

The Relationship of Right

A Constitutive Vindication of Human Rights

by

Ariel Hernán Zylberman

A thesis submitted in conformity with the requirements

for the degree of Doctor of Philosophy

Graduate Department of Philosophy

University of Toronto

© Copyright by Ariel Zylberman 2013

The Relationship of Right: A Constitutive Vindication of Human Rights

Ariel Zylberman

Doctor of Philosophy

Department of Philosophy

University of Toronto

2013

Abstract

What is the fundamental justification of the idea of human rights? In this dissertation I argue that human rights are justified in virtue of the special role they play in practical thought: they function as the *constitutive* conditions of the relationship of right. This answer has two distinctive features: it justifies human rights *non-instrumentally* and *relationally*, as those claim rights universally necessary for relating to each other as juridical equals, as lacking authority *over one another*. This constitutive argument for human rights contrasts with the predominant theories of human rights, which tend to justify human rights *instrumentally* as means for the protection of an independently intelligible (and non-relational) purpose (e.g., basic needs, urgent interests, autonomy, capacity-development). A strong reason for endorsing the account proposed here is that it explains better than its instrumentalist competitors the universal validity of human rights while offering a more robust response against the human rights skeptic. Furthermore, this constitutive argument gives us the resources for seeing how human rights form an indivisible whole comprising civil, political, social, economic and cultural rights and how human rights structure an international order of peace. My account thus promises to offer a much-needed defense of the ideals enshrined in the Universal Declaration of Human Rights.

Acknowledgments

It is hard to believe that a dissertation could ever come to an end. The first sign that this may have happened is the realization that one owes so much of it to others.

The Social Sciences and Humanities Research Council provided invaluable research funding through the Vanier Canada Graduate Scholarship. In the final year of my dissertation, I benefited immensely from a Chancellor Jackman Graduate Fellowship at the Jackman Institute for the Humanities, which allowed me to focus exclusively on the dissertation and to participate in a lively inter-disciplinary community of scholars.

The University of Toronto was the perfect place to write a Kantian defense of human rights. I am grateful to Juan Pablo Bermudez, Ken Boyd, Anthony Bruno, Phil Clark, David Dyzenhaus, Diana Heney, Brad Inwood, Hasko von Kriegstein, Devlin Russell, Ulrich Schlösser, Dave Suarez, Sergio Tenenbaum, Evan Thompson, and Jacob Weinrib. Our conversations have made their mark here in one way or another. The Law and Philosophy Group was an unexpected highlight of my time here. Although I have always taken the history of philosophy seriously, I had never imagined I could learn so much from reading Hugo Grotius *that* slowly. Without knowing it, Simone Chambers, David Dyzenhaus, Dennis Klimchuk, Joanna Langille, Arthur Ripstein, Scott Shapiro, Hamish Stewart, Martin Stone, Ernest Weinrib and Jacob Weinrib taught me so much about juridical thought.

In the course of writing my dissertation, I was struck with the incredible fortune to have become part of a second community. Jim Conant and Sebastian Rödl's second-person institute was as rich and intense a venue for philosophical conversation as one can get. The institute took place through a crucial period of my dissertation and left an indelible stamp. In addition to Jim and Sebastian, Byron Davies, Anton Ford, Paul Franks, Matthias Haase, Adrian Haddock, Thomas Land, Sasha Newton, Glenda Satne, Will Small, Martin Stone, and Michael Thompson were incredible, generous, challenging and stimulating interlocutors.

If I was incredibly fortunate to have enjoyed the support from these wonderful communities, I hit jackpot with my dissertation committee. Paul Franks, Arthur Ripstein, and Jennifer Whiting provided me with so much inspiration, guidance, wisdom, and encouragement. In their own ways, each is an exemplar for me. Arthur supervised this dissertation with insight, good humour, and kindness. Through his work and in countless conversations, Arthur demonstrates for me how the abstract transcendental reflections of Immanuel Kant can illuminate the most intimate aspects of ordinary life with one another. Arthur's support and perseverance were super-human. I had not thought it possible for a supervisor to give such helpful and detailed feedback, and to do so not just once, but over ten times for essentially the same chapter. I am deeply grateful to my committee.

I only began serious reflection on the idea of human rights when I worked as an international cooperant for the Peruvian non-governmental organization APRODEH. In their vigorous defense of human rights in Peru and, especially, their insistence on the indivisibility of human rights, APRODEH taught me how significant and all-encompassing human rights really are. The people of Apurímac taught me similar lessons through their own perseverance in seeing through their claims of right and challenged me to think with them systematically about what human rights mean in everyday life.

I owe my family the greatest debt of gratitude. My parents, Marta and Mauricio Zylberman, and my siblings, Leandro and Melina, unconditionally supported from the beginning my peculiar decision to pursue philosophy. Pat Reid, my mother in law, was also always supportive, in spite of the dubious prospect of having an aspiring philosopher marry her daughter. To my wife, Claire Reid, I owe everything. Any idea of substance about human rights put forward in this dissertation, I owe to her. Claire has always been my north star, and her love and support made life as a PhD student not just tolerable but positively enjoyable. I dedicate this dissertation to her and to our children, Zoe and Noah.

Contents

Acknowledgments	iii
Introduction: Free and Equal in Dignity and Rights	1
1 Human Rights and the Problem of Universality	8
2 The Very Thought of (Wronging) You	30
3 <i>Sub Specie Alteritatis</i> : Two Forms of Relational Justice	72
4 Why Human Rights? A Constitutive Vindication	106
5 The Unity and Indivisibility of Human Rights	135
6 Matters of International Concern	172

Introduction: Free and Equal in Dignity and Rights

Modern consciousness finds within itself a contradiction concerning human rights. On the one hand, the validity of human rights strikes us as obvious, as unshakeable moral bedrock. Where the grand old ideologies of the past collapsed, the spare criteria of human rights shine forth as the sole surviving ideology. Human rights are said to be the “last utopia,”¹ to function as the universal, moral *nova lingua franca*. Thus, human rights, *inter alia*, determine benchmarks for development and economic projects, are key for changing national law, set standards for the legitimacy of states, establish criteria for foreign aid, foreign development and foreign relations, facilitate the transition from communist to market economies, set norms for a burgeoning international criminal law, and secure access to such varied goods as free expression, religious toleration, due process, food, water, housing, and a free elementary education. On the other hand, the unparalleled success of the human rights discourse feeds skepticism. As Andrew Clapham puts it, human rights are under attack precisely due to their omnipresence.² The air of self-evidence enjoyed by the invocation of a human right means that we appeal to the unquestioned force of a human right in a dizzying array of circumstances and ultimately whenever we feel an important value has come under threat. Milan Kundera captures this sentiment and the problem associated with it with characteristic lucidity: “the more the fight for human rights gains in popularity the more it loses any concrete content, becoming a kind of universal stance of everyone towards everything, a kind of energy that turns all human desires into rights.”³ The self-evidence of human rights feeds skepticism, then, because the discourse of human rights is so widely used that human rights have begun to lose concrete content.

Thus, the contradiction concerning human rights is that they simultaneously appear self-evident and suspect. We bow unflinchingly before the shrine of the Universal Declaration of Human Rights and

¹ Samuel Moyn, *The Last Utopia: Human Rights in History* (Cambridge, MA: Harvard University Press, 2010).

² Andrew Clapham, *Human Rights: A Very Short Introduction* (Oxford: Oxford University Press, 2007), p. 15.

³ Milan Kundera, *Immortality* (London: Faber and Faber, 1991), pp. 150-154, quoted in Clapham, *Human Rights*, p. 17.

acknowledge that all humans are born “free and equal in dignity and rights.” But when it comes to our everyday relations, our domestic and international politics, we doubt that human rights can offer much guidance. At best, human rights may function as noble political aspirations, but they can and should be readily sacrificed in the pursuit of more realistic and concrete political goals. However, once human rights can be easily traded with alternative goals, they lose their distinctive normative character: they cannot function as universal rights. And if they cannot function as universally valid rights, we have good reason to be skeptics about human rights.

My aim in this dissertation is to resolve this contradiction by vindicating the idea of human rights. We should resist skepticism by rejecting the idea that human rights matter, to paraphrase Kundera, because they turn our most important desires into the objects of a human right. Instead, my proposal is that human rights matter because they are direct, juridical expressions of our *original relationship of right* to each other, the right to be treated as free and equal in rights correlated to the duty to not dominate others by treating them as unfree and unequal, as slaves and inferiors.

