

Exploring the Justifications for Human Rights

by

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## **Abstract**

In this paper the concept of a 'human right' is analysed and clarified. Some justifications for human rights – such as natural rights theory, contractarianism, utilitarianism and rights as vital interests – are explored with respect to their emphasis on rights as protected choices or protected interests. Finally, a vital interests view is defended in which the rights to subsistence, security, and liberty of movement and political participation form the set of our basic rights without which we cannot enjoy our other rights.

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To Dave and my family  
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## **Introduction**

Human rights are powerful and vital. They empower us to make choices about our lives that fit our interests. They empower us to stand up for what we believe in, even in the face of overwhelming opposition. They also allow us a measure of security where we would otherwise be vulnerable. The idea of human rights is a compelling and commanding political tool. Much discussion about the current condition of the world revolves around rights; who has them and who doesn't, how they are implemented and to what extent they are implemented. The fact that talk of rights can be employed as such a powerful tool ensures that it is widely used but the effects of such wide usage are both positive and negative. On the one hand, the more discussion there is about human rights the more awareness there is and the more pressure there is to ensure that human rights are respected and protected. On the other hand, human rights inflation threatens to erode the moral force of human rights. When we are not clear about what a right is we may speak too loosely about rights. When we are not clear about the justifications for rights we may attribute rights where there are none, or, worse, we may not attribute rights where rights should be. So it does us well to be clear about what rights are and how they are justified.

Focusing on the concept of a right allows us to be clear about what can logically count as a right and what cannot. This is undoubtedly an important step in any theory of rights but there is only so much mileage that can be gained from analysing the concept. Since the concept of 'a right' doesn't give us any details about what our rights are, there is a need for a strong justification. The justification, in turn, allows us to focus on that which can legitimately be considered a right and that which cannot. As with any topic in philosophy, there are a wide variety of theories about what justifies a right and in any

theory there are a wide variety of nuanced views. My intention in this paper is to clarify the concept of ‘a right’ and then to present *some* prominent views and analyse whether the justifications of human rights which they provide are strong. I have grouped these views into two categories: protected choices and protected interests. The choice theories focus more on freedom and autonomy, so that we can make choices about what *is* our personal best interests. The interest theories focus on protecting our general interests, i.e. those interests that everyone shares, rather than our personal preferences (although not necessarily to the exclusion of our individual interests) so that we can all have a decent minimal standard of living. Overall, I find that the most compelling justification for human rights is a justification based on vital interests. It is the most satisfactory justification because it explains the moral force that our rights have and it most successfully upholds the commitments to equality and universality.

The history of human rights has led us to a commitment to these two principles, i.e., equality and universality. Naturally, this commitment to equality does not mean total equality but simply a minimum or baseline level, i.e. the objects of our human rights are not dependent on race, gender, or socio-economic status. The commitment to universality is the commitment to ensuring that everyone, regardless of borders, ideological beliefs and customs, has the same rights. Most of the horrifying rights violations that have occurred in history have been as a result of the perception that a certain class of people is subhuman and therefore not worthy of the same respect and dignified treatment as humans. If we do not extend human rights to everyone equally then we leave the door open for human rights violators.



The sad fact that there are still many nations that do not respect the rights of their people shows that human rights are not descriptive but prescriptive. Human rights are an ideal that we try to strive for. They are both morally compelling and attainable.

### **Chapter One: The Concept of a Right**

The importance of analysing the concept of ‘a right’ cannot be underestimated since it has direct implications on what can be said in a theory of rights. There have been many approaches to analysing the concept and one of the less successful ways has been to try and determine what a right denotes. This approach leads to the difficulty of having to view rights as properties and, since there is nothing that we can point to and say “that is a right,” we will have to appeal to rights as some metaphysical entity. This is not a promising solution as any theory that appeals to metaphysical entities is going to have to explain these metaphysical entities and how we have access to them, so we certainly want to avoid this approach if we can. On the other hand, if we want to avoid saying that a right is denotative, our only option is to say that it is non-denotative. But this too leads to difficulties. If rights are non-denotative then we are hard-pressed to explain why it is that “A has a right to X” can be fact-stating, i.e. that it can be subject to the conditions of truth or falsity. Arguing that, perhaps, these sentences are not fact-stating may lead us to say that these are value utterances which, in a sense, record our decisions<sup>1</sup>.

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<sup>1</sup> McDonald, M. “Natural Rights”, pp 35, reprinted in Waldron, J. (ed), *Theories of Rights*, Oxford University Press (1984).

This is problematic for two reasons: (1) we do use sentences like “A has a right to X” in fact-stating ways; and (2) there is nothing to say that once the value utterance is made my value utterance must remain the same. If it did then I should be very careful about what I say. Since the value utterance does not necessarily record a permanent decision there can be no stability to rights. I might decide, at this time, that A has a right to X, and two minutes from now state that A does not have a right to X. Furthermore, if these are just value utterances then there is no reason why anyone should accept my utterance that A has a right to X; there can be no justification for rights.

A better approach would be to analyse rights in terms of their relations to other notions such as duty. The following will be a discussion of the concept of ‘a right’ and its distinction from and correlation with other terms.

### **‘Right’ vs. ‘a right’**

The first thing that should be clarified is that ‘a right’ is different from ‘right’. This seems to be a fairly obvious distinction but we can get entangled in the move from that which is right to that which is a right. The two notions come together because rights are governed by what we feel it is right to have *a right* to. For instance, we think that it is right to refrain from punching people on the nose, which translates into *a right* to personal security that requires us all to refrain from punching people on the nose. On the other hand, the two notions can diverge so that what is right is not a right. For instance, it may be right to protect an historical building but that doesn’t mean that the building has a right to be protected. There are also times when I may have a right but it is not right that I exercise it. These are usually particular circumstances wherein it may be a right that I

have that I can freely express my opinions and beliefs but that does not mean that it is right that I do so when those opinions, for example, include saying nasty things about some racial minority.

The difficulty with distinguishing the two is that we try to base our rights on what we think is right but we cannot have rights to everything that we think is right. For instance, we may think that it is right that everyone has a partner that loves them unconditionally but it would be hard to translate that into a right. The reason being that it is beyond our abilities to ensure that everyone has this as a right. So rights must be linked in some important way to what it is possible to ensure that everyone gets. The distinction becomes even more difficult when the things that we think are right are plausible objects of rights. It certainly seems right that everyone should have food and water, since this is biologically required for survival, but it is another matter altogether whether we can justify this as a right. Some philosophers argue that it is a right, others argue that it isn't. A theory of rights, then, justifies which of these things it is plausible, and necessary, to name as rights.

### **Claims and Duties**

One of the most prevalent definitions of 'a right' is that it is a claim with a corresponding duty. This explanation seems to have been entrenched by the work of Wesley Newcomb Hohfeld<sup>2</sup> who argued that we need to pay attention to the different concepts that are usually covered by our notion of a right. Being a legal scholar his work was restricted to firming up the concept of a legal right but his clarifications have helped to lay out some of the relationships that are involved in a right. It was his belief that by separating out

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<sup>2</sup> Hohfeld, W. N. *Fundamental Legal Conceptions*, Yale University Press (1966).

notions that were captured by our use of ‘a right’, we would generate less confusion in judicial reasoning.

Hohfeld argued that rights should be separated from other concepts such as privileges, powers and immunities and that, if we were to talk about rights in the strict sense, we could effectively use ‘claim’ as a synonym<sup>3</sup>. A claim-right then has a correlative duty. For example, if X owns a house he has a right against Y that Y not enter his house (unless, of course, he is invited) and Y would have the correlative duty to stay out of X’s house. So X’s right imposes a corresponding duty on Y. Powers, privileges, and immunities also have correlatives but the correlatives are different for each of them, and can be different again from duties. A privilege can best be thought of as the negation of a duty. If X has a privilege to enter and exit his house then he has no duty to do otherwise<sup>4</sup>. The correlative is that of no-right so that Y has no-right against X about X’s use of his house. Powers and immunities seem to act as second-order operations on the primary relations of rights to duty and privileges to no-rights. A power is the ability to affect changes in relations so that, for example, a court has the power to impose a statute stating that any citizen between the ages of 18 and 65 may be called on to stand as a member of the jury. While this doesn’t initially impose a duty on those citizens they are liable if they should be called on. An immunity, on the other hand, is to be outside of the scope of power so that there is no power over you to act. In the example used above, if I am not a citizen the courts have no power over me in terms of calling me for jury duty.

There are two objections to Hohfeld’s analysis: (1) the term ‘right’ is only analysed in terms of its relationships with ‘duty’ and no-right’ but this in itself is not

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<sup>3</sup> *Ibid.*, pp 38.

<sup>4</sup> *Ibid.*, pp 45.

helpful as it presupposes that we understand these latter terms; and (2) there is no necessary logical connection between 'right' and 'duty'.

The first objection is not a criticism of Hohfeld since he had no reason to suppose that we didn't have a basic understanding, or intuition, of what a right is. Rather, it is a reminder that more might be needed to fully understand this notion since we cannot understand it by its relations alone. For instance, if I am unaware of the meaning of the term 'A' as well as that of the term 'B' then being informed that A stands in relation R to B does not help me to understand what is meant by the terms 'A' and 'B'. If, however, we do know the meaning of one of the words, then we should be able to form a rough idea of what the other term means. It is not likely that we can clarify the term 'right' much further so to have a fuller understanding of the term we will have to focus on the criteria of application which is best captured by their justification. But we will not have progressed at all if it is shown that rights and duties do not have a necessary logical connection.

Alan White<sup>5</sup> argues that duties are not logical extensions of rights and that rights are not logical extensions of duties. His argument is not specific to human rights but, rather, encompasses any notion of rights that we may have. His main argument is that, if we cannot show that there is a necessary logical connection between rights and duties, then we will have to explain why, particularly when it comes to human rights, we should view them as involving duties at all. He illustrates his argument by showing that we can have rights without duties and we can have duties without rights, mainly by looking at examples of cases where we can have one without the other. I have picked four examples that I think are illustrative of his case: (1) teaching, (2) criticizing, (3) assuming, hoping,

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<sup>5</sup> White, A. *Rights*, Clarendon Press (1984).

expecting, etc., and (4) rights in games. First, White argues that the right to teach people, if I am a professor or a teacher, or the right to heal people, if I am a doctor, does not impose on them a corresponding duty to be taught or to be healed<sup>6</sup>. Now, clearly what White says is true; it would hardly make sense to say that, when I teach, others have a duty to be taught. But his claim that this means there is no corresponding duty to the right is mistaken. The example is just not specific enough about the rights in question. On the one hand, there is the right to fulfill my career goals, which might include teaching, and this would certainly impose duties on others not to unjustifiably interfere with that goal. On the other hand, presuming that the school has hired me to teach, I have a duty to teach, since the school is paying me, and the school has a right that I teach. This also means that I have a privilege or liberty to teach so that everyone, besides the school, has no-right with regards to my teaching. This should be clear from Hohfeld's analysis and it is precisely this kind of confusion that Hohfeld aimed to clear up with his analysis.

