufficient reason to impose duties on others in the case of human rights. Different theorists will provide different answers to this question. However, the least controversial way of determining whether an interests counts as sufficient is to consider whether it is *basic*. After all, the ordinary understanding of human rights is that they do not protect everything that we value, like glasses of beer. Rather, they cover the bare minimum: the basic requirements for a minimally decent life. This point alone shows that a traditional theory of human rights need not conflate what we value with what we hold as human rights.

Furthermore, the class of interests that count as sufficient can be narrowed even further if one so chooses. After all, some theorists have claimed that only a particular class of

⁴⁹ Joseph Raz, “Human Rights Without Foundations”; and Jean L. Cohen, “Rethinking Human Rights, Democracy, and Sovereignty in the Age of Globalization”, p. 582.

⁵⁰ Joseph Raz, *The Morality of Freedom*, p. 166.

interests can be deemed sufficient to warrant protection in the form of human rights. For example, James Griffin has argued that only those interests which protect our personhood – our capacity as autonomous, self-determining agents - can be translated into human rights. This is why, he claims, a woman who suffers psychological torment from her husband, although wronged through a setback of her basic interests, does not suffer a human rights violation.⁵¹ Alternatively, other theorists would argue that the reason this woman does not suffer a human rights violation is because the torment comes from a private individual and not the state. These theorists would want to claim that only those interests which are sufficient to impose duties on the *state* are sufficient to warrant protection in the form of human rights.

I should point out that I personally do not agree with these other means of narrowing the range of interests that can be translated into human rights. I myself see no reason why human rights must be limited to protecting autonomy alone, or protecting individuals only from the state. As such, I do not find it at all obvious that the woman's human rights have not been violated by the psychological torment meted out by her husband.⁵² After all, we should be wary of taking an overly narrow conception of human rights purely because some thinkers complain about the possibility of proliferation. It may well be the case that there are good rational and normative reasons for extending the range of human rights in novel directions.⁵³ However, the point of this paper is not to provide a full justification for an expansive list of human rights. The important relevant point is that a traditional theory of human rights grounded in the basic interests of persons does not collapse the distinction between what is of value to humans and what constitutes our rights. The range of interests that count as sufficient can be narrowed in a variety of ways. Obviously, all interest-based theories derive rights from an account of the essential components of human well-being. But they do not consider rights to protect everything that makes a human life go well: only those interests that are deemed a sufficient reason for imposing duties on others translate into human rights. As discussed, just which interests actually count as sufficient is open to debate; a debate beyond the remit of this paper. But interest-based theories of human rights can and should discriminate between interests.

Conclusion

Traditional theories of human rights argue that human rights are moral rights that all persons possess in virtue of some valuable aspect of their humanity. I have defended traditional theories of human rights in two stages. First of all, I have defended conceiving of human rights as moral rights. This was on the basis that conceiving of

⁵¹ James Griffin, *On Human Rights*, p. 52.

⁵² Even under Griffin's account of human rights it seems to me that her human rights may well have been violated.

⁵³ This point is well made in Nick Ferreira, "The Expanding Realm of Human Rights", *Res Publica*, 14 (2008), 57-64.

moral rights accords with the practice of human rights, accords with the ordinary use of human rights, and reminds us of our moral obligation to protect and promote human rights. Secondly, I have defended grounding human rights in some valuable aspect of humanity. I first pointed to the fact that providing a normative justification of human rights endows them with determinacy and gives us a principled basis for persuading sceptics and condemning violators. I then went on to show that a normative justification grounded in the basic interests of human beings could avoid dubious metaphysical assumptions, parochialism, rigidity and conflating what is of value to humans with what we hold as rights. Despite then the wide-ranging criticisms from proponents of positive, practical and political theories of human rights, traditional theories of human rights remain the most plausible. It is important to remember, however, that a traditional theory of human rights need not also be a conservative one. It need not be based on premises concerning the moral agency of human beings; and it need not propose only a very limited and conservative range of human rights. All a traditional theory does necessarily do is claim that human rights are essentially moral rights that all persons possess in virtue of some valuable aspect of their humanity.