This manner of thinking about human rights restricts in a central way what may count as a human right. Human rights are not justified instrumentally as securing a goal that matters independently of them. Instrumentalist accounts represent this independently intelligible goal as the *object* of the right. When human rights are the protections of high-priority goals, the concept of a human right loses any concrete content, for anything from the fight against cancer to the pursuit of happiness and love may now count as a human right. This is certainly over-inclusive, as skeptics point out. However, we avoid this problem when we think of human rights as *non-instrumentally justified*. Indeed, my central proposal is that we should justify human rights non-instrumentally as the *constitutive conditions* of the relationship of right. The relationship of right is that juridical relation under which my claims of right against you necessarily entail and are entailed by your duties to me. Human rights matter non-instrumentally precisely because they *constitute* – are conditions of the possibility and meaningfulness of – the relationship of right, that is, are the constitutive conditions of any claim of right or any juridical duty. Do away with human rights and you destroy our juridical interpersonal relations.

To say that human rights are constitutive of the relationship of right is to maintain that human rights function as *juridical* norms: they are proper claim rights against others. Their aim is exclusively to protect your right to be treated as an equal in rights to others. There are several human rights for the simple reason that others can fail to treat you as an equal, can dominate you, in a variety of ways: by not permitting you to practice your religion or to speak your mind, by treating you as a slave rather than a paid employee, by injuring you or detaining you arbitrarily, and so on. For this reason, my vindication of human rights is *constitutive* and *relational* (or juridical): human rights matter not instrumentally but rather as the constitutive conditions of any relationship of right.

The contradiction between the apparent self-evident and suspect character of human rights can be shifted into the philosophical register by inquiring into the justification of the idea of a human right. I begin, then, by introducing in chapter 1 a puzzle about such justification. The puzzle is this. It appears to belong to the very idea of a human right that such right must be (in some minimal sense) universally valid. Human rights cannot belong *only* to those who live in some state or other or are members of a particular religion, ethnicity, gender. Instead, to count as a human right, said right must belong *equally to all*. I call this the “minimal universality constraint.”

The puzzle is that neither of the two standard models of justification, foundationalism and coherentism, appears to meet the universality constraint. Foundationalist accounts fail due to their instrumentalist character. As I have just mentioned, any instrumentalist account makes the validity of human rights contingent on the extent to which the human right is the best means for producing the founding end. As a result, on occasion it would be more warranted to violate rather than to respect human rights. Human rights become *locally* valid rather than universally valid norms. Similarly, standard coherentist accounts fail due to their *arbitrary particularism*. Human rights are valid by fitting within an internally consistent web of beliefs, such as the beliefs of a liberal. This strategy fails because it makes human rights contingent on the particular sociological practice within which they fit, such as the practice of liberalism. Human rights cannot be binding on non-liberals and therefore cannot be universally valid.

If my argument in chapter 1 succeeds, it sets the stage for my constitutive vindication of human rights in the remainder of the dissertation. The puzzle gives us the form of its resolution. An adequate justification of the idea of human rights would avoid the instrumentalism characteristic of standard foundationalist accounts, while avoiding the arbitrary particularism characteristic of standard coherentism.

My constitutive argument for human rights develops a version of coherentism inspired by Immanuel Kant's concept of the *constitutive a priori*. Unlike standard, empiricist forms of coherentism, *a priori holism* (as I shall call my version of coherentism) attributes a special justificatory role to certain *core* concepts. This role is precisely the core concept's function in constituting – making possible and meaningful – non-core concepts. Just as Kant argues that the concept of causality is constitutive of any empirical judgment about the external world, so too I shall argue that the concept of a human right is constitutive of any juridical judgment about the relationship of right. My constitutive (*a priori holistic*) vindication avoids the perils of foundationalism by justifying human rights non-instrumentally, and it avoids the perils of standard coherentism by making human rights constitutive of a basic (rather than contingent) relationship, the relationship of right. Human rights then function as non-instrumentally justified, relational and juridical norms. The remainder of my dissertation develops this constitutive argument in detail.

First, I seek to vindicate the generic idea of a right relationally and non-instrumentally by following Immanuel Kant's idea that rights are paradigmatically enforceable claims to independence from others. In chapter 2, then, I argue that rights are intelligible only by taking the relationship of right to be normatively basic. I thus depart from most theories of rights, for they seek to justify rights instrumentally by grounding them in non-relational goals, duties or rights. Put differently, we might say that my independence theory of rights is second-personal rather than third-personal, for rights are justified in

virtue of our authority relations to one another rather than by tracking values independent of our interpersonal relations.⁴

In chapter 3, I continue this argument by uncovering the *internal* relationship between the generic idea of a right and the idea of justice. I exploit Aquinas's fusion of the concepts of rights, law and justice into the concept of *ius*. Furthermore, the self-development of this idea of justice means that it necessarily leads from an original relation of justice as we relate to each other as equals in rights to a more concrete form of corrective justice. This form is horizontal and bipolar, linking private persons to each other in a direct juridical nexus. In order to make a system of right internally coherent, the form of corrective justice must lead to the form of distributive justice, understood along Kantian lines as a vertical and omnilateral form, linking private persons to their public authority. The virtue of my coherentist approach is that it reveals relations of normative necessity. If I am correct in suggesting that these forms of just relations of right are indeed identical to the generic concept of right defended in the previous chapter, one cannot have one without the other. As a result, my vindication of the generic idea of a right carries over to the idea of justice.

Having revealed the internal connection between right and justice, in chapter 4 I return to the question of the justification of human rights and develop more explicitly my constitutive argument for human rights. Human rights, I argue, are the constitutive conditions of any relationship of right and in particular of three forms of relations: one horizontal, one vertical, and a third that fuses the first two, namely, the international relationship of right. I develop the constitutive argument in three stages. First I focus on the internal normativity of human rights; then I show how my relational account meets the

⁴ For illuminating discussion of the contrast between second- and third-personal norms, see Stephen Darwall, *The Second-Person Standpoint: Morality, Respect, and Accountability* (Cambridge, MA: Harvard University Press, 2006). See especially pp. 8 and 33 for the contrast between second-personal norms as *agent-relative* reasons and third-personal norms as *agent-neutral* reasons.

universality constraint with far greater ease than its familiar foundationalist and coherentist alternatives; and finally I argue that my relational account is best positioned to refute both regular and radical skeptics.

The last two chapters develop in more detail the thought that human rights constitute three forms of relations of right. In chapter 5, I defend the indivisibility of human rights by offering a formal argument: human rights from five categories of rights – civil, political, social, economic and cultural – manifest the same form of thought, play the same constitutive function. Indivisibility is necessary to a system of human rights because without it forms of domination would be permitted. In chapter 6, I defend the idea that human rights are matters of international concern and therefore structure the international relation of equal authority among states.

As the positive pole of our modern consciousness maintains, the validity of human rights is moral bedrock. However, if my argument in chapter 1 is sound, it shows that philosophical accounts have not successfully vindicated that insight, opening the idea of human rights to various forms of skeptical attack. I argue that the best way to repeal these attacks is to recognize their insight, for they are correct in insisting that instrumentalist accounts of human rights are inadequate. And yet, to succumb to skepticism is premature. Human rights matter because they constitute our relationships of right, rather than because they secure objects we desire strongly. Human rights are not merely noble inspirations. They articulate our most profound vocation by structuring a world in which you and I can live as equals, protected by the rule of law, and in an international order of peace.

Chapter 1

Human Rights and the Problem of Universality

1. HUMAN RIGHTS AND THE PROBLEM OF UNIVERSALITY

What is the nature and justification of human rights? Regardless of our specific conceptions, one thing seems to be sure: it belongs to the very idea of a human right that it must be *universally valid*. If a human right were valid only in some jurisdictions but not others, or were possessed by a certain category of persons but not others, then the right in question could not be a human right. As put in the Vienna Declaration and Programme of Action, the result of the World Conference on Human Rights in 1993, “the universal nature of these rights and freedoms is beyond question.”¹ For instance, to say that you enjoy the right to due process as a human right is to say that this entitlement is not conditional upon your living within a specific jurisdiction or upon your belonging to a specific cultural group, nationality, or religion. If your right to due process is to count as a human right, you and everyone else must enjoy the very same right. This seems an uncontroversial feature of the concept of a human right.

That human rights must be universally valid also places a constraint on the adequacy of any account of human rights. I shall call this the *minimal universality constraint*. This is a minimal sense of universality because it does not require *strict* universality, the thought that human rights must be valid anywhere and *always*, and does not require any specific view about the *ground* for the universality of human rights, such as the *essence* of human nature or God’s commandments. This is a *constraint*, because any account of human rights must be inadequate if it entails that some persons, say, of a particular nationality, religion, or sex do not bear the same human rights as persons of different nationality, religion or sex. But how are we to account for the universal validity of human rights?

My aim in this chapter is simply to formulate a puzzle: neither of the two predominant models of justification can meet the universality constraint. Foundationalism fails because of its instrumentalism; standard coherentism fails because of its arbitrary particularism. Instrumentalism and arbitrary particularism are problematic because they yield at most *locally valid* rather than universally valid rights.

¹ Vienna Declaration and Programme of Action, World Conference on Human Rights, Vienna 14-25 June 1993, UN Doc A/CONF 157/24 (Part I), §1.