Second, White argues that it is ridiculous to think that A's right to criticize B imposes a duty on B to be criticized, or to listen, since A can criticize B when B is not there, or even when B is dead. White, here, seems to assume that having a right or exercising a right always requires positive action on the part of the duty-bearer but it seems quite obvious that the duty-bearers in the case need simply refrain from interfering with A's criticism and whether B is there or not is irrelevant. Furthermore, the duty of non-interference does not require that C, who is present when A is criticizing B, has to be a party to, or has to refrain from disagreeing with A, or even refrain from telling him to "shut up." After all, C has the right to speak and criticize as well. C, however, cannot interfere with A's criticism by issuing any kind of serious threat to him; this would be an

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<sup>6</sup> *Ibid.*, pp 64.

unjustifiable response and a genuine interference with A's rights. So, certainly, White is correct in saying that it is ridiculous to suppose that B has a duty to be criticized but that does not make his case for him. It simply shows that there is at least one kind of duty that is not correlative of A's right but it does not thereby show that there are none.

Third, White argues that no one can possibly have a duty corresponding to my right to hope, expect, assume, complain, resent, condemn, despise someone, etc.<sup>7</sup> This example is a little trickier because it involves our psychological states and it is hard to imagine how anyone can interfere with our psychological states when they have no access to them except through our expressions of them. Perhaps these cannot be rights since we have no control over them. Since a right aims to *protect* our interests or choices, the objects of our rights must be something that can be interfered with by others. For instance, property can be stolen from us, even in our presence, if the threat is severe enough such as having a gun pointed at us. Expressions of our opinions and beliefs can be curtailed by the threat of being thrown in jail. But no matter what anyone threatens to do, our hoping, or resenting, or assuming cannot be changed; it is only our expressions of them that can be interfered with. Essentially, then, since these psychological states cannot be subject to threat and so cannot be interfered with, they do not fall into the domain of claim-rights. How, then, do we explain our use of the word 'right' in this context? This might fall, once again, under the domain of that which Hohfeld calls a privilege or a liberty. No-one has a claim-right against me that would prevent my hoping, expecting, assuming or resenting, and, as a result, I have no duty to do otherwise. My right to these things is more properly stated as my liberty-right.

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<sup>7</sup> *Ibid.*, pp 71.

Finally, there is the right, in football, to tackle the guy that is carrying the ball but this does not involve any corresponding duty in the person carrying the ball to be tackled<sup>8</sup>. This, however, is a misrepresentation of a right. The right in question is the right to *try* and tackle the person carrying the ball, and while the person carrying the ball does not have to agree to being tackled, he does have a duty to avoid interfering with the right to *try* and tackle him. Interference in this regard would be along the lines of interfering with his ability to play, for instance, by poisoning him<sup>9</sup>. The tacklee has the duty to abide by the rules of the game.

It may seem, from the above examples, that White has exactly that kind of confused notion of a right that Hohfeld tried to clear up but, in fact, White's overall point is that, with regards to liberty-rights and claim-rights, we may have a distinction between two kinds of rights. But it is not a conceptual distinction. The distinction lies in assigning one kind of right to liberties and another kind of right to claims but, in an analysis of the concept of 'a right' itself, there is no logically necessary connection between rights and duties or rights and the absence of duties. I think the best way to avoid this confusion of White's is to argue, along with Hohfeld, that rights, in the strict sense, involve claims. The point is that powers, privileges and immunities are not rights, although they have frequently been referred to under the heading of rights. 'Powers', 'privileges', and 'immunities' are separate concepts from the concept of 'a right' and when we use the concept of 'a right' in its strict and proper sense we mean, precisely, that it is a claim that imposes a correlative duty on someone, whomever that someone may be (and, of course, it can be more than one person). To be clear, I might have a liberty to enter and exit my

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<sup>8</sup> *Ibid*, pp 64.

<sup>9</sup> This example might be slightly different from the one that Jan Narveson addresses in *The Libertarian Idea*, (pp 43) but they are sufficiently similar that I owe this argument to him.



house whenever I want but my right to that liberty involves a claim against others not to interfere with that liberty. We may assert, along with Brian Orend, that a claim is at the core of a right.<sup>10</sup>

Overall, I think that White makes the mistake of arguing from too broad a conception of rights and, as a result, he is led to the conclusion that duties are not logically necessary extensions of rights. In light of his conclusion, the onus, he believes, is on the philosopher (or legal scholar) to explain why, in certain cases, we take rights and duties to be correlates. This would not be an easy task but since we are concerned with a much narrower, and I think more accurate, conception of rights than White has, we can safely conclude that duties are necessary logical extensions of rights. However, it is not the case that rights are necessary logical extensions of duties. We can have duties to persons without them having rights against us. Finally then, every right implies a duty but not every duty implies a right.

### **Rights and Human Rights**

Now that we have forged a connection between rights and duties, we can establish that any claim-right has 3 elements:

1. Right-holders
2. Duty-bearers
3. Objects.

The 'human' in human rights draws attention to the fact that the right-holders are human beings. Of course, animals, birds, and insects may be right-holders as well but they do not

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<sup>10</sup> Orend, B. *Human Rights: Concept and Context*, Broadview Press (2002), pp 23.

have human rights and, as such, the grounds and justifications for, say, animal rights will be different from those of human rights.

Human rights are, in one sense, a subset of rights since there are many rights that aren't human rights. However, human rights also form the basis of other rights, such as legal rights, because without the objects of our human rights we would not be able to enjoy the more specific rights such as entering into agreements or contracts, owning cars or houses, etc. Human rights also differ from other rights because they are general in the sense that they apply to everyone – as right-holders and duty-bearers – and don't require any action on the part of the right-holders. Specific rights, on the other hand, require some sort of action, such as a promise, or the signing of a contract, and only apply to the people that are involved in the agreement.

Finally, the objects of our rights are those things to which we have a right. If A has a right to X, then X is the object of A's right.

### **Moral and Legal Rights**

There is no easy distinction between moral rights and legal rights since the two are interconnected. The most important moral rights should have a legal basis to be fully realised but the absence of a legal right does not indicate the absence of a moral rights. Legal positivists have tried to ground the presence of a moral right in a legal right but this approach ignores one important aspect of moral rights, namely, that one driving force behind moral rights is to change existing social institutions. Furthermore, if human rights are to be universal and equal they cannot simply be legal since there are nations in which rights are not recognised but we still feel that the citizens in those countries have rights.

The legal positivists collapse the distinction between having a right and having that right respected. Whereas having a right is a moral matter, for the right to be appropriately respected it must be entered into law.

### **Negative and Positive Rights**

The distinction between positive and negative rights is in the duties that they require.

Negative rights simply require one to refrain from certain actions whereas positive rights require action. For instance, the right to freedom of expression is considered a negative right because the correlative duty simply requires that one refrain from interfering with another's expression. An example of a positive right would be the right to health care because it requires some action on the part of social institutions to ensure that everyone has access to health care. The distinction is not, however, a totally clear one, with rights falling neatly into one category or the other. Even the rights that are generally thought of as negative rights do occasionally require some positive action. The right to personal security, for instance, requires that everyone refrain from subjecting me to personal injury. However, since there are people that may try to violate my rights, there are positive actions that social institutions must perform to minimize the chances of that happening, such as having a police force to prevent violations or having a legal system that prosecutes those who violate rights.

To a certain extent, all rights are negative since they at least require that no-one interfere with exercising the right in question. It is when we look at the positive duties that may be required for the recognition of a certain right that we run into difficulties

because the action required, inevitably, costs something and it is difficult to determine which actions may be too costly. The right to personal security, for instance, may require that we employ a police force as a preventative measure; does this mean that we have one police man for every hundred citizens or for every thousand citizens? The more police men or women we have the more secure we may feel but the costs of employing police personnel can become so high that they become burdensome.

### **Conclusion:**

As we saw, there is an important distinction to be marked by what is right and what is a right. Since what is right governs what we think should be rights we need a way of distinguishing when what is *right* has no influence on what is *a right*. This can be further expounded now by drawing attention to the fact that rights have correlative duties. If the duties that would be imposed by a proposed right are not capable of being fulfilled then it cannot have the status of being a right. What distinguishes ‘a right’ from ‘right’ is the attendant obligations. ‘A right’ establishes that something is mandatory whereas right establishes that something ought to be done. We further established that moral rights and legal rights are distinct. However, our most important moral rights should have a legal basis to be fully realised. Finally, the distinction was drawn between negative rights and positive rights and it was shown that all rights are at least negative. Furthermore, all rights do impose at least some positive duties so the distinction between negative rights and positive rights is unnecessary. The important question is which duties correlative to rights are too burdensome and which duties are reasonable.

## **Chapter Two: The Justifications for Rights**

The most important part of any human rights theory must be the justification since analysing the concept will have no bearing on *why* we have rights. It is important for a justification to fit our intuitions, at least to some extent, but it should not be the case that too much faith should be placed in our intuitions either; we must be open to the possibility of being guided by our reason into new territory. The kind of intuitions that a justification should be able to capture are, for instance, our intuition that it is perfectly acceptable to punish criminals and that punishment in this regard is not a form of human rights violation. A good justification should also be able to attribute human rights to precisely those whom we think of as having human rights, and should avoid precisely those whom we think should not. The ascription of human rights is covered by determining the necessary and sufficient conditions for them. This will clearly have an impact on the requirements of universality and equality.

The theories presented here are divided into two sections based on their focus: choice theories take rationality as their basis; interest theories take vital interests as their basis. These are not mutually exclusive categories but, rather, I have simply used them as a device for highlighting the main thrust of the argument.

### **Choice Theories**

The focus of choice theories is to justify human rights through rationality. Choice conceptions treat rights as devices for promoting individual freedom and autonomy. Rationality grounds rights so that rationality is either one or both of the necessary and sufficient conditions. This has implications for right-holders as it limits right-holders to

those who have a certain degree of rationality. The choice theories presented here all differ in degree with respect to the emphasis that they place on the condition of rationality. For both Gewirth and Narveson, rationality is absolutely central to their justifications. For Hart, however, while rationality is necessary for the one natural right that we have, that natural right is contingent on the existence of other rights.

The main drawback of the choice theories is that they cannot capture fully the core commitment to universality and equality of human rights. Since they rely on rationality, they are forced to exclude those below a certain minimum level of rationality as being right-holders.

### **Locke and Hart on Natural Rights**

Natural rights theories take rights to be properties of persons and, often, these properties are presented as metaphysical properties since there is no rights-property that one can point to and say “there are your rights.” One prominent natural rights theory is that of John Locke. His theory stems from a belief in God and the natural law of reason and he sets the state of nature as the foundation of his argument. This is a state of existence prior to laws and rules in which humans can do anything that they want except violate God’s property.

The state of nature is the state of existence or interaction in which humans are not governed by any laws or have to obey any rules. The reason for setting the state of nature as the theoretical background is that we can proceed with a rational argument for what should be accepted without any obstacles or pre-established ideas. We can effectively

start with a blank slate. Locke<sup>11</sup> argues that in this state of nature we are governed by the natural law of reason and everyone is obligated to follow this natural law. This natural law of reason serves two functions: (1) it sets limits on what we can do, and (2) it dictates that everyone respect those limits.

Since we are all God's creatures and we are sent into the world to do God's work we have liberty only insofar as we do not destroy ourselves. We do not have the licence to destroy ourselves since we are God's property. Survival requires life, liberty, health and property and, as rights, these ensure that we are adequately protected. As we seek these protections for ourselves, we must ensure that we do not violate those rights of other human beings since they too are God's creatures. Any violation of these rights is a transgression against the law of nature and, as such, the offender denies his own humanity, becomes degenerate, and essentially declares himself to be a "noxious creature."

There are three problems with this theory of natural rights, and they can be extended to any theory of rights that relies on a belief in God or natural law. The first problem is precisely that the reasoning proceeds from a belief in God. This probably could be extended to any religious belief but it creates a problem for those who don't believe in God or any other supernatural being. This rejection of the justification for human rights could lead to a rejection of human rights without leaving any room for argument. If I reject this justification for human rights because I do not believe in God, there is little room for the proponents of this justification to argue their case.

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<sup>11</sup> Locke, J. *The Second Treatise of Government*, collected in Wootton, D. (ed.) *Political Writings of John Locke*.

The second problem is that this theory relies on the natural law of reason which “teaches all mankind who will but consult it that, being all equal and independent, no one ought to harm another in his life, liberty, health, or possessions.”<sup>12</sup> We may be able to appeal to the natural light of reason if it is the case that everyone seems to agree. It is much more difficult when there are people that disagree about which rights the natural law of reason reveals to us. The only response to disagreement from a proponent of this theory is to argue that the person disagreeing hasn’t thought about this enough. One can easily see how the argument would just go around in circles at that point with each person arguing that it is the other person who hasn’t thought about it enough. This doesn’t mean that we must reject reason altogether; in fact we are deeply committed to the role that reason plays in justifying human rights. The point is that, while we do rely on reason, we cannot just appeal to reason without presenting an argument that outlines the steps leading to the conclusion. Presenting the conclusion without presenting the steps in between makes the conclusion difficult to argue against since one hardly knows what there is for one to argue against.

The final problem is that, because rights are a natural property, one has to say that criminals are not human to explain their behaviour and to justify punishing them. Since rights are natural properties, and since we are led to an acceptance of rights for everyone through the natural law of reason, anyone who acts against these principles must be denying their own humanity and becomes, in Locke’s words, a “noxious creature”. This may help to justify why it is acceptable to punish a criminal. If a criminal is no longer considered a human being then he or she no longer has human rights. However, this seems both counterintuitive and too stringent. It is counterintuitive because, despite the

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<sup>12</sup> *Ibid*, pp 263-4.



fact that certain criminals may commit some vicious acts, such as murder, they are still human beings. Clearly, the humanity that they are charged with denying is not biological but rather metaphysical – and what is this metaphysical humanity? It makes no sense to say that it is the denial of reason since there are some cases in which it seems someone might have good reasons for violating the rights of another. For instance, if someone is starving, they may violate the rights of another by stealing food from them. This may well be considered wrong and unjustifiable but the act of stealing for survival hardly seems a denial of reason and as a result a denial of humanity. However wrong we deem the act of stealing, even if it is for survival, we could hardly consider someone who does so a “noxious creature” that has denied their humanity. It is reason which has led them to the realization that if they do not have food they will die; and it is reason which leads them to the conclusion that they may have to steal food if there is no other way to get it. It is simply too stringent to argue that someone in this position, committing these acts, is a “noxious creature.”

H. L. A. Hart has formulated an approach whereby he shows that if we have any rights at all we must have one natural right and that is the equal right of all to freedom.<sup>13</sup> Hart lists two reasons for holding that this right to freedom is a natural right:

- (1) This right is one which all men have if they are capable of choice: they have it *qua* men and not only if they are members of some society or stand in some special relation to each other.
- (2) This right is not created or conferred by men’s voluntary action; other moral rights are.<sup>14</sup>

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<sup>13</sup> Hart, H. L. A. “Are there any natural rights” reprinted in *Theories of Rights*, Waldron, J. (ed.), pp 75-90.

Once again we see the grounding of a right in a certain degree of rationality; the degree of rationality it takes to be capable of choice. Hart proceeds to point out that special rights are agreements that we enter into with another person or persons. In making these agreements we are effectively agreeing to limit our freedom with respect to the obligation that we have incurred. For instance, if A promises B that she will drive B to work because B's car has broken down, A agrees to limit her freedom about what she can and will do on the day in question. In this way, a right is conferred on B but it is only credible to suppose that A can enter into such an agreement with B if A has a general right to freedom. This also shows that the reason we need to be capable of choice is because all other rights extend from an agreement to limit our freedom.

The first problem is with the requirement that we need to be capable of choice to have rights. The same problem surfaces within most theories that are based on rationality since it *excludes* infants and those who have less than a certain degree of rationality. Hart, however, acknowledges this and argues that, while having a right imposes a duty on others, benefiting from a duty doesn't mean that the subject of a duty has a right. He says further that, if we do accept moral duties as having moral correlative rights, then we must accept that we have rights against ourselves because of our duties to keep ourselves alive or to develop our talents. Hart illustrates that benefiting from a duty does not mean that one has a right with the example of a promise. For instance, if Amy has promised Burt that she will look after his mother, Cassandra, while he is away it is Burt who holds the right to having his mother looked after. However, it is Cassandra that benefits from the duty. It is the fact that Burt can release Amy from her obligation and not that Cassandra benefits from the obligation that confers the right on Burt rather than Cassandra. Amy has

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<sup>14</sup> *Ibid.*, pp 75-76.

a duty to look after Cassandra in the same way that parents have a duty to look after their infants but this confers no right correlative with that duty.

There are two things that might be said here. Perhaps Cassandra, as the beneficiary of the duty, has a right against her son that he look after her. The duty correlative to this right is then passed on to Angela. If Angela reneges on her promise then Burt will have been wronged but so will his mother since Burt will not have fulfilled his duty to her.

Second, it seems entirely plausible to suggest that the duty not to murder an infant is equal to the duty not to murder an adult but how does one explain the equal stringency of these duties if one has a right and the other does not? If we are to argue that the duty not to murder babies is equally as stringent as the duty not to murder adults but that infants do not have rights, then why would it be necessary to appeal to rights at all? Given that these two acts are equally reprehensible, it would not make sense to say that one is reprehensible because it is a violation of freedom while the other is reprehensible for a different reason that is equally compelling as murder being a violation of human rights.

Even if we can separate the infant's murder from the adult's murder in terms of rights and duties, it doesn't seem obvious that it would be by an appeal to freedom. It should be apparent that the murder of an infant would also put a halt to any ability to make choices in the future. The point of having the freedom to make choices is that we have the freedom to enter into agreements that limit our choices or our freedom. However, there is nothing to say that one must be exercising the right at this moment to be considered a right-holder. It is simply the freedom to do so whenever one chooses to

do so. This may be tomorrow as well as twenty years from now. If one is not going to enter into an agreement that limits one's choices for the next twenty years it hardly means that one does not have the right at this moment. This would be equally true of infants. So there seems to be no grounds on which we can deny infants rights simply because they are not capable of choice at this moment. To put a finer point on it, if this is Hart's argument, then he would have to accept that, for instance, I do not have rights when I am asleep, unconscious or in some other way incapable of making a decision at that moment. It seems pretty clear to me that we do not lose our rights in these situations.

A further problem is that, if Hart is correct in suggesting that the only natural right is the right to freedom, then we need to explain why it is precisely freedom that criminals forfeit when they violate the rights of others. If the right to freedom is a natural right then it cannot be forfeited and to punish criminals by taking away their freedom is a violation of their rights. Even worse are cases in which criminals do not violate the rights of others. For instance, in most countries people can go to jail for selling drugs but this is not a violation of anyone's rights. In these cases we cannot even make an argument for their rights being overridden and we have imposed a penalty that is much greater than the crime that has been committed.

Finally, this view ascribes only one right to us and this right is contingent upon there being other rights. Most of us would like to think that we have more than this one right and there seems to be enough support and justification for a greater number of rights. So we may look for another justification which will ascribe the rights we think are necessary.

We may argue that the grounds of human rights are biological humanity and, indeed, this seems plausible since they are *human* rights and we are *human beings*. This would be the clearest way to ensure that the commitments of universality and equality are met by a theory of human rights. It ensures that anyone who is biologically human has human rights and everything that is not biologically human does not have human rights (they may have other kinds of rights but not human rights). The problem with this approach is that the necessary and sufficient conditions of rights would be biological humanity and it would follow from this that rights are natural properties. Once again, there is nothing that we can point to and say “there is your right”. Furthermore, as with Hart’s theory, it cannot explain why it is that criminals are said to forfeit their rights. If rights are natural properties then there doesn’t seem to be any way that we can forfeit them. However, it does draw our attention to the fact that at least part of having human rights is to be a member of the human race. So, it is plausible, and desirable, that we take biological humanity to be a necessary, but not sufficient, condition for being a human right-holder.<sup>15</sup>

### **Contractarianism**

The driving force behind contractarianism is the desire to generate moral principles from non-moral premises by showing that there is a rationally acceptable pattern of behaviour that would capture what we generally believe to be moral behaviour. John Rawls’s contractarianism differs from Jan Narveson’s contractarianism in one very significant respect. Rawls, through a thought experiment, takes us outside of our personal interests to formulate principles that everyone would agree to if they had no knowledge of who they

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<sup>15</sup> Orend, pp 41-44.

were and what their station in life was. Rawls essentially asks us to separate ourselves from our current interests based on who we are and what we have by asking us to imagine a situation where we do not know what kind of life we will be born into. Narveson's approach, on the other hand, is to argue precisely from the interests that we do have. Since we alone know what is in our best interests, his theory is formulated in such a way that we do not have to ignore the things that we want. There are rational ways to maximize our interests that are morally rational as well.