Should this argument be correct, it would show that the predominant accounts of human rights are flawed precisely because they presuppose one of these two justificatory models.

However, my intention in formulating this puzzle is not to defend skepticism about human rights. Instead, I think that formulating the puzzle in this fashion is crucial for envisaging the form of its resolution. If the puzzle emerges from the instrumentalism of foundationalism and the arbitrary particularism of coherentism, we may resolve the puzzle by envisaging a form of justification that is non-instrumentalist (non-foundationalist) and yet avoids the arbitrary particularism characteristic of standard coherentist accounts. Articulating and defending such an account is the purpose of my dissertation.

In this chapter, then, I shall simply formulate the puzzle by showing how standard accounts of human rights deploy foundationalist and coherentist models of justification and how these models are in conflict with the universality of human rights. I should note in advance that I shall devote most of my attention to foundationalist accounts since the majority of current accounts presuppose such model.

2. SIMPLE FOUNDATIONALISM: A NATURALIST ANSWER

As a general model of justification, foundationalism is a strategy for resolving the skeptic's trilemma of justification.² Whenever you advance a claim, regardless of its content, I can rightfully demand a justification by *challenging* it in two ways: I can show that there are many other people who claim precisely

² Perhaps it was Aristotle who first articulated this trilemma. See Aristotle, *Posterior Analytics*, 72b5-17. The skeptic Agrippa made the trilemma famous by embedding it into his five modes for the suspension of belief. Like so many other skeptics, Agrippa wrote nothing. But as Barnes notes we learn of Agrippa through Diogenes Laertius IX.88-89 and of the five modes in Bk.1, §15 of Sextus Empiricus, *Outlines of Skepticism*, J. Annas and J. Barnes (eds.) (Cambridge: Cambridge University Press, 2000). Here I follow Fogelin's helpful distinction between the *challenging modes* (the first two I go on to describe) and the *dialectical modes* (the modes constituting the trilemma). See Robert Fogelin, *Pyrrhonian Reflections on Knowledge and Justification* (Oxford: Oxford University Press, 1994), p. 116.

the opposite (discrepancy) or I can show that your claim is relative to a particular context (relativity). But the moment you respond to the demand for reasons and begin to offer further reasons for your claim, the skeptic argues that any justification leads to one of the horns of a trilemma. If you refuse to justify your grounding claim, then the grounding claim will be simply *arbitrary*. If you offer reasons for the grounding claim, those reasons themselves must be justified, thereby triggering an *infinite regress*. And if in the process of justification you return to the original claim, your defense will have turned into a *vicious circle*. As a general model of justification, foundationalism seeks to escape the trilemma by offering a reason that is *self-justified*, a non-inferentially justified ground. Foundationalism can escape the trilemma only when it can answer the demand for reasons by coming to rest in a non-arbitrary and non-inferential stopping point, a foundation.

When applied to the topic of human rights, a foundationalist must justify human rights in three basic steps. First, when a human rights claim is challenged, one must offer a further reason for the claim, a *more basic value*. Second, this basic value must be characterized in terms that make no reference to human rights. This step into the *extra-juridical* is crucial: if the basic value were another human right, then the skeptic would charge that the account has run into a vicious circle. To avoid vicious circularity, the foundationalist must ground human rights in an *extra-juridical value*, a value intelligible independently of any rights. And finally, in order to avoid the problem of infinite regress, the grounding basic value must be *non-inferentially* justified.

To the extent that they are foundationalist, the two predominant accounts of human rights, naturalist and institutional, develop in two different ways this basic foundationalist strategy. The two strategies share their commitment to the second and third steps but differ on their understanding of the first step. For the naturalist, human rights can be derived *directly* from the basic value; for institutional theorists human rights can only be derived *indirectly* from the basic value via some institution or practice. I shall call the former strategy *simple foundationalism* and the latter *two-level foundationalism*.

Naturalist accounts of human rights tend to presuppose simple foundationalism. According to the *naturalist*, human rights are pre-conventional, pre-institutional and historically invariant moral rights

belonging to human beings as such. We may unify these four features under the following formula: human rights are moral rights that belong to human beings as such and that protect *interests* so basic that their normative force is independent of particular laws, institutions or historical circumstances.³

That naturalist accounts tend to presuppose simple foundationalism is evident from their common espousal of an Interest theory of rights. The basic idea of the standard Interest theory is that rights are protections of an aspect of your welfare sufficiently weighty to furnish a ground, all things being equal, for imposing a duty on another.⁴ Two features of an interest theory of human rights are crucial for our purpose: the grounding interest is designed to play the role of a proper *foundation* for human rights, and this foundation need not be characterized exclusively in terms of welfare. The grounding interest is supposed to count as a non-inferentially justified, extra-juridical basic value, that is, as a *foundation*. Naturalist accounts then compete for a proper characterization of the foundational interest, but tend to share the very same Interest model of rights and simple foundationalist model of justification. Thus, human rights are the necessary protections of your interest in *normative personhood* (James Griffin),⁵ in basic human *capabilities* (Martha Nussbaum),⁶ the natural human good (John Finnis),⁷ or, more straightforwardly Razian, your *well-being* (John Tasioulas).⁸

³ This formula is meant to capture only roughly the central thought of the naturalist family of theories. For similar characterizations, see Charles Beitz, *The Idea of Human Rights* (Oxford: Oxford University Press, 2009), chapter 3; and David Boucher, *The Limits of Ethics in International Relations* (Oxford: Oxford University Press, 2009), pp. 150-151.

⁴ Joseph Raz offers perhaps the classic modern definition of rights according to the Interest theory, which, of course, goes back to the utilitarian tradition spearheaded by Jeremy Bentham. See Joseph Raz, *The Morality of Freedom* (Oxford: Oxford University Press, 1986), chapter 7, p. 166.

⁵ James Griffin, *On Human Rights* (Oxford: Oxford University Press, 2009).

⁶ Martha Nussbaum, "Human Rights Theory: Capabilities and Human Rights," *Fordham Law Review* 66 (1997): 273-300.

We can put some flesh on these justificatory bones by taking James Griffin's "personhood" account of human rights as an exemplar of naturalism and simple foundationalism. The exemplary character of Griffin's account is important for two reasons. First, it offers one of the most recent and developed versions of human rights naturalism. And second, as an exemplar, it stands for any other simple foundationalist account. To the extent that the troubles we shall find with the account pertain to the justificatory model deployed by Griffin, foundationalist naturalism will stand or fall with Griffin's personhood account without requiring a survey of every possible deployment of this justificatory strategy.

Griffin's basic thesis is that human rights have two distinct grounds. Human rights are grounded, first and foremost, "in the three values of personhood: autonomy, liberty, and minimum provision."⁹ Griffin understands autonomy as your ability to choose your path through life without being controlled by your circumstances or by other people. Since being autonomous requires a minimum provision of resources such as a basic education, access to health or a basic standard of living, your personhood also requires what Griffin calls a "minimum provision" of goods. Finally, if you have chosen your ends autonomously and you count with basic resources but you are still impeded in your pursuit by the imposition of others, you would not be autonomous. For that reason, Griffin argues for a third value of personhood: liberty from others forcibly stopping you from pursuing your autonomously chosen ends.¹⁰ But Griffin also argues that a list of human rights cannot be generated solely from the values of personhood. These values must be complemented by a second ground, which he calls "practicalities:"

⁷ John Finnis, "Natural Law: The Classical Tradition," in *The Oxford Handbook of Jurisprudence and the Philosophy of Law*, eds. J. Coleman and S. Shapiro (Oxford: Oxford University Press, 2002), chapter 1.

⁸ John Tasioulas, "The Moral Reality of Human Rights," in T. Pogge (ed.), *Freedom from Poverty as a Human Right: Who Owes What to the Very Poor?* (Oxford: Oxford University Press, 2007), pp. 75–101.

⁹ James Griffin, *On Human Rights* (Oxford: Oxford University Press, 2009), p. 51.

¹⁰ Griffin offers this explanation of the three values of personhood in p. 33.

basic facts about human nature and human societies.¹¹ The view is that when we appropriately focus on the formal values of personhood and supplement these with suitable material information about the human condition, we can justify most of the human rights we encounter in the international law of human rights.

For the personhood account, then, any right that is not a necessary condition of personhood cannot count as a human right. Griffin thus argues that while the rights to life, freedom of expression or health count as human rights, the rights to peace, to protection of one's honour and reputation, or the freedom of movement and residence do not.¹² Furthermore the right to political participation is not a human right, Griffin argues, because it is both possible and realistic for a nondemocratic government to violate no human rights and to respect the value of personhood. Griffin's form of argument must be, then, that since the conditions for normative agency could possibly obtain in authoritarian societies, the right to political participation cannot count as a human right.¹³

Whether Griffin is right about these particular rights is beside the point for now. For our purpose what matters is that Griffin's account is naturalist and an instance of simple foundationalism.