Rawls<sup>16</sup> aims to find a set of principles that would benefit everyone and that everyone would agree were just. As individuals with our own interests and desires, there is a tendency for us to be in favour of principles that would maximize our interests and minimize our costs. To prevent this Rawls has us imagine a hypothetical situation, which is akin to the state of nature in traditional social contract theories, in which everyone is equal. He has us further imagine that the people in this 'original position' would also be behind a 'veil of ignorance'; they would have no idea what life they were going to be born into. They would not, for instance, know their social status, class position, or what natural assets they would have. Rawls even goes so far as to suggest that behind this veil of ignorance each person does not even know his or her conceptions of the good, or his or her psychological propensities. The reason for using this hypothetical veil of ignorance is to ensure that the choice of principles does not leave anyone advantaged or disadvantaged by social circumstances or natural chance. We arrive at a just society if, through these hypothetical agreements, we would all contract into the rules that govern that society. So,

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<sup>16</sup> Rawls, J. "A Theory of Justice", reprinted in *Social and Political Philosophy*, Arthur, J., Shaw, W. (eds.) pp 542-563.

for instance, such things as slavery would never be agreed upon in the original position because no one would know whether that would be the life that they were born into or not and, as a result, they would not want to agree to a principle that may place them at a strong disadvantage in society. Finally, Rawls stipulates that we should imagine that those in the original position are rational and mutually disinterested.

The function of this hypothetical situation is as a sort of apparatus by which we might test the principles of our own society to determine whether they are just or unjust. We do this by testing the principles in this hypothetical situation to see if they would be agreed to by everyone but this hypothetical situation does not give us a strict determination on the justice of the principles. Rather, we may find that, in this hypothetical situation, we accept principles that seem to be antithetical to our deepest convictions. We must not accept blindly the conclusions that are reached in the original position but, rather, we must practice a sort of balancing act in which we make some changes to the original position or, sometimes, make some changes in what we believe. In so doing, we reach a reflective equilibrium in which we have pinned down a description of the original position that is both reasonable and matches our reflective judgements.

Rawls arrives at two principles that he believes would be agreed to in the original position:

1. each person is to have an equal right to the most extensive basic liberty compatible with a similar liberty for others; and
2. social and economic inequalities are to be arranged so that they are both
  - a. reasonably expected to be to everyone's advantage, and

b. attached to positions and offices open to all.<sup>17</sup>

There are two problems that I can see with Rawls's approach to establishing principles of justice: (1) the difficulty of coming to a decision in a hypothetical situation and; (2) reflective equilibrium may have a tendency to simply reinforce our own beliefs.

The first problem is: in this hypothetical situation we have to have unanimous agreement. This is often difficult even when we are trying to reach agreement on issues that are much less serious than agreement on the principles of justice. While this problem is not of prime importance it should make us aware that the original position is an hypothetical situation but it is not clear how we should use it. I would imagine that the point of using a group of people in the original position, rather than one person, would be to capture the idea of disagreements and debate, and, through debate, reaching a consensus. As an individual, however, there is the question of how it is that I am to imagine this debate and the disagreements that take place given that I will probably be driven to a conclusion that fits my beliefs as they stand now. The only arguments against my beliefs about justice I am going to be able represent in the original position are arguments that I can counter. To add to the difficulty we are supposed to imagine that those in the original position have no conception of good. Whether we take Rawls to mean good overall, or simply individual conceptions of good, it is hard to see how I, imagining all this, would be able to separate my own vision of the good to form an unbiased judgement about the principles that those in the original position would supposedly reach. I may, using this hypothetical situation, come to the conclusion that complete equality in the distribution of wealth and resources is the most beneficial

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<sup>17</sup> *Ibid.*, pp 551.



principle and that those lacking in natural abilities would be compensated through a distribution of wealth. However, I would reach this conclusion because, being precisely the person that I am, I already believe this. Of course, I think that everyone in the original position is going to accept a principle of equality because it is my belief that it is a just principle and because the debate is taking place in my imagination so that the disagreements with my position are limited by what I can imagine. If some other person, let's call him X, believed quite strongly that equality was not a just principle and that a just principle is rather that we accept the luck of the draw and do what we can with what we have, they most likely would have reasons for believing so and it is hard to imagine that their reflecting on the original position would show them any errors in their reasoning. They may feel that the principle of equality which I espouse penalizes those who have natural abilities and that it is unfair to do so because they had no control over gaining these abilities. So it seems that the original position would simply affirm whatever X already believed since there would be no way to separate his beliefs and reasons from himself.

Surely, a similar problem is going to occur with reflective equilibrium. If I believe in complete equality in the distribution of wealth and resources I will have already affirmed this as a principle in my reflection of the original position. I would then find that the original position would affirm my deepest convictions and feel that I had justifiably arrived at a principle that everyone can agree on. We are naturally going to be biased in favour of our own deeply held beliefs. This is not to say that this idea has no merit at all. It certainly provides a reasonable argument against those who feel that one group of

people (be they black, woman, or any other criterion which can be used to ostracize a group of people) deserves less than another.

Now, we might imagine that instead of ruminating on this situation as an individual, we might do so in a group and imagine ourselves to be in the original position – I am ignoring the fact that we still would not be able to separate ourselves from our beliefs and interests – to encourage a debate about what the principles of justice might be. It should be apparent, especially if there are philosophers involved, that it is going to be difficult to come to an agreement. It may be the case that we come to some general agreement that, for instance, everyone should have the right to a minimal level of subsistence but once a discussion takes place on how this is to be implemented and what precisely is meant by a minimal level of subsistence, it is hard to imagine that we would readily agree to the same level of implementation. As far as I can tell, there seems to be no way that we can divorce ourselves from our beliefs enough for this hypothetical situation to aid us in coming to the principles of justice.

Rawls, however, does manage to arrive at the two principles that were stated above. The first principle that Rawls arrives at is the principle of liberty. Liberty includes political liberty; freedom of speech and association; freedom of thought; freedom of the person along with the right to hold personal property; and freedom from arbitrary arrest and seizure.<sup>18</sup> This principle is prior to the second principle – the principle dealing with socio-economic inequalities – so that we cannot use greater socio-economic advantages as a justification for taking away the liberties covered by the first principle. In this respect, Rawls falls almost completely in line with other choice theorists by placing a greater emphasis on freedom and autonomy rather than socio-economic welfare.

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<sup>18</sup> *Ibid.*, pp 551.

This seems credible given the fact that we are deciding on principles in the original position as it seems that we would have to agree to respecting autonomy, expression, etc., otherwise we wouldn't be able to discuss and come to decisions on this matter. The need to respect all the freedoms that go into making these decisions would make it irrational to think that there would be non-agreement on this. However, this does serve to point out that these principles come prior to any agreement that we establish in the original position. To be able to have any discussion at all, in the original position, one would have to have freedom of expression, freedom of association, autonomy and equality. So, one cannot argue that these principles are arrived at in the original position but, rather, one must say that they are prior to the original position and, if that is the case, then it seems that we can adequately arrive at just principles without reflecting on the original position.

Narveson's<sup>19</sup> contractarianism is based on the idea that the principles of morality must be rational in the sense that there must be good reasons for everyone to accept them. Since there are good reasons for wanting everyone to accept these principles, we will in turn feel compelled to act on these ourselves. Furthermore, since these principles allow us to maximize on our own best interests we do not have to try to imagine, as in John Rawls's scenario, what principles we would agree to without taking our own interests into consideration. The benefit of this theory is that it allows us to fulfill exactly those interests we have.

As with other contractarian theories we attempt to start off with no principles at all; the traditional and hypothetical state of nature where everyone is free to do as they wish when they wish it. In this state of nature, where anything goes, there would be no

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<sup>19</sup> Narveson, J. *The Libertarian Idea*, Chpt 12.

rules restricting certain kinds of behaviour so that it would be perfectly acceptable to use violence to get what you want, to lie, to cheat, or anything else that might improve your lot. In this situation it may be that X has certain goods, say oranges, that Y wants, and Y has certain goods, apples, that X wants. It may be possible for Y to trade his apples for X's oranges but that would mean that he would have to give up something to get something and that both X and Y would have to cooperate to get what they wanted. X, however, would prefer to have both his oranges and Y's apples and so there is nothing to be gained by cooperating with Y when he could simply steal Y's apples and keep his oranges. This sets up what is traditionally known as the prisoner's dilemma. If X and Y both cooperate then they both get what they want but at a cost. If X cooperates and Y doesn't then X gets nothing and Y gets everything (and vice versa for Y cooperating and X defecting). If neither cooperates then they each have what they started out with. They have not lost anything, nor have they gained anything.

Clearly, in this situation, the most rational course of action is not to cooperate since, if you do, there is a chance that the other person will defect and you will be much worse off than when you started. However, if you do not cooperate, then, at worst, you end up no worse off than when you started and, at best, you end up with everything that you want. This course of action can be called straight-forward maximization since each person is trying to get the most that they can.

The most obvious problem with straight-forward maximization is that, quite often, we genuinely would like to trade with others so that we can, perhaps, have a variety of goods. We want more than what we currently have. However, the straight-forward maximization model shows that it is irrational to cooperate. Given that we repeatedly

interact with individuals it is, of course, necessary and to our benefit to seek a way in which we can cooperate. The way to cooperation, and avoidance of the problems associated with straight-forward maximization, is to develop a disposition to cooperate and only enter into agreements with those that have the same cooperative disposition. This ‘constrained maximization’ is effective because it allows a level of cooperation that cannot be achieved at the level of straight maximization which encourages defection. Since we are likely to interact with others more than once, constrained maximization is the rational course of action. This constrained maximization sets up the basis of morality whereby we can all pursue our own interests through the spirit of cooperation. It ensures that everyone with this disposition to cooperate will be treated in the same way by those who want to continue in this spirit of cooperation. By following the rules of cooperation each person can ensure that he or she maximizes on his or her interests.<sup>20</sup>

There is, however, a problem with the view that constrained maximization is the most rational course of action. It requires, first of all, that we sometimes judge a person’s disposition before we have ever entered into any bargain with them. How do we tell that whether someone that we have not dealt with before has the required disposition? Now we may be able to tell by the situation that we are in. For instance, it is not likely that a store is going to be around for very long if the store owner and the store employees do not have a disposition to cooperate. So we will most likely come to the conclusion that the store owner is going to cooperate. Furthermore, we will cooperate with him if we ever want to do business with him again. The long-term pay-off of cooperation is better than the short-term pay-off of defecting. However, there are many situations that we might be in where there is only going to be one interaction and we *can* be assured that the other

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<sup>20</sup> Gauthier, D. *Morals by Agreement*, Clarendon Press (1986).

person *is* going to cooperate. I might be vacationing somewhere and choose to enter a store that I know I will never have the opportunity to enter again. I have more information than the store owner and, in this case, since I can be reasonably sure that the store owner is going to cooperate and he has no reason to believe that I am going to defect, the rational thing to do would be to defect. In this case, the rational course of action does not translate well into the moral course of action and, in fact, is the complete opposite of the moral course of action.

Indeed, it is difficult to see how constrained maximization captures all of the things that we think of as moral. This model seems to have no way of accounting for why it is that we feel a moral obligation to treat children or animals, who cannot practice constrained maximization, in certain ways. This leads to the further question of how we are to treat those that are known defectors. Sometimes it simply isn't enough to avoid them since they pose a serious danger to us. If a known serial killer is walking around we feel that we should do something to protect ourselves and avoiding him does not seem especially helpful or beneficial to us. But, even more to the point, it seems that there are no rules governing what is the moral course of action with respect to criminals. It seems that, since they are not constrained maximizers, there are no rational principles that capture morally acceptable ways of treating these people.