How is the personhood view naturalist? For the personhood view, human rights are *pre-conventional*. They derive their validity *directly* from the three values of personhood, rather than from any particular convention or agreement. Human rights are also *pre-institutional*. As Griffin puts it, these are rights we have "in the institution-free state of nature."¹⁴ Third, human rights are fundamentally ahistorical and timeless norms. Griffin offers a nuanced treatment of this aspect of human rights, since he distinguishes between *basic* and *derived* rights. Basic human rights are those generated directly by the three values of personhood (e.g., freedom of expression), while derived human rights are derived from basic human rights applied to

¹¹ Ibid., p. 38.

¹² For Griffin's argument that these are not human rights see §11.4.

¹³ For Griffin's argument against a human right to democracy, see chapter 14, especially p. 248-250.

¹⁴ Ibid., p. 277.

particular circumstances (e.g., freedom of the press as the application of freedom of association to circumstances where the institution of the press is available). This distinction between basic and derived human rights in principle enables Griffin to argue that basic human rights are invariable, whereas derived human rights may be historically contingent. And finally, for the personhood account human rights derive “not from any institutions of society ... but from our human status alone.”¹⁵

From the description so far it should be clear that Griffin’s personhood account presupposes a *simple foundationalist* model of justification. First, the personhood account offers the *value of personhood* as the ground, the foundation, of human rights. Second, the value of personhood must be characterized so as to avoid reference to rights, lest the skeptic charge Griffin with begging the question. As Griffin puts it, his account begins with a class of goods (the value of personhood) which “attracts the protection afforded by rights,” but the good in question is not only *more basic* than the class of rights, it must also be intelligible independently of any rights to avoid vicious circularity.¹⁶ And finally, in order to avoid the problem of infinite regress, Griffin must claim that this more basic value is *non-inferentially justified*. Griffin is careful to note that the value of personhood falls short of a full-blown theory of the human good or of human flourishing.¹⁷ Personhood is supposed to offer a *minimalist* foundation, for human rights are the conditions necessary for the protection of our personhood, not for leading a happy life. Personhood provides a simple foundation, then, in the sense that human rights can be generated directly from it.

3. TWO-LEVEL FOUNDATIONALISM: AN INSTITUTIONAL ANSWER

To recall, any foundationalist account must justify human rights in three steps. The *two-level foundationalist* shares with the simple foundationalist the second and third steps (extra-juridical and non-inferentially

¹⁵ Ibid., p. 277.

¹⁶ Ibid., p. 258. Elsewhere he admits that the form of a personhood account is teleological, for it offers a way of “basing the right on the good,” p. 80.

¹⁷ Ibid., p. 34.

justified ground), but differs with regard to the first. Human rights cannot be derived *directly* from the founding interest. Instead, we must distinguish *two forms of justification* already present in the first step: the first form justifies human rights by reference to their role in a *practice* or institution; the second justifies particular *practices* and institutions by reference to a more basic value.

Institutional accounts of human rights tend to presuppose two-level foundationalism. First, they justify human rights in virtue of their role in an institutional practice. More specifically, human rights play the political role, as John Rawls put it, of limiting the sovereignty of states and offering reasons for taking action against the violator in the international arena.¹⁸ In the second level, the institution itself gets justified by appealing to a basic value, a grounding interest. Thus, Charles Beitz grounds rights in *urgent interests*,¹⁹ while Thomas Pogge grounds them in *basic needs*.²⁰

It is important to note that since two-level foundationalist accounts interpose institutions between human rights and their ultimate ground, the institutional justification of human rights is not a *direct derivation* from the grounding interest. This enables institutional accounts to shed three of the distinguishing features of naturalist accounts. As I have indicated, human rights are institutional rather than *pre-institutional norms*, since human rights for the institutionalist make essential reference to the modern institution of the state system. Second, institutional accounts are not committed to the *ahistorical* character of human rights, but often emphasize their historically contingent character. And for a similar reason,

¹⁸ John Rawls, *The Law of Peoples* (Cambridge, MA: Harvard University Press, 2001). See also Joseph Raz, “Human Rights Without Foundations,” in S. Besson and J. Tasioulas (eds.), *The Philosophy of International Law* (Oxford: Oxford University Press, 2010), p. 328.

¹⁹ Ibid.

²⁰ Thomas Pogge, *World Poverty and Human Rights* (Malden: Polity Press, 2008), p. 276: “The switch in idiom from ‘interests’ to ‘needs’ is meant merely to flag the idea that only the most important interests of human beings should be seen as giving rise to human rights.” For another institutional account, see Rex Martin, *A System of Rights* (Oxford: Oxford University Press, 1997), chapter 4.

human rights need not belong to human beings *as such*. Human rights, in short, are primarily addressed to *states* rather than to other individuals, as the naturalist claims. We may unify these features under the following formula: human rights are the special norms of the current international practice that protects individuals against threats to their most urgent interests from the acts and omissions of governments, thereby constituting a matter of international concern.²¹

Let me make this picture of institutional (two-level) foundationalism more concrete by briefly considering Charles Beitz's practice conception as an exemplar. As with Griffin, concentrating on an exemplar avoids the need of surveying various versions of two-level foundationalism and allows us to focus on the justificatory model in question. Other foundationalist institutional accounts will stand or fall with the exemplar.

Like the naturalist, Beitz claims that "human rights are like natural rights in being critical standards whose content is not determined by the moral conventions and legal rules of any particular society."²² But unlike the naturalist, Beitz argues that we can comprehend the idea of human rights only by attending to the practical inferences participants make within the relevant *practice*. We understand the idea of human rights not by thinking of human rights as the normative properties of individuals, but rather by comprehending the *discursive role within a practice* entailed by making a human rights claim. For this reason, Beitz calls this a "practical" conception.²³ Human rights constitute a practice because they consist "of a set of rules for the regulation of the behavior of a class of agents, a more-or-less widespread belief that these rules ought to be complied with, and some institutions, quasi-institutions..."²⁴ In particular, the human rights practice makes essential reference to the current international order composed of states. And for this reason, Beitz denies the naturalist claim that human rights are *pre-institutional* norms. From this it

²¹ This formulation mirrors Charles Beitz's in his *The Idea of Human Rights*, p. 197.

²² Charles Beitz, *The Idea of Human Rights* (Oxford: Oxford University Press, 2009), p. 54.

²³ *Ibid.*, p. 102.

²⁴ *Ibid.*, p. 42.

follows that Beitz is in no way committed to think of human rights as *ahistorical* norms. And furthermore, there is no need to think of human rights as belonging to all human beings ‘as such’.²⁵ Human rights, then, function as standards for criticism of the conduct of the modern state.²⁶

The practice conception appears to presuppose two-level foundationalism. First, for Beitz a human right is not the property of an individual in abstraction, but an inferential role within the current practice of holding states to account. Beitz identifies this role with the second and third elements of his practice model: human rights function as basic rules for the regulation of the behavior of states, both at a domestic (second element) and at an international level (third element). We may construe Beitz’s first element of the practice model as the second form or level of justification, that is, the justification of the practice. Here is the first element of Beitz’s practice model:

Human rights are requirements whose object is to protect urgent individual interests against certain predictable dangers (‘standard threats’) to which they are vulnerable under typical circumstances of life in a modern world order composed of states.²⁷

If I understand the justificatory structure of Beitz’s account, this first element introduces a new level of justification, one that justifies the practice itself. The practice of human rights, the institutions and quasi-institutions regulating the conduct of states, is grounded in a basic value distinct from the practice itself: the urgent interests of individuals.

The crucial point for our purpose is that Beitz’s practice conception appears to presuppose two-level foundationalism. Human rights are justified in two stages: first as the rules constitutive of the

²⁵ For these two claims, see p. 112: “the justification of most any human right will be more-or-less dependent on empirical generalizations about the nature of social life and the behavior of social and political institutions... the generalizations no more need to pertain to social life in all times and places than the underlying interests need to be shared by all human beings ‘as such’.”

²⁶ Ibid., p. 197.

²⁷ Ibid., p. 109.

contemporary practice of limiting the sovereignty of states, and then the practice is justified by appeal to urgent interests. These are two distinct forms of justification because the justificatory level of *individual interests* is logically independent from the justificatory level of *human rights* as inherent in an institutional practice. Individual interests are intelligible independently of the institutions of the modern state; human rights are not.

We may then put the contrast between naturalist and institutional foundationalism by elaborating Griffin's distinction between *basic* and *derived* human rights. While naturalist foundationalists understand at least some human rights as *basic* (derived directly from the founding value), institutional foundationalists understand *all* human rights as *derived*, that is, derived from the conjunction of an independent normative layer of basic interests and a historically contingent institutional practice.

Another way to sharpen the contrast between these two foundationalist strategies is by recalling John Rawls's early distinction between two concepts of rules.²⁸ According to what Rawls calls the *summary* conception, the justification of individual actions and rules is essentially the same: it appeals to the promotion of a basic value. Thus, for the summary conception we must justify, say, individual promises and the institution of promising in the same way: by establishing whether they promote the basic value in question, such as the principle of utility. By contrast, for the *practice* conception, we must distinguish the justification of individual acts falling under a practice (e.g., individual promises) from the justification of the practice itself (e.g., promise-keeping). For the practice conception, we justify rules in virtue of their *constitutive function*, their role in constituting the practice in question. A constitutive rule defines the practice, is logically prior to particular instances of it and is normative in the sense that it justifies the specific act simply in virtue of explaining the act to fall under the practice. Thus, the rule *do not use your hands* when playing soccer (unless you are a goalie) is a candidate constitutive rule: it is part of the definition of the game of soccer, is prior to particular acts of playing soccer (for in the absence of this rule no bit of

²⁸ John Rawls, "Two Concepts of Rules," in *Collected Papers*, ed. Samuel Freeman (Cambridge: Harvard University Press, [1955] 2001), pp. 20-46.

movement could count as *playing soccer*) and is normative (for in using your hand, as in Maradona's immortal moment, you commit a basic infraction). A crucial feature of the practice conception, as Rawls understands it, is that the constitutive function of rules cannot serve to justify the practice itself.²⁹ For this reason, the practice itself must be justified by reference to a further basic value, a value *external* to the practice itself.

Against this Rawlsian background, we may say that simple foundationalists (naturalists) assume a *summary* conception of human rights: we must justify human rights by direct reference to a basic value. Similarly, two-level foundationalists (institutionalists) assume a *practice* conception of human rights: we must justify human rights first in virtue of their role in a particular institution, and then we must justify said institution by reference to a basic value.

Having in view both versions of foundationalist accounts of human rights, we ought to ask whether either version succeeds in accounting for the universal validity of human rights. I shall now argue that both fail to meet the universality constraint for the same reason: their instrumentalism.

4. INSTRUMENTALISM AND THE CARNEADEAN CHALLENGE

In 155 B.C. the skeptic Carneades arrived in Athens from Rome on a diplomatic mission and took the city by storm when he argued for the idea of natural justice on the first day, only to robustly attack it on the next. Carneades argued that “there is no such thing as natural law,” no norm of justice whose validity is universal and independent of specific conventions. The gist of Carneades's argument appears to have been

²⁹ “When the challenge is to the practice, citing the rules (saying what the practice is) is naturally to no avail. But when the challenge is to the particular action defined by the practice, there is nothing one can do but refer to the rules.” (Ibid., p. 39)

that no norm of justice can be *universal* because natural justice either presupposes an implausibly altruistic picture of human motivation or ignores the incredible diversity in customs and legal practices.³⁰

Carneades's spectacular attack on the idea of natural justice has echoed throughout history. Like Carneades, David Hume argued that the idea of *natural justice* is an illusion. Bentham famously pronounced the idea of natural rights "non-sense upon stilts." Marx declared human rights a bourgeois mask for disguising the brutal social and economic inequalities of capitalist society. Echoing echoes, more recently, Žižek speaks of human rights as "a false ideological universality, which masks and legitimizes a concrete politics of Western imperialism..." and Alasdair MacIntyre condemns human rights to a mishmash bag of fictions on a par with belief in witches and fairies.³¹

Instead of surveying these various skeptical arguments, I want to focus on a single problem affecting any *foundationalist* account of human rights. The instrumentalist character of any foundationalist account means that such account cannot meet the minimal universality constraint. If so, this would support the skeptic's conclusion that the idea of a natural norm of justice – a universally valid right – must be a chimera.

By *instrumentalism* I understand an account that justifies human rights as means for the promotion of an independently intelligible end, an end that makes no reference to (human) rights. Why must foundationalist accounts be instrumentalist?

³⁰ Our only access to Carneades's famous speech is through the testimony of Cicero, who defends in *De Re Publica* the Stoic theory of natural justice after presenting Carneades's argument in Book 3. See Cicero, *On the Commonwealth* and *On The Laws*, in J. Zetzel, ed. (Cambridge: Cambridge University Press, 1999), at p. 63.

³¹ Slavoj Žižek, "Against Human Rights," *New Left Review* 34 (2005), pp. 128-129. Alasdair MacIntyre, *After Virtue* (Notre Dame: University of Notre Dame Press, 1981), pp. 65-67.

I have suggested that any foundationalist account seeks to escape the skeptic's trilemma by trying to establish a non-arbitrary and non-inferentially justified ground for human rights. As such, any foundationalist account must have three steps: it must ground human rights (directly or indirectly) in a basic value; it must characterize this ground as an *extra-juridical* value in order to avoid the charge of circularity; and it must justify this ground *non-inferentially* in order to avoid an infinite regress. Our two forms of foundationalism differ with regard to the first step, but share the second and third steps. Any foundationalist account of human rights will be instrumentalist in virtue of the second step: the attempt to ground human rights in an *extra-juridical value*. Lest the account become circular, the ground of human rights must be intelligible independently of the rights in question. Foundationalist accounts, then, are instrumentalist because they justify human rights as means for the promotion of an extra-juridical value.

It is important to bear in mind two points regarding instrumentalism in order to bring into view why and how exactly instrumentalism is problematic. The first is that instrumentalism is a commitment necessary to *both versions of foundationalism*. To the extent that simple and two-level foundationalism share the second step of the foundationalist strategy, they must be committed to an instrumentalist account of human rights. The second is that by focusing on instrumentalism, I shall focus on the second and not the third step of the foundationalist strategy. Critiques of foundationalism often focus on the third step, by arguing that the offered ground cannot play the role of an adequate foundation because it remains an arbitrary stopping point. This shall not be my critique. Indeed, I shall not dispute the ultimate importance, say, of urgent interests or of the values of personhood.

Instead, by focusing on the second step of any foundationalist account, my argument will focus on the *relationship* between human rights and their ground. In essence, the problem is that by making this an *instrumental* relationship, foundationalist accounts flout the minimal universality constraint.

Once we bring this problem into focus, it is easy to see it. By seeking to justify human rights instrumentally we make it possible for the justifying end to be promoted precisely by means other than human rights, indeed by *violating human rights*. And if this is so, human rights cannot be universally valid, for in some circumstances the foundation in question requires violating rather than respecting human rights.

If in a certain jurisdiction the grounding value is better promoted by not recognizing a certain human right, then that human right cannot be valid in that jurisdiction. But once we allow a human right to be valid in some jurisdictions but not others, we have flouted the minimal universality constraint.

Put differently, instrumentalism opens up a justificatory gap between human rights and their foundation. Once this gap is opened, it becomes possible for the foundation to be better promoted by means other than human rights. In the extreme case, this makes it possible for a regime or a jurisdiction to recognize no human rights whatever and still promote the basic value in question. If this is correct, Carneades appears to have been right: the idea of a universally valid norm of justice must be a fiction.

Once again it is important to underline two features of the scope of this argument. First, by focusing on the second step of any foundationalist account, this way of framing the problem affects both versions of foundationalism, naturalist and institutional alike. The problem with Griffin and Beitz's accounts does not pertain to the first step of foundationalism, the step about which they disagree. Instead, the problem pertains to the second step of foundationalism, the step they share. In this sense, the problem of instrumentalism is general and affects *any* foundationalist account. Second, the problem of instrumentalism is also independent from the status of the grounding value. I have not disputed the ultimate importance of the values of personhood or of urgent interests. Indeed, we generate the problem of instrumentalism precisely by taking for granted the ultimate importance of these values as the ends that human rights must promote. And it is for this reason that foundationalism cannot yield a universally valid right.

It may be helpful to make my argument against instrumentalism more vivid through a thought experiment. Suppose that in a world much like our own, things had turned out differently for two countries: Cuba and Saudi Arabia. Imagine, on the one hand, that no awesome oil deposits are discovered in Saudi Arabia in 1938 and that, in fact, not a single drop of oil is to be found in the Al-Hasa region. Instead, in the aftermath of Fidel Castro's famous attack on the Moncada Barracks in Santiago on July 26th, 1953, and his subsequent escape to Mexico, the dictator Fulgencio Batista wakes up one day to find out that the vastest reserves of oil in the world are found off-shore La Habana. Profitable contracts are

quickly secured; oil exploitation begins immediately; Batista's coffers begin to swell. Though fluent in the art of dictatorship, Batista is no dumb man: he realizes that the July 26th Movement makes a point. He realizes that he has been too lenient on the colossus to the North, that Cuba has perpetuated too many social and cultural inequalities, and that his country has relied too much on a single export. Thus, while becoming spectacularly rich, he *also* fosters a number of progressive policies, stealing the thunder from the revolutionaries. Batista promotes a system of free primary education, develops the system of health and makes it free and universal, opens up the civil service to the previously excluded Afro-Cuban population, industrializes the economy. All of this with one proviso: Batista is to stay on as Eternal President of Cuba. As Batista carries out his own revolutionary zeal, Cubans may not form political parties, openly criticize any of Batista's policies, or gather for any political purpose. Soon, summary executions of the few dissidents are a common practice as the judicial system comes more firmly under Batista's grip. By the time the Granma arrives, the survivors of Batista's fulminating response find themselves alienated from the *campesinos*. Ordinary Cubans support Batista. Finding no support, Che Guevara and Fidel Castro leave Cuba for more fertile revolutionary ground in 1957, never to return. By the end of 1962, Cuba is booming. Instead of a missile crisis, Cuba's main role in the world stage is its renaming in the United Nations, for now it will be known as *Batistan*, the prosperous land of Batista.