Overall, it seems difficult to draw a necessary connection between rational behaviour and moral behaviour. On top of this, is the difficulty of determining how we should treat those that are unable to enter into these interactions or are known defectors. This gives the impression that, while adults who practice constrained maximization will

all accept and respect each others' rights, those who fall outside of this contract have no rights and this is at odds with the simple notion that everyone has human rights.

### **Rational Agency**

Alan Gewirth<sup>21</sup> provides us with a theory in which it is purposive human action that justifies human rights. The theory takes as its starting point the fact that every rational agent has purposes that she wants to fulfill and since she *acts* to fulfill those purposes, she must consider those things which are required for action to be necessary goods. In fact, the rational agent must logically hold that she has rights to those things needed to fulfill action, namely, freedom and well-being and, if she does not hold this, then it is on pain of contradiction. At the very least, the rational agent faces the practical contradiction of wanting X yet not wanting the necessary means for getting X. Gewirth presents his argument, moving *from* the necessity of these goods *to* rights to these goods, as follows:

1. The rational agent must accept that his freedom and well-being are necessary goods.
2. Therefore, he must accept that, as a rational agent, he must have freedom and well-being.
3. He must also accept that all other persons must at least refrain from removing or interfering with his well-being, for, if other persons remove or interfere with these, then he does not have what he said he must have.

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<sup>21</sup> Gewirth, A. *Human Rights: Essays on Justification and Applications*, University of Chicago Press (1982).

4. Let's suppose that the agent now denies that he has rights to freedom and well-being.
5. He must also then deny that others ought to refrain from interfering with his freedom and well-being.
6. As a result, he must accept that other persons are permitted to remove or interfere with his freedom and well-being. This, however, contradicts (3) which the rational agent must accept.

Since this contradiction has arisen because the agent denies that he has rights to freedom and well-being, the rational agent must accept that he has these rights or he contradicts himself.<sup>22</sup> Furthermore, since all purposive agents must accept that they have these rights, they must also accept that all other purposive agents have these rights too. This establishes a Kant-style maxim which Gewirth calls the Principle of Generic Consistency:

Act in accord with the generic rights of your recipients as well as of yourself  
[where generic rights refers to the rights to freedom and well-being].<sup>23</sup>

In linking human rights with action, Gewirth immediately runs into the problem that rights are no longer universally and equally distributed amongst all human beings since there are some who are not capable of purposive action, such as infants, the senile and the insane, and others who are not capable of action at all, such as those in a persistent vegetative state. To deal with this problem, Gewirth appeals to the Principle of Proportionality:

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<sup>22</sup> *Ibid.*, pp 50-51.

<sup>23</sup> *Ibid.*, pp 3.



When some quality Q justifies having certain rights R, and the possession of Q varies in degree in the respect that it is relevant to Q's having of R, the degree to which R is had is proportional to or varies with the degree to which Q is had.<sup>24</sup>

Clearly this principle is open to misinterpretation. One might, for instance, interpret it in such a way that the more rational an agent is the stronger his rights claims are. Gewirth is quick to offer his own interpretation so as to avoid any obvious misinterpretations. He argues that all human beings have full human rights to the extent that they are rational in a minimal sense i.e. that they are capable of having purposes that they want to fulfill and are capable of controlling their behaviour in such a way as to meet those ends. All humans that are rational agents in this minimal sense will not have any variations in the degree to which they have rights. Gewirth illustrates this point with an example about voting. If we take the voting age to be 18, then the Principle of Proportionality applies to those under the age of 18. Since being 16 years old is closer to being 18 years old than being 10 years old is, we may, at 16 have the right to attend voter education classes, which we do not have at 10. As we approach voting age there may be an increase in the number of activities that bear on having the right to vote. However, once we are 18, we have the right to vote and there are no longer any variations with respect to this right<sup>25</sup>.

Regarding the generic rights, persons fall below the minimal level of rational agency in two ways: (1) when they are not capable of exercising their rights at all, or (2) when they are not capable of exercising their rights without serious harm. It is here that I think Gewirth faces a serious problem but before I get to that we must first be clear about what Gewirth means by freedom and well-being.

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<sup>24</sup> *Ibid.*, pp 8.

<sup>25</sup> Gewirth, A. *Reason and Morality*, University of Chicago Press (1978), pp 121-2.

By freedom Gewirth is referring to the freedom of action whereby the agent is in no way coerced or forced to act and that he is in control of his own behaviour. With respect to well-being, Gewirth establishes three levels of well-being: basic, nonsubtractive and additive. The basic level of well-being is that which is essential to action, namely, life, physical integrity and mental equilibrium. Nonsubtractive well-being consists in the maintenance of abilities and conditions that are needed for particular actions. Being lied to or stolen from are examples of violations of one's nonsubtractive well-being because one's capacities or conditions for action are diminished rather than being maintained. Additive well-being consists in having conditions for increasing one's abilities to fulfill one's goals or purposes. Examples of additive well being would be education, enhancement of self-esteem, and the ability to acquire wealth. What distinguishes these three levels is that they differ in degree of necessity with basic well-being as the most necessary. However, these variations in degree of necessity should not diminish the fact that all three levels are still necessary for successful purposive action.

To turn to the problem that Gewirth faces we must notice that he has to mark a distinction between the justification for the right to freedom and the justification for the right to well-being. When Gewirth says that rights vary in proportion to rationality, if that rationality falls below the minimal sense, he cannot mean that both the right to freedom and the right to well-being varies. He seems to be thinking simply about the right to freedom since that is precisely what is curtailed in varying degrees according to the ability to exercise that right or the potential for doing harm to oneself or another. However, he cannot be suggesting that the right to well-being varies based on these criteria, or, in response to falling below a minimal level of rationality. For example, it

would seem odd to claim that, since an infant is incapable of exercising its rights to freedom and well-being, both its freedom and well-being should be restricted. Now, if one of these varies in accordance with rationality while the other does not then only one must be justified on the basis of rational agency while the other must have an entirely different justification. Since Gewirth has also stipulated that it is the basic level of well-being that is most necessary for human action he cannot resort to simply calling for varying degrees amongst the levels. He cannot, for instance, argue that infants have the basic right to well-being but their rights to the nonsubtractive or additive levels of well-being will vary according to their degree of rationality since the basic level of well-being is justified precisely because it is the most necessary for purposive human action. If I am right then Gewirth's options don't look promising. Either he must give up the right to well-being or he must find an alternate justification for human rights.

By grounding human rights in rational agency, Gewirth must offer an explanation for why we think that it is acceptable to punish criminals without appealing to the notion of forfeiture. He does so by pointing out that rights are *prima facie* and, as such, they can be overridden. If one person tries to violate the rights of another this creates a 'transactional inconsistency' and steps can be taken to remove it. Since these transactional inconsistencies can occur we are required to put a limit on the right to freedom so that it can be overridden when someone tries to use their freedom to infringe on other's rights to freedom and well-being. The Principle of Generic Consistency (PGC), however, is an absolute principle as it sets the criteria for when rights may justifiably be overridden in cases where they come into conflict.

What are the criteria that the PGC sets for the overriding of rights? The most obvious criterion is that my rights may be overridden if I violate your rights. The difficulty of resorting to a prima facie explanation of rights is that we do not know precisely under which conditions they may be overridden, we are only given vague guidelines. The PGC is no help there either since we are going to have to appeal to more than just the PGC to explain the overriding of rights in certain situations. Now Gewirth gives the following examples of conflicts between rights and I will use these examples to emphasize my point:

1. A's right to freedom may conflict with B's right to well-being when A uses his freedom to kill or rob B. A's right to freedom is then overridden.
2. Different persons' right to well-being may conflict with one another as when A must lie to B to prevent C from being murdered. B's right to well-being is overridden in this case.
3. A person's right to freedom may conflict with his own right to well-being, as when he commits suicide or ingests harmful drugs. In this case, the duty of others not to interfere with his behaviour will conflict with their duty to prevent his losing basic goods.<sup>26</sup>

Looking at the list of examples we might note that there isn't enough in the PGC to give us these results without adding an independent criterion. The PGC can capture example 1 since a rights violation is occurring but it cannot, on its own, tell us what to do in example 2 where there is no initial violation just the conflict that will lead to the violation of the right to well-being of one person over another. It may seem obvious that in

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<sup>26</sup> *Op. cit.*, pp 57

example 2 we should rather lie to save someone's life than to tell the truth and aid in the murder of another person but this isn't captured by the PGC<sup>27</sup>. So perhaps a further criterion needs to be added, whereby, it is the exercising of the right that leads to the greatest harm that is overridden. This would help us with respect to the choice between lying and being an indirect party to murder since telling the truth would cause greater harm than lying and would indirectly play a part in someone's death. The trouble with adding such a criterion is that it may allow us to override one individual's rights in favour of another's in a way that seems unjustifiable to us. My right to freedom may be overridden in the interests of another's right to well-being if, for instance, the other person will die if she doesn't get a blood transfusion and mine is the correct blood type. I have my right to freedom and she has her right to well-being but respecting my right to freedom creates the greater harm and so it must be overridden. This is, in effect, what Gewirth says when he deals with the issue of starvation but it might just as easily be applied here. With respect to the right to freedom he says:

The . . . right stops where it serves to inflict serious harm on other persons by failing to prevent the severe loss of well-being entailed by starvation.<sup>28</sup>

So it seems that freedom is only a right when it does not lead to serious harm even if there is no direct conflict or violation of rights occurring. Since, it is clear that there is at least one other criterion under which rights may be overridden that is not captured by the PGC, Gewirth cannot claim that the PGC is absolute.

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<sup>27</sup> Gewirth may be able to side step the issue by saying that lying violates a non-subtractive good, whereas murder violates a basic good. But we could simply change the example to lying to B about where C's goods are so that B can't steal them. These are both non-subtractive goods yet we would still lie rather than be a party to theft.

<sup>28</sup> Gewirth, pp 213.

Gewirth's theory is a complicated but sophisticated account of the justifications for human rights but it is, I think, ultimately untenable. If the PGC isn't absolute then there is no firm basis for respecting the rights of others. Moreover, if we can still manage to appeal to the PGC, the PGC must be supplemented with a further criterion – involving appeal to objective harm – for when rights can justifiably be overridden. If this further criterion sets a limit on the right to freedom so that it must be overridden in cases where exercising it would lead to severe loss of well-being, then our right to freedom is limited to a degree that I think would be unacceptable to most people.