Batistan should illustrate two points. The first point is that as a state Batistan recognizes no human rights. Although the citizens of Batistan enjoy much better levels of health, education and considerably decreased levels of poverty, none of these are issues of rights in Batistan. Batista promoted these policies as a mere means for securing the stability of his own grip on power. There is no talk of *rights* either by Batista or Batistanis. Batistanis receive these services due to the goodness of the Eternal President's heart. These are questions of *charity*, not of *rights*. Batistanis enjoy no civil or political rights either. The Constitution is widely disregarded. Disappearances and summary executions of traitors are frequent, but they are widely regarded as a minor cost to pay for the enormous increase in overall welfare.

The second point is that although Batistan recognizes no human rights Batista's policies still promote effectively Griffin's "values of personhood" or Beitz's "urgent interests," or, crucially, at least no

less effectively than ordinary states who recognize human rights. Take Griffin's values of personhood. Although for the wrong reasons, Batista has significantly increased the standard of living of the average Batistani and decreased the level of systematic racial discrimination, thereby promoting the values of minimum provision. In fact, Batistanis may enjoy a higher standard of living than their fellows in human rights respecting countries. When it comes to liberty, by the early 60s, the security service is so well paid that it is rarely corrupt and so strong that few Batistanis dare cheat others. And because Batistanis are fairly free to do what they want – so long as they do not cross Batista – they can lead fairly autonomous lives. Due to Batista's policy of industrializing the economy with oil-funds, by the mid-60s Batistanis can choose from a number of careers formerly unavailable to them. *Campesinos* can end up as civil servants, engineers or artists. Cuban music flourishes. Afro-Cubans reconnect with their Yoruba roots, leading more authentic lives than ever before.

Batistan thus illustrates the peril of instrumentalism: once there is a justificatory gap between human rights and their foundation, the foundation may occasionally be better secured by infringing human rights or by establishing a political community that recognizes no human rights whatever. Once this is permitted, the universality constraint cannot be met, for human rights (individually or as a body) cannot be universally valid when they are not justified in certain places or circumstances. In short, instead of acknowledging the binding force of human rights claims, foundationalism makes it an open question whether human rights ought to be recognized and thereby makes it impossible for human rights to be universally valid.

The problem of instrumentalism is not confined to an arm-chair thought experiment. When we hear of the "Asian challenge" to human rights, the structure of the challenge is the same as the one illustrated by Batistan. Consider, for instance, China's challenge of the Western "imposition" of civil and political rights in the Vienna Conference in 1993. China argued that in its stage of historical and economic development, the most effective means of promoting basic human interests is by recognizing limited social and economic rights and a one-party, Communist state. The recognition of civil and political rights would be a hindrance to the welfare of its people, though in a later stage of economic development perhaps civil

and political rights would have to be recognized. Regardless of its empirical accuracy, the Chinese argument is made possible by the instrumentalism characteristic of foundationalist accounts.

Foundationalism makes it an open question whether in particular historical circumstances human rights are the best means for promoting the founding value. China's argument exploits this gap: in their circumstances, civil and political rights are not the best means of promoting general welfare. The moment this argument can be sound in at least one case, foundationalism reveals its failure to meet the universality constraint.

David Hume's argument against natural justice also reveals this problem for any conception of natural justice that involves the idea of a universally valid right. Like Carneades, Hume argues that no reflection on our nature will lead to a rule of justice. Human nature is not sufficiently altruistic and conventions are too varied for a right to be universally valid. Like Carneades, Hume argues that justice is a convention designed "as a remedy to some inconveniences, which proceed from the concurrence of certain *qualities* of the human mind with the *situation* of external objects."³² Rules of justice, Hume argues, are locally rather than universally valid: their validity must be understood as an instrumental *remedy* to the inconveniences generated by two pre-juridical grounds, our limited benevolence and scarce resources.

Encrease to a sufficient degree the benevolence of men, or the bounty of nature, and you render justice *useless*, by supplying its place with much nobler virtues, and more valuable blessings.³³

The important point of parallel for our purpose is that Hume is right: once we justify justice instrumentally, rules of justice will be valid only to the extent that they continue to function as remedies to empirically contingent circumstances. But once we conceive of justice in this way, we must reject the thought that any rules of justice, including human rights, could be *universally valid*, valid independently of contingent circumstances. Batistan and the Chinese argument illustrate this problem.

³² David Hume, *A Treatise of Human Nature* (Oxford: Oxford University Press, 1978), Bk. 3, §2, p. 494.

³³ *Ibid.*, pp. 494-495.

An obvious response to my objection is to deny that human rights must be universally valid in a strict sense. Departing from naturalist orthodoxy, John Tasioulas, for instance, argues that “human rights enjoy a temporally constrained form of universality, so that the question of which human rights exist can only be answered within some specified historical context.”³⁴ Similarly, the two-level structure of institutional theories permits the grounding interest to be more or less universal, but the practice of human rights to be *derived* and contingent. According to these theorists, then, we justify human rights by coupling more or less universal interests with contingent historical circumstances. Thus, Charles Beitz rejects the strict universality of human rights and argues that human rights must be justified partly by appealing to contingent empirical generalizations.³⁵ Human rights must function then at a “middle level of practical reasoning,” mediating between a fairly universal foundation and perfectly contingent circumstances.³⁶ As Joseph Raz puts it, human rights “lack a foundation in not being grounded in a fundamental moral concern but depending on the contingencies of the current system of international relations.”³⁷ In sum, the response to my objection is that I assume that human rights must be universally valid in a strict sense. Once we drop this assumption and loosen the sense of universality, my objection loses its force.

³⁴ John Tasioulas, “The Moral Reality of Human Rights,” p. 76.

³⁵ Charles Beitz, *The Idea of Human Rights*, p. 112: “This shows that the justification of most any human right will be more-or-less dependent on empirical generalizations about the nature of social life and the behavior of social and political institutions ... But the generalizations no more need to pertain to social life in all times and places than the underlying interests need to be shared by all human beings ‘as such’.”

³⁶ Ibid., p. 212: “Human rights operate at a middle level of practical reasoning, serving to consolidate and bring to bear several kinds of reasons for action.”

³⁷ Joseph Raz, “Human Rights Without Foundations,” in S. Besson and J. Tasioulas (eds.), *The Philosophy of International Law* (Oxford: Oxford University Press, 2010), p. 336.

In effect, however, this line of response only serves to further entrench the difficulty, for I have only assumed a *minimal form of universality*, rather than a strict or timeless one. It may be fine to insist on the historically contingent character of human rights, but then we are owed an account of how human rights can be historically contingent and minimally universal. The trouble is that the historical contingency of human rights collapses into local particularism. Even in contemporary historical conditions, the instrumentalist character of any foundationalist account still means that in certain contemporary circumstances it may be more warranted to violate than to recognize human rights. China articulated a version of this problem: the contemporary level of its own historical development means that civil and political rights ought not to be recognized. Once we grant that human rights are historically contingent, it is not clear how foundational accounts can quarantine this contingency and prevent it from spreading to the entire body of human rights, thereby rendering human rights valid only locally rather than universally.

Let me put the problem differently. The rejection of strict universality and necessity can meet the minimal universality constraint only by holding constant the current historical condition. But the current historical condition is not unified. Even on the problematic assumption that economic historical conditions progress in linear fashion, it is plainly false that all states currently inhabit the same stage of historical development. Once again, this is precisely China's argument: since China sees its own historical and economic condition as lying behind that of Western countries, China argued that it too ought to be allowed leeway with regard to civil and political rights in order to attain the same level of development. The particular Chinese argument may be flawed, but the general problem remains. By relying on the false assumption that there is a unified historical condition, the denial of strict universality collapses into a denial of minimal universality. The upshot of instrumentalism would be that inhabitants of developing countries such as Liberia, Haiti or Afghanistan would not enjoy the same human rights as the inhabitants of developed countries such as Sweden, Germany or Canada.