## **Conclusion**

The general problem faced by theories that ground rights in rationality is that they are unable to extend rights to infants, the senile, or those below the minimal level of rationality that is set by the theory. If the point of rights is to protect choice then those without the power to choose lack rights. Hart's argument that duties do not entail rights, so that we may have duties to infants without having rights, is plausible but faces the difficulty of having to explain why it is that our duties to those below a minimal level of rationality are equally as stringent as those that are correlates of rights. Even if we find Hart's argument to be an acceptable response we are still faced with the fact that, by excluding a group of human beings from having rights, we do not meet one of the aims of human rights: that of universality.

## **Interest Theories**

Interest theories take having a vital interest in something to be one of the conditions for grounding a right. Having vital interests cannot be both the necessary and sufficient conditions for grounding human rights since animals, birds and insects all have vital interests but they do not have human rights. They may have their own branch of rights but the word 'human' is present in human rights to capture the idea that humans are the right-holders for this special class of rights. Since it is humans who have these rights it is safe to say that biological humanity must be a necessary condition.

The interest conceptions of rights are more encompassing than the choice conceptions since they appeal to welfare rather than rationality. The normative function of rights in the interest theories are to protect the right-holder's welfare.<sup>29</sup> The main disadvantage of these theories is that the liberty of the right-holder may be restricted to serve this function. The main advantages of these theories is that they capture the human rights commitments to universality and equality and that they can incorporate freedom and autonomy (to a certain extent); they will usually recognise anything that the choice conceptions recognise as a right but the reverse is not true.

### **Utilitarianism**

Utilitarian theories focus on interests but it is the interests of the majority rather than the interests of the individual that plays a role in determining the extent of our rights. Since the focus is on majority interests it is often thought to be the case that utilitarianism conflicts with human rights. A fairly obvious example that brings out this conflict is when

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<sup>29</sup> Sumner, L. W. *The Moral Foundation of Rights*, Clarendon Press (1987) pp 97.

one individual has three working organs that can save the lives of three people in need of those organs; utilitarian considerations must weigh in favour of the three lives rather than the one. This example, however, belies the sophistication of some utilitarian theories and the depth of the information that must be taken into consideration. However, even utilitarians that argue against the simplicity of this example must constantly be on guard against the evident paradox that threatens an approach that tries to align utilitarian considerations with human rights.

Alan Gibbard<sup>30</sup> has a well-formulated description of this paradox. Utilitarianism can support human rights, to an extent, because human rights generally promote happiness. The interests of most people are served by the acceptance of and respect for human rights. Since utilitarianism aims to promote the greatest amount of happiness for the greatest number of people it can support human rights. The crux of the difficulty that utilitarians face is that, either they must support the idea that violations of human rights can *never* be the best course of action in promoting the general good, or, if there are cases when it seems that violating human rights does promote the greatest good, then they must be prepared to sacrifice human rights for the general good. Given that rights will offer us very little protection if they can be overturned by any considerations that are deemed to be in favour of the general good, it seems inevitable that the utilitarian must promote the idea that violating human rights never promotes the greatest good. Now, however, the utilitarian is faced with the question of how concern for the general good could dictate that respect for rights should take precedence over considerations of the general good<sup>31</sup>. The added difficulty is that there are always cases, albeit rather extreme cases, where

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<sup>30</sup> Gibbard, A. "Utilitarianism and Rights" reprinted in *Social and Political Philosophy*, pp 181-189.

<sup>31</sup> *Ibid.*, pp 182.



human rights are legitimately violated to protect the general good. Such cases would be those extreme circumstances where one might be forced into quarantine because one is infected with a deadly and contagious virus. So, either the utilitarian advocates that human rights always take precedence and, by extension, forcing those infected with a deadly virus into quarantine will promote less happiness than respecting the rights of those individuals to freedom of movement, or he must admit that the general good is not always promoted by respect for rights in which case anything perceived to promote the general good becomes acceptable.

Rule-utilitarianism offers a possible response to this problem by promoting the idea that utilitarian considerations are simply taken into account when we are formulating *rules* for society. We implement a moral code if, and only if, there are no other moral codes that would provide greater utility and, since the code we settle on would provide the greatest overall utility, there is no inconsistency with it providing less utility in particular situations. This is in contrast to act-utilitarianism, in which calculations are made on a case by case basis. Richard Brandt<sup>32</sup> argues that a rule-utilitarian theory would be entirely consistent with human rights since the rules would be something like Kantian maxims but they would be based on utility rather than some intuitive moral faculty. Brandt even goes a step further to say that the utilitarian view is favourable to other views since it can tell us what rights people have and how stringent they are relative to each other. We do this by establishing whether the right in question would ‘maximize long-range expectable utility to include recognition of certain rights in the moral code of society with a certain degree of stringency as compared with other rights’<sup>33</sup>. Jack

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<sup>32</sup> Brandt, R. *Morality, Utilitarianism and Rights*, Cambridge University Press (1992).

<sup>33</sup> *Ibid*, pp 199.

Donnelly, however, takes the opposite view and argues that, while rule-utilitarianism might be able to justify a pre-established list of rights such as those in the *French Declaration of the Rights of Man and Citizen*, this would be an after-the-fact justification. It is difficult to imagine that, starting with utilitarian principles, we would be able to generate such a list.<sup>34</sup>

I am sympathetic to Donnelly's complaint since a reliance on long-range expectable utility hardly seems like an exact science. In fact it seems likely that the long-range expectable utility would be perceived as maximizing those principles that would support our pre-established beliefs. Brandt gives an example to support his point that we can establish certain rights as maximizing long-range expectable utility but I think that our pre-established beliefs in this case would influence how we calculate the long-range expectable utility:

Suppose, for instance, one wants to know what should be the scope of the "right to life". Then it would be proper to inquire whether the utility maximizing moral system would require people to refrain from taking the life of other adults, more positively to support life by providing adequate medical care, to abstain from life-termination for seriously defective infants or to refrain from abortion, to require abstaining from assisting a person with terminal illness in ending his own life if he requests it, to refrain from assisting in the discharge of a sentence of capital punishment, or to refrain from killing combatants in war time and so on.<sup>35</sup>

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<sup>34</sup> Donnelly, J. *The Concept of Human Rights*, Croom Helm (1985), pp 54.

<sup>35</sup> *Op. cit.*, 199-200.

If this approach is to be realistic then there has to be a quantifiable way of measuring what features of the right to life would maximize utility. If there is no way to quantify the long-range expectable utility then there is no way that we could arrive at any conclusion that isn't biased towards our personal beliefs since we would naturally think that our own views will promote the greatest amount of utility. If we focus on even one aspect that is being considered in this example, for instance, whether the right to life should include a prohibition against abortion, and there is no quantifiable method for determining this, then, clearly those in favour of abortion will think that long-range expectable utility would be maximized if this is not covered in the right to life. Those on the opposing side would naturally think that their view, that abortion should be considered a violation of the right to life, would maximize long-range expectable utility. Given the complexity of the considerations involved in determining what is covered by the right to life, there doesn't seem to be any way that we could actually establish any sort of realizable calculation at all. Brandt admits that this is may be difficult, or perhaps even impossible, but he offers no solution to the problem at all.

Even if we can get beyond the problem of calculation and establish a moral code of rights justified by rule-utilitarianism, we are not going to be able to establish a successful theory that is based purely on rule-utilitarianism simply because a rule-utilitarian theory would not be able to capture every situation in which the rules might conflict to establish a conflict-free code. Inevitably, situations will arise in which two rules, or rights in this case, will come into conflict and, since any utilitarian is concerned with maximizing happiness (or the general good), the most reasonable action would be to apply act-utilitarian principles. In accepting this, though, the rule-utilitarian accepts that

these rules are flexible so that there are cases when one rule may justifiably override another and that the justification for the action is the greatest expected utility overall.

If, as Brandt argues, we can generate a list of human rights to be included in society's moral code that would maximize long-range expectable utility, it is difficult to imagine that the list would simply consist of those rights that we think of as vital to us and society. If we are maximizing utility as the basis for rights then certain things become objects of our rights even when they shouldn't. Whether utility is happiness, or the general good, there are many non-necessary goods that would increase and maximize utility and utilitarians would be faced with a list of rights that may be a mix of necessary and non-necessary goods. This is where the having a mixed theory would be problematic in two senses: (1) human rights inflation; and (2) when and if two rights conflict, one promoting a necessary good and the other promoting a non-necessary good, we might on utilitarian grounds weigh in favour of the right promoting the non-necessary good.

Both act-utilitarianism and rule-utilitarianism seem to be unable to adequately justify human rights. Act-utilitarianism is inadequate because it cannot give us a stable and consistent judgement that would conform to human rights. We can readily think of examples where actions based on the greater good would be contrary to the actions promoted by a respect for human rights. Rule-utilitarianism, while it can support human rights, has trouble generating a reasonable list of rights and, alongside this, runs the difficulty of utilitarian calculations that, in the absence of something measurable, will inevitably conform to our personal beliefs rather than objectively promoting the greater good. Despite these difficulties, utilitarianism does offer some independent support for human rights. We do tend to think that human rights promote happiness and that we can

increase overall happiness by ensuring that rights are respected everywhere and for everyone. Indeed, there are general sociological comparisons that offer plausible, and possibly even persuasive evidence, in favour of having human rights protections.

### **Vital interests**

Both Brian Orend<sup>36</sup> and Henry Shue<sup>37</sup> justify human rights based on vital needs or interests and it is this view that I find most compelling because they most effectively realise the human rights commitments to universality and equality. Furthermore, rights are justified by appeal to our vital needs which include those things that we biologically need for survival and also captures the social needs that that must be met for a minimally decent life.

Shue views one of the chief purposes of rights as providing a minimal level of protection for those that might otherwise find themselves utterly helpless in the sense that their situation is so dire there is almost nothing they can do to help themselves. He outlines three basic rights that provide at least some measure of protection against those of life's threats that have proved to be fairly common: the right to personal security; the right to subsistence; and the right to liberty. Shue calls these "the basic rights" because they form a foundation for other rights; we are unable to enjoy other rights if we do not have these three rights. Furthermore, they are basic because they draw a line which we shouldn't fall beneath; they specify a minimally decent life which everyone should be able to have.

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<sup>36</sup> Orend, B. *Human Rights: Concept and Context*.

<sup>37</sup> Shue, H. *Basic Rights*, Princeton University Press (1980).

Shue approaches the task of justifying these basic rights by first exploring the basis of the right to personal security, which is probably one of the least controversial human rights. He then takes the structure of the argument and creates a general formula for determining whether a right is a basic right or not. He uses that same structure to argue for the rights to subsistence and liberty (of movement and participation).