It appears, then, that both forms of foundationalism fail to meet the minimal universality constraint due to their *instrumentalist* character. This conclusion may encourage the thought that a

coherence model of justification would more easily meet the universality constraint. But as I shall argue, standard coherentist accounts also fail to meet the universality constraint.

5. COHERENTISM AND THE PROBLEM OF ARBITRARY PARTICULARISM

As a general model of justification, coherentism too is a strategy for resolving the skeptic's trilemma of justification. Foundationalism seeks to escape the trilemma by offering a reason that is *self-justified*, a non-inferentially justified ground. By contrast, coherentism seeks to escape the trilemma by offering a circular form of justification, only one that is not vicious. When applied to the topic of human rights, a coherentist seeks to show at the very least that the idea of human rights is not incoherent or, conversely, that human rights are justified by fitting in an internally consistent web of beliefs. Unlike foundationalism, the coherentist justification of human rights is inferential all the way down.

When considering coherentist accounts of human rights an initial difficulty is that there are almost no candidates, since most accounts tend to be foundationalist. Even those accounts that are avowedly non-foundationalist, such as Joseph Raz's, turn out to be non-*simple*-foundationalist on closer inspection, for they retain the structure of two-level foundationalism. Nevertheless, just as with foundationalism, it still seems possible to distinguish *naturalist* from *institutional* variants of coherentism about human rights.

Perhaps a paradigmatic example of a naturalist coherentist account might be that of Richard Rorty. Rorty understands human rights foundationalism as the attempt to ground human rights in the ahistorical essence of the human.³⁸³⁹ Although he denies that such an essence is anywhere to be found, he

³⁸ Richard Rorty, "Human Rights, Rationality and Sentimentality," in *Truth and Progress: Philosophical Papers* (Cambridge: Cambridge University Press, 1998), p. 170: "Human rights foundationalism is the continuing attempt by quasi-Platonists to win, at last, a final victory over their opponents... I shall enlarge upon, and defend, Rabossi's claim that the question of whether human beings really *have* the rights enumerated in the Helsinki Declaration is not worth raising. In particular, I shall defend the claim that nothing relevant to

is not a skeptic about human rights or an “irrationalist,” for he retains the minimal constraint that we ought to “make one’s web of belief as coherent, and as perspicuously structured, as possible.”⁴⁰ In spite of his rejection of foundationalism, Rorty appears to ground the idea of human rights in a single principle: solidarity. Solidarity is “the ability to think of people wildly different from ourselves as included in the range of ‘us’.”⁴¹ But solidarity itself is not grounded in any essence of the human being. Instead, solidarity is simply a *liberal value*. By making solidarity a key liberal commitment rather than a non-inferential ground, Rorty effectively distances himself from any foundationalist account but also renders his own account avowedly *ethnocentric*. This is “the ethnocentrism of a ‘we’ (‘we liberals’) which is dedicated to enlarging itself, to creating an ever larger and more variegated *ethnos*.”⁴² In sum, there is no transhistorical foundation for human rights, but rather the justification of human rights turns on the internal coherence of a *liberal web of beliefs*.

If it is correct to understand Rorty’s account of human rights as coherentist, it is important to recognize two aspects of the account. The first is that the account seems to be *naturalist* in a restricted sense. Unlike standard naturalists, Rorty would reject the view that human rights are *ahistorical* and grounded in

moral choice separates human beings from animals except historically contingent facts of the world, cultural facts.”

³⁹ Put in the terms I have been using, Rorty’s argument against foundationalism focuses on the third step. Rorty’s argument is essentially that what foundationalists offer as a non-arbitrary non-inferential ground (e.g., the essence of the human) remains arbitrary, for it is only a historically contingent cultural product. Regardless of its merits, it is important to distinguish this type of critique, which focuses on the third step of foundationalism, from my own, which focuses exclusively on the second, extra-judicial and instrumentalist one.

⁴⁰ Ibid., p. 171.

⁴¹ Richard Rorty, *Contingency, Irony and Solidarity* (Cambridge: Cambridge University Press, 1989), p. 192.

⁴² Ibid., p. 198.

the “human being as such.” What Rorty might share with other naturalists is the view that human rights are essentially *pre-institutional*. If the value of liberal solidarity is intelligible in a condition without public institutions, but where liberal individuals interact with one another, human rights would function as pre-institutional norms. The second aspect of Rorty’s account is that in spite of its coherentism it seems to be *instrumentalist*: human rights are justified as means for the promotion of an independently intelligible end, namely, *liberal solidarity*.⁴³

Similarly, I think it is possible to read Charles Beitz’s *practice* conception of human rights as an institutional *coherentist* account.⁴⁴ Indeed, one may argue that a peculiar feature of Beitz’s practice conception is precisely its avowed anti-foundationalism. Unlike naturalist views, which apply an independent philosophical idea to the international realm, the practice conception is not metaphysical but political. Beitz himself claims that the practice conception differs from naturalist views “in not presupposing any one view about their basis or justification [i.e., the basis of human rights].”⁴⁵ The practice conception would be coherentist insofar as it justifies human rights simply in virtue of their special

⁴³ I shall not labour this point, for as I shall argue the main problem for standard coherentist accounts is not their instrumentalism but their arbitrary particularism. If Rorty’s account turns out to be instrumentalist, then this would be an additional reason to reject it.

⁴⁴ It may seem odd that I mention Charles Beitz’s practice conception as both foundationalist and coherentist. To my knowledge, Beitz never explicitly addresses the foundationalist or coherentist character of his own account and ends up saying some things that make him sound like a foundationalist (e.g., about the role of urgent interests) and others that make him sound like a coherentist (e.g., his insistence on the political, not metaphysical character of the account and the eschewal of any *basis* for human rights). For instance, in p. 7, he emphasizes the coherentist (“bottom-up”) aspect of the practice account, but in p. 103 he contrasts his view with the anti-foundationalism of Rorty and says: “One need not say, however, that practical views are nonfoundationalist.”

⁴⁵ Beitz, *The Idea of Human Rights*, p. 54.

inferential role in the current global practice, namely, their function in offering reasons for limiting sovereignty. Similarly, Michael Ignatieff argues that we should abandon the idolatry that worships the imagined metaphysical grounds of human rights, such as human dignity or equal creation by God. Instead, we should think of human rights as political, as justified prudentially (in terms of human needs) and as a groundless “antifoundational humanism.”⁴⁶ If it is correct to read these views as coherentist rather than as simply two-level foundationalist, then they would have to eschew a non-inferential ground for human rights. They would count as *institutional* accounts in the sense that the primary function of human rights is to serve as standards for the legitimacy of states.

Now, do these coherentist accounts meet the universality constraint more easily than foundationalist ones? I shall argue that they do not, for a simple reason. The core difficulty, to borrow Rorty’s term, is the *ethnocentric* character, or arbitrary particularism, of standard coherentist accounts.

Rorty’s ethnocentrism evidently flouts the minimal universality constraint: if human rights are requirements (or necessary means for the promotion of) liberal solidarity, human rights cannot govern non-liberal peoples. Given the abundance of non-liberal corners of the planet, human rights cannot enjoy minimal universal validity. The idea of human rights collapses into the idea of *liberal* rights. But liberal rights in this sense would be valid only *locally*, in those places where people subscribe to liberal values. Human rights could have no independent binding force on places such as China or North Korea, which claim to reject liberal values.

Rawls’s practice conception of rules sheds light on the arbitrary particularism of a coherentist reading of Beitz’s practice conception. As we have seen, in “Two Concepts of Rules,” Rawls argues that a challenge to a particular action can be met by referring the challenger to the practice or institution, but if the challenge is leveled against the practice itself, then we must appeal to a ground *external* to the practice, otherwise the practice remains unjustified. If while playing soccer you use your hand to help you score, I

⁴⁶ Michael Ignatieff, *Human Rights as Politics and Idolatry* (Princeton: Princeton University Press, 2001), pp. 55-56 and 88.

can cite the rule constitutive of the game to point out your infraction and the invalidity of your move. However, if you insist that we are not playing soccer but some other game in which using your hand is permitted, then citing the rules of soccer loses its justificatory force. The difficulty for coherentist views is the same: by making human rights part of contingent practice (liberalism or the “current” global order), human rights lose their binding force on those who claim to remain outside of the practice. But if human rights are valid only for those who embrace a contingent sociological practice but not for those who remain outside it, human rights are only locally valid.

Just as the validity of traffic rules are keyed to a particular jurisdiction and it would be absurd to suppose that it is intrinsically correct to drive on the right side of the road, the standard coherentist keys the validity of human rights to particular jurisdictions or practices, rendering it problematic to suppose that human rights can be intrinsically correct or universally valid. To outsiders, not just academics but also the North Koreans of the world, the practice will appear simply as arbitrary.