Shue – inspired somewhat by Hart – starts with the assumption that everyone has at least one right, whatever that right may be. He then argues that it is not possible to exercise that right if one’s physical security is threatened in any serious way. For example, it is impossible for me to enjoy my right to freedom of expression if every time I open my mouth to express my opinion someone threatens to beat me, torture me or inflict any other serious bodily harm. If I lack the right to personal security then others have an extremely effective means of ensuring that I do not exercise my other rights. In other words, to be able to enjoy any other rights, it is imperative that I have the right to personal security. This gives us the following structure for the argument that a certain right is a basic right:

1. Everyone has a right to something.
2. Some other things are necessary for enjoying the first thing as a right, whatever the first thing is.
3. Therefore, everyone also has rights to the other things that are necessary for enjoying the first as a right.<sup>38</sup>

We can, by this argument, now establish that we also have a right to a minimal level of economic security. Minimal economic security includes such things as unpolluted water, unpolluted air, adequate food, subsistence clothing and shelter, and minimal preventative

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<sup>38</sup> *Ibid.*, pp 31.

health care. By having a right to minimal economic security we essentially want to ensure that everyone has a reasonable chance at a healthy and active life of average or normal length. The deprivation of food, water, clothing and shelter would be sufficiently detrimental that one would be rendered unable to enjoy one's other rights.

Shue is quick to point out that this formulation of the right to subsistence can be grossly misrepresented as a right to be free from serious and tragic illnesses and a right not to die since tragic illness and death interfere with the enjoyment of other rights. Given that illness and death are *not* circumstances which social policy can prevent or control we cannot take freedom from illness or death to be objects of human rights. However, even if we do not interpret the right to subsistence in such an extreme way, there are still going to be disagreements about the full scope of this right. To try to capture the scope of this right, Shue says:

A right to subsistence would not mean, at one extreme, that every baby born with a need for open-heart surgery has a right to have it, but it would also not count as adequate food a diet that produces a life-expectancy of 35 years of fever-laden, parasite-ridden listlessness.<sup>39</sup>

A lack of a minimal level of subsistence can be equally, if not more devastating than a lack of personal security since, if one's personal security is threatened, one may be able to fight back. A lack of food and water and a social system that provides no means for securing those things would, without a doubt, provide little opportunity to enjoy other rights. Even if one has food and water, the threat of deprivation of those things biologically necessary for survival would be equal to the threat of physical harm. As a

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<sup>39</sup> *Ibid*, pp 23.

result, the right to a minimal level of subsistence can adequately be considered a basic right.

There is no doubt that the lack of such things such as food, water, clothing and shelter would leave us unable to enjoy our other rights and Shue is right to point out the absurdity of taking the extreme view that this should include the right not to be terminally ill and the right not to die. However, the scope of the right is something that should concern us. Whereas social institutions could not fulfill the duty correlative to a right not to die, it is possible to discharge a duty that requires open-heart surgery for every baby born with the need. A separate argument needs to be made for why this cannot be included in the scope of the right since it is no less devastating than lack of food. That argument would have to be based either on the burdensome costs that would be incurred by ensuring open-heart surgery was included in the right to a minimal level of subsistence, or it would have to be based on the fact that open-heart surgery is, in some sense, a less basic need than that of food or water. Ultimately, both of these factors would come into play but it is not implausible to suggest that there is a hierarchy of need. For instance, while we all need food and water to survive, only some of us need open-heart surgery. Following such a pattern would allow us to separate basic needs from more advanced needs and, once everyone had access to the objects of their basic needs, we could go on to determining whether the costs of implementing coverage for the more advanced needs would prove to be too overwhelming or not.

The final basic right that Shue discusses is the right to liberty, which includes both the right to movement and the right to participation. In evaluating the status of the right to liberty we must bear in mind that, while liberty is valuable in and of itself, this does not



make the case for it to be accepted as a basic right. The requirement for a basic right is that the enjoyment of *any* other right must depend on the enjoyment of the basic right. The right to participation is the right to be able to effectively exert an influence on social institutions and the policies that they adopt where those policies and institutions have an influence on our lives. Establishing this as a basic right is much more difficult than establishing security or subsistence as basic rights for two reasons: (1) some people may have no interest in participation and would still be able to enjoy their other rights without a right to participation, and (2) it seems that if a benevolent dictator secured our other rights we would be able to enjoy those rights despite, once again, not having the right to participation.

The first problem, that of interest, Shue counters by arguing that the willingness to exercise a right has no bearing on whether the right in question is a basic right or not. I could, for instance, have a right to freedom of movement without having any intention or desire to move right now, or for the next 24 hours. Not having an interest in moving right now does not invalidate that right. Instead we establish rights and their correlative duties by the weight of reason and, if the reasons for according that right as a right for everyone are strong enough, then the reasons should be sufficient to establish it as a right.

To deal with the problem of the benevolent dictator we must be clear about what is provided by a right:

1. the rational basis for a justified demand
2. that the actual enjoyment of a substance be
3. socially guaranteed against standard threats<sup>40</sup>

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<sup>40</sup> *Ibid.*, pp 74.

A person enjoys a right only if the social institutions protect that right, or, in the case of violations of that right, try to restore that right. If it is the social institutions that are meant to be fulfilling the duty correlative to the right but are not doing so, then, without a way to exert pressure or influence on those institutions, one cannot enjoy or exercise the right. Even though a benevolent dictator might theoretically respect rights to security and subsistence, in the absence of any way to exert an influence to ensure the continued protection of those rights, we are unable to fully enjoy the exercise of those rights. In fact, under a benevolent dictator, while we may experience security and have a minimal level of subsistence, we do not have rights to both security and subsistence since there is no way to ensure that they are socially guaranteed and dictatorship is definitely “a standard threat” to human rights. As a result participation is necessary for the enjoyment of all other rights since we must have some degree of control, or right to express and protest, when those rights are neglected.

The argument for the right to freedom of movement is similar to that of the right to participation since it faces some of the same difficulties, namely that, even without the right to freedom of movement, the objects of other rights can be enjoyed. However, they cannot be enjoyed as rights to those objects. If, for instance, a person is arbitrarily imprisoned, that person can still enjoy the objects of her rights, such as security and subsistence, but they are not rights because she has no power to make demands, or has no control over, ensuring that her rights are respected. The provision of food and water and the prevention of threats to physical security are given at the mercy of the captor and this, like the example of the benevolent dictator, makes them privileges rather than rights.

It is important to note that we cannot trade one of our basic rights for another. For instance, we cannot ensure that everyone has a right to a minimal level of subsistence at the expense of the right to liberty. The reason for this should be obvious. Since these rights are basic, based on the fact that without these rights we cannot enjoy any of our other rights, to trade one of these rights in favour of another would mean that, in one way or another, we were being deprived of something essential to the enjoyment of all rights. It should also be noted that while the rights to subsistence, security and liberty are basic rights, Shue says that this list is not necessarily exhaustive.

The deprivation of food and water and the deprivation of physical security are sufficiently extreme threats that they can leave us in a position where we are unable to enjoy our other rights. Shue's argument, then, is based on the effectiveness of these deprivations as a form of coercion. The focus of the argument, then, isn't so much focused on the need for these things in and of themselves. Could we not make the same argument about property rights? We must, of course, make the distinction between property *in* ourselves and property *of* ourselves. Property in ourselves forms the basis of the right to personal security since, if we were slaves and, therefore, owned by someone else, then the fact that we may experience personal security does not establish that it is a right. This follows directly from the example of the benevolent dictator that Shue provides. So it seems that, without recognising the right to property in ourselves we, cannot sufficiently enjoy any of our other rights. This, however, is not enough to establish property rights as a basic right. We must make the case that property *of* ourselves is necessary to establish this as a basic right. Now, if we do not have property rights in the sense of ownership over the things

that we have acquired then it seems that perhaps our right to subsistence is threatened. The right to anything tangible, such as food and water, seems to be intimately connected with property rights since, if I cannot exert ownership over those objects that are given to me my right to those things doesn't seem to be any sort of right at all. In other words, the threat of the deprivation of one's property seems equally likely to render one unable to enjoy other rights, especially if, under this right we do include the food and water that is provided.

Property rights may not have concerned Shue too greatly because his focus seems to be on nations where there is a severe lack of the basic goods necessary for survival and in such places there may not be such a concern for owning property. However, if one can make the case that property rights form the basis of our rights to personal security and subsistence then he must have reason to worry. It is, in a sense, crucial to this view that this argument be blocked, especially since Shue has made the claim that none of these rights can be traded for another; all of them must be respected. If property rights cannot be violated to ensure that the duties correlative to subsistence rights be fulfilled then there may be a conflict within Shue's theory that is irresolvable.

One way to counter this argument is, perhaps, to turn it around by arguing that, since we cannot talk of the right to security or subsistence without appealing to some sort of ownership of the objects of those rights, there is something akin to ownership of property that is inherent in these rights. If we have a claim-right to something we are entitled to the objects of the right but entitlement may be conceptually distinct from ownership. For instance, if I have a right to food and water, I am entitled to those objects. Now, Shue argues that rights have three correlative duties:

1. Duties to *avoid* depriving.
2. Duties to *protect* from deprivation.
3. Duties to *aid* the deprived.<sup>41</sup>

The distinction between entitlement and ownership will be most noticeable in the third case; the duty to aid the deprived. If I lack any resources for obtaining food for myself, then others have a duty to aid me and I am entitled to the food that they give me. I do not, however, have ownership over the food that they give me. I cannot, for instance, throw it away or sell it or, in any way, misuse what has been provided for me. Of course, it will most likely be the case that I don't want to misuse the food that I have been given but that is irrelevant. The fact that I am entitled to the food rather than having ownership over the food means that there are certain restrictions in how that food is used. This may be sufficient to establish that property rights do not form the basis for the right to subsistence. Now we may not be able to make the same case for property *in* oneself but it seems to me that we would have to establish the necessity of both property in oneself and property of oneself to be able to make the case that property rights are basic rights.

Shue's argument is strong and ingenious in the sense that, one simply has to accept that one has moral rights at all to reach the conclusion that the realization of certain rights is necessary for those moral rights. However, while his theory gives us strong reasons to respect these rights, his argument doesn't appeal to any moral necessity of rights but, rather, it appeals more to the inference connecting the admission that we have one right to the acceptance of rights to security, subsistence and liberty. To counter Shue's argument one may simply deny that we have any rights at all and, in that case, Shue's argument does not give us any morally compelling reasons with which we might

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<sup>41</sup> *Ibid.*, pp 52

persuade someone that we do have rights. While this denial may be extremely implausible it does encourage us to supplement Shue's view with a view which gives morally compelling reasons that lead to an acceptance of rights. By establishing that we have morally compelling reasons to accept, as rights, those things that we have a vital interest in we will have, in conjunction with Shue's theory, a morally and inferentially compelling argument for the existence and respect of certain basic rights

To draw the connection between rights and vital interests, Brian Orend argues that we must understand what it means to have an interest in something and what it means to have a vital interest in something. To have an interest in something, say x, is for one's well-being to be affected by x in such a way that the one is harmed by the absence of x. *Vital* interests are needs which, if unmet, result in grievous harm. To vitally need something is for it to be necessary in such a way that its absence harms our very functioning as a human being and for there to be no substitutes for those objects of our vital needs. Orend lists five vital interests that form the foundation of human rights: (1) personal security, (2) material subsistence, (3) elemental equality, (4) personal freedom, and (5) recognition as a member of the human community<sup>42</sup>

To reiterate a point made earlier, vital interests cannot be the necessary and sufficient conditions for being a right-holder of human rights since, at least, anything that is alive has vital interests. Given that we have appealed to vital interests as one condition for human rights, we can limit the scope of right-holders by including biological humanity as a necessary condition. This allows us to ensure that everyone equally has human rights but that other living things, despite having vital interests, do not have

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<sup>42</sup> Orend, pp 64.

*human* rights, though they may have rights of another kind. With just these two conditions, though, we cannot explain the permissibility of the punishment of criminals, as criminals are both biologically human and have vital interests. Limited to these two criteria, we run into similar problems that human rights theories grounded in rationality have; we can no more forfeit our vital interests than we can our rationality. The final condition upon which rights are grounded must then be a certain degree of moral goodness. The degree of moral goodness that is required is simply that one refrain from violating another's rights, i.e. unjustifiably depriving someone of the objects of their rights. By including this as a necessary condition for human rights we can say that human-rights violators forfeit (some of) their rights. So the necessary conditions for human rights are biological humanity and non-violation of others rights, and the sufficient condition is having vital interests.<sup>43</sup>

Now that we have established the grounds for human rights we can return to the justifications for rights. It is one thing to establish that the absence of vital needs results in grievous harm but it is another thing altogether to establish a connection between rights and protection from grievous harm. We can try to establish the connection in three ways: (1) by appeals to personal prudence, (2) by recognising that most of us are purposeful rational agents who want to pursue our goals, and (3) that one of the most compelling moral duties is not to inflict grievous harm on others.

Personal prudence gives us compelling reasons to at least assert that we have rights. Since human rights can protect our vital interests – those things that we need to have a minimally decent life – it is obviously in our best interests to secure the objects of our vital interests for ourselves in this way. However, the number of objects that we

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<sup>43</sup> Orend, Chpt. 2. "Who Holds Human Rights?".

might want to secure for ourselves is greater than those captured by our vital needs, so, drawing the connection this way may stretch the limits of what would be acceptable as a human rights claim. For instance, we might think that it is prudent that everyone has a garden and swimming pool in which to play and get some exercise. One of the features of human rights is that they have a certain gravity; they are not to be taken lightly. If we claim that everyone should have a right to a pool and a garden we lessen the gravity of human rights claims in general. In a certain sense, then, prudential concerns can actually constrain our claims to only those things that are necessary and prudence would certainly guide us to securing the objects of our vital needs as rights. Prudence, I think, would also dictate that we respect other's rights simply because, if we do not respect the rights of others, we give them no reason to respect our rights.

We can, in trying to forge a connection between vital interests and rights, also appeal to Gewirth's view of humans as rational purposive agents. This will not be open to the same objections that Gewirth's argument is since we are not grounding human rights in rationality. However, we are pointing out a feature of life for most of us, namely, that we act to achieve certain goals. Without the objects of our vital needs, we cannot pursue our goals in life and we cannot pursue the many things that might be of interest to us. The pursuit of our goals is a feature of life that gives credibility to our vital need for personal freedom and a minimal level of well-being.

Finally, basic social morality is largely concerned with the prevention of harm to others. We have moral obligations not to harm others and these obligations, when viewed as duties, provide the compelling counterparts to human rights. The presence of a duty does not, of course, establish the presence of a right but, given the strength of our duties



not to subject others to grievous harm, the best protection is to ensure that those duties are correlative with rights. There is, naturally, a distinction to be made between causing harm by our actions and causing harm by our inactions but I think most people would agree that harm as a result of inaction can be almost, and in some cases equally, as abhorrent as harm caused by direct action. Take, for instance, a case where a child is drowning and a person, with the full capacity to save the child from drowning, does nothing. While the inaction is perhaps not as bad as, say, the action of deliberately drowning the child, it seems that the inaction is still morally questionable. I believe that the same thing can be said of rights; if deliberately depriving someone of the objects pertaining to their rights is a violation of those rights, to stand by and watch others suffering from deprivation when we have the capacity to do something must also be a violation. There is, of course, the difficult problem of determining when the costs of taking action becomes too burdensome and we must be able to temper human rights claims if they become too costly.

## **Conclusion**

Analysing the concept of a right allows us to understand the necessary connections between rights and other concepts, in particular, duties which are correlates of rights. With this in mind we notice that rights have 3 elements: (1) right-holders, (2) duty-bearers, and (3) objects. The right-holder is what we draw attention to when we talk about

*human* rights and this sets up criteria for the necessary and sufficient conditions, namely, that they include all humans and that they do not include anything which is not human.

The choice theories include rationality as at least one of the conditions that grounds a right. As a result, they exclude any human beings below a minimal level of rationality so that infants, the senile, and those in a persistent vegetative state either do not have rights, or do not have a full set of rights. Hart's approach to dealing with this problem was to point out that, while rights impose duties, duties do not impose rights; one may have a duty to care for infants but that does not mean that those infants have human rights. Interestingly, those duties are equally as stringent as the duties that are correlates of rights; it seems no less terrible to murder a child than it does an adult. If these duties are equally stringent, then it seems that there must be some connection between those duties and rights. If we have equally stringent duties without rights as we have with rights then it seems unnecessary to appeal to rights at all. What we try to capture in a theory of rights is that rights-claims are high-priority but, again, if the duties are equally as stringent with or without rights then there seems to be no reason to appeal to rights at all. In other words, Hart's response threatens to do away with the need for rights at all, instead enshrining purely an ethic of duty.

Gewirth attempted to find a solution to the problem of exclusion and his solution was to appeal to his Principle of Proportionality. This principle essentially says that anyone that has a degree of rationality above a certain level has full access to rights. Anyone that falls below that level has rights in proportion to their degree of rationality. Gewirth's appeal to this principle created a problem for him since it created a separation of the two rights that he thought of as necessary for purposive agency: freedom and well-

being. The principle forced him to say, either, that rights to well-being varied according to the degree of rationality, which would be unacceptable, or, that the Principle of Proportionality only applied to the right to freedom. In the latter case, which is the most plausible, Gewirth is forced to either jettison the right to well-being, or to establish criteria other than rationality as the basis for rights.

Both Rawls's theory and utilitarianism ran into the problem of being pre-formed by our preferences. Rawls's original position is, to a certain degree, supposed to be neutral with respect to the principles that are decided on in the original position. However, it seems that there are certain principles that would have to be in place before any discussion could take place in the original position. The principles would be such things as equality (which he accepts comes prior to negotiation), freedom of speech and autonomy. Rawls may be able to identify a successful solution to this problem but, given the difficulty of reaching the objective agreements that are supposed to be taking place in this hypothetical situation, it seems more fruitful to look at alternative theories. One distinct benefit of Rawls's hypothetical situation is the emphasis on developing just principles by having us imagine what we would agree to if we didn't know what social advantages or disadvantages we have or what natural abilities we have. I think that this consideration is worth keeping in mind even if Rawls's theory cannot adequately justify human rights.

To turn to utilitarianism, it seems that act-utilitarianism is incapable of supporting human rights as there are too many instances where an action will provide the greatest utility but be contrary to a respect for human rights. Rule-utilitarianism is, at least initially, more plausible since it does seem to be compatible with human rights. However,

in the absence of any tangible method for calculating utility, it loses its neutrality with respect to the principles that it is supposed to promote. In other words, rule-utilitarianism seems more likely to support our personal beliefs than to promote any objective, utility-maximizing principles.

Finally, the most credible theory is the theory that rights are justified by our vital needs. Shue's approach was to show, by inference, that if we have even one right, then we must accept that the rights to security, subsistence, and liberty, in the form of freedom of movement and participation, are basic; they form the foundations of our human rights because we must have these rights to be able to enjoy or exercise any of our other rights. While Shue's argument is compelling it has problems. One may, for instance, deny the fact that we have any moral rights at all and there would be no way to argue against this position. Although this may be a disingenuous approach it shows that we have need of a morally compelling justification that can be used in conjunction with Shue's theory. For this we turn to vital needs as the basis of our human rights.

A theory based on vital needs most adequately captures the commitments of equality and universality that human rights attempts to promote. In naming the objects of our rights to be those things without which we experience grievous harm, we find morally and prudentially compelling reasons for asserting that we have human rights and respecting that others have human rights as well. The choice theorists may well disagree with this approach since their commitments are to freedom and autonomy. My response to them is two-fold. First, while we may not have as much freedom and autonomy when our rights are justified by vital interests, the interest theories promote both freedom and a minimal standard of living, whereas the choice theories, in general, place a much greater

value on freedom and autonomy, often to the exclusion of needs. Second, none of our rights are absolute, they must all be limited to some extent and to limit them in the interests of securing a minimally decent life for all seems to be the most compelling reason to do so.

## **Bibliography:**

Arthur, J. and Shaw, W., *Social and Political Philosophy*, Prentice-Hall (1992).

Brandt, Richard. *Morality, Utilitarianism, and Rights*, Cambridge University Press (1992).

Donnelly, J. *The Concept of Human Rights*, Croom Helm (1985).

Gauthier, D. *Morals by Agreement*, Clarendon Press (1986).

Gewirth, A. *Reason and Morality*, The University of Chicago Press (1978).

- *Human Rights: Essays on Justification and Applications*, The University of Chicago Press (1982).

Gibbard, A. "Utilitarianism and Rights", reprinted in Arthur, J. and Shaw, W. *Social and Political Philosophy*, Prentice-Hall (1992), pp 181-189.

Gorman, J. *Rights and Reason: An Introduction to the Philosophy of Rights*, McGill-Queen's University Press (2003).

Hohfeld, W. N. *Fundamental Legal Conceptions*, Yale University Press (1966).

Locke, J. *Second Treatise of Government*, collected in Wootton, D. *Political Writings of John Locke*, Mentor (1993).

McDonald, M. "Natural Rights" reprinted in Waldron, J. (ed.) *Theories of Rights*, Oxford University Press (1984).

Narveson, J. *The Libertarian Idea*, Broadview Press (2001).

Orend, B. *Human Rights: Concept and Context*, Broadview Press (2002).

Rawls, "A Theory of Justice", reprinted in Arthur, J. and Shaw, W. *Social and Political Philosophy*, Prentice-Hall (1992), 542-563.

Shue, Henry, *Basic Rights*, Princeton University Press (1980).

Sumner, L. W. *The Moral Foundation of Rights*, Clarendon Press, Oxford (1987).

Waldron, J. (ed.) *Theories of Rights*, Oxford University Press (1984).

White, A. *Rights*, Clarendon Press (1984).

Wootton, D. *Political Writings of John Locke*, Mentor (1993).