It is easy to develop a thought experiment parallel to the one I constructed for foundationalism to illustrate how standard coherentist accounts fail to meet the universality constraint. What argument could the coherentist summon to show that human rights are valid in Batistan? Rorty’s argument fails because Batistan is not a liberal society. No civil and political rights are recognized: no voting is permitted; the courts are not independent; and laws are created by the will of the dictator rather than by an elected body of representatives. Furthermore, Rorty’s aesthetic appeal to the power of story-telling as a tool for expanding our solidarity may be effective on Batistanis, but that provides no justification for human rights in Batistan. Batistanis could coherently value solidarity with fellow Batistanis and with foreigners and deny that their solidarity has anything to do with the *rights of others*. Beitz’s argument fails because Batistan as a state can coherently think of itself as standing outside of the human rights practice (as conceived by Beitz). Similarly, Beitz’s argument fails when a human rights skeptic such as the United States fails to ratify the International Covenant on Economic, Social and Cultural Rights. If Beitz’s practice conception is understood along coherentist lines, then, the practice conception has nothing to say to those who challenge

the practice from the outside, as Batistan and the United States do. But the moment Batistan is permitted to stand outside of the domain of human rights, human rights can no longer be universally valid.

A defender of the practice conception might respond that my objection is unfair because there is an important distinction between the more or less universal practice of human rights and the very particular practice of traffic rules. While traffic rules depend on specific jurisdictions, human rights do not.

But this is precisely the problem. How is a coherentist going to distinguish the validity of traffic rules from that of human rights? For the coherentist, human rights are valid because of the role they play in a specific sociological practice, just as traffic rules are valid due to their role in a specific sociological practice. Since the coherentist keys the validity of human rights to a specific sociological practice, the coherentist lacks the resources to make human rights universally valid. This is because human rights cannot be binding on those who stand outside the practice, just as those who drive in France cannot be bound by British traffic rules. Beitz's practice conception can avoid this charge only by appealing to the normative function of *urgent interests* in grounding human rights. But the moment this is allowed, the practice conception is no longer coherentist. The account becomes two-level foundationalist. If so, the account becomes vulnerable to the problems generated by instrumentalism.

6. SURVIVING SKEPTICISM: NON-INSTRUMENTALISM, THE SECOND PERSON AND *A PRIORI* HOLISM

We should now have in full view our puzzle about the universality of human rights. Lest the concept of a human right collapse into that of an ordinary positive right, human rights must be *minimally universal*. The puzzle is that neither of the two standard models of justification appear able to vindicate the minimal universality of human rights. Foundationalist accounts fail due to their instrumentalism; coherentist accounts fail due to their ethnocentrism. The puzzle seems to encourage the conclusion that we should be skeptics about human rights. If the two standard models of justification fail to meet the universality constraint, then we should give up the idea of human rights altogether.

My argument for the remainder of my dissertation will be that this conclusion is premature, for careful reflection on the form of the puzzle also gives us the form of its resolution. If foundationalism is

indeed instrumentalist, we ought to reject foundationalism as a strategy for justifying human rights. And if coherentism tends to lead to an arbitrary particularism and turn into a viciously circular vindication, we may still envisage a form of coherentism that is virtuously circular, one that avoids the arbitrary localism of Rorty's liberal ethnocentrism.

What skeptics like Carneades and Hume, on the one hand, and foundationalists like Griffin and Beitz, on the other, share in common is the instrumentalist assumption that there is a justificatory gap between justice and its foundation, between human rights and their ground. Once opened, this gap cannot be closed. Batistan was meant to illustrate this gap: the grounds of justice broadly obtain while the rules of justice are broadly absent. Batistan manifests the *external nexus* between justice and its foundation.

The alternative to the instrumentalist assumption shared by foundationalists and skeptics alike is a non-instrumentalist conception of human rights. Human rights cannot be justified by virtue of the independent value they are meant to protect, but rather by the *form of relationship* they embody. In this sense, human rights must be understood as *second-personal* rather than *third-personal* norms: norms governing *forms of relations* among persons rather than norms tracking independently intelligible values.

By eschewing foundationalism, my account will be *coherentist*. So the challenge my account must meet is to avoid the problem of arbitrary particularism. I shall argue that we may avoid this charge by distinguishing two forms of coherentism, one that simply fits human rights into a *contingent sociological practice* and another that fits human rights into an *original practice*. Human rights enjoy a special normative structure, it will emerge, in virtue of their special *a priori* role: *human rights are the constitutive conditions of the relationship of right*. While it is easy to stand outside of contingent sociological practices – think how easy it is to not be a liberal – it is practically impossible to stand outside of an *original practice* such as the practice of claiming rights against one another. What makes this practice original, I shall argue, is its constitutive function, its constitutive role in our interpersonal relationships. Life without rights would be utterly unrecognizable, so the cost of rejecting an original practice is infinitely greater than the cost of rejecting a contingent sociological practice. While contingent practices are apt for an *external vindication*, no such vindication is possible for an original practice, which can only be justified from the inside, as it were.

I shall develop this argument in more detail in chapters 2 and 4, but the basic thought is that we may vindicate human rights in a virtuously circular fashion by standing firmly on a middle ground between a weak and an ambitious response to the radical skeptic. The ambitious response seeks to refute the radical skeptic (who rejects even the original practice) by revealing the skeptic to be incoherent or conceptually confused. To succeed, the ambitious response must begin from premises the radical skeptic will accept. The recoil from the failure of the ambitious response is that apparently taken by Rorty, acknowledging the contingency of *our values*. My strategy will be to develop a middle ground. Unlike the weak response, we should say something more to the skeptic. But unlike the ambitious response we should see that a successful vindication of rights need not begin from premises acceptable to the radical skeptic. Indeed, my argument against the radical skeptic will be that her demand for an *external justification* is itself unwarranted. Once we realize that it is not necessary to engage with the radical skeptic on her own terms in order to vindicate the relationship of right, we should immediately realize that our entitlement to the original practice of claiming rights is virtuously circular.

Immanuel Kant spoke of pre-critical philosophy as the surrender to the natural impulse to seek the ultimate ground of our system of judgments in something *external* to the system (God, the soul, a thing in itself, etc.). For critical philosophy skepticism has the salutary effect of shaking us free from dogmatic slumber, the illusion that the ultimate and external ground of our practices is ever attainable. And yet, for the critical philosopher the unattainability of such ultimate, external grounds need not mean a surrender to skepticism either. Instead, it should also shake us free from the skeptical illusion that a satisfactory justification must be one acceptable to the radical skeptic, the skeptic who stands outside our original practices. The critical path I shall seek to carve out in what follows is that a proper vindication of the idea of human rights will see them for what they are: those rights which function as the constitutive conditions of the relationship of right. The proper vindication of human rights will see them as non-instrumental and second-personal norms.

Chapter 2

The Very Thought of (Wronging) You

When Claudius poured poison into his brother's ear did he thereby *wrong King Hamlet* or did he merely perform a wrong act? Let me sharpen this question by distinguishing relational from non-relational duties, duties *to* another from duties *with regard to* another.¹ If you entrust upon me the care of your ficus tree while you are away on holidays, I have duties *with regard to* the ficus tree, but no duties *to* the tree. If upon your arrival it turns out that I have not watered the now moribund tree, I have wronged *you*, not the tree. Although I have duties with regard to your tree, I have no direct normative connection to it.² Put from the perspective of the patient, relational duties are *logically correlated with*, i.e., *logically entail* rights against the agent, while non-relational duties have no such correlate. The judgment that I have a relational duty to you *entails* (and is entailed by) the judgment that you have a right against me that I water the tree. Now, the judgment that Claudius *wrongs* Hamlet appears to presuppose that Claudius breached a *relational* duty to Hamlet and thereby to entail that Claudius infringed Hamlet's right. If Claudius merely performed a wrong act, he would have breached a non-relational duty with regard to Hamlet without violating Hamlet's rights and therefore would not have *wronged* Hamlet. Let me now re-phrase my question in light of these distinctions. When we reflect on Claudius's murderous act, which judgment is more apposite, that Claudius breached a relational or a non-relational duty?

The answer to this question may appear obvious: Claudius clearly *wrongs* Hamlet. But if the thought of wronging another presupposes the thesis of logical correlativity between relational duties and rights, then how are we to comprehend this thesis? A puzzle arises because, as we will see, current moral theories regard relational duties as *normatively derivative*. In so doing, they effectively *undermine* the thesis of logical correlativity and make it a mystery how one person could wrong another.

¹ Immanuel Kant, *The Metaphysics of Morals*, in *Practical Philosophy*, trans. and ed. Mary Gregor (Cambridge: Cambridge University Press, 2006), 6:442.

² I assume for the sake of argument that we hold no duties to living organisms as such. Naturally, environmentalists may disagree.

My aim in this chapter is to take the first step towards a non-instrumental and second-personal (or relational) account of human rights by articulating and defending a correspondingly non-instrumental and second-personal account of *rights*. The task of this chapter is to vindicate the generic idea of a right. I shall argue that the thought of wronging another is intelligible only when we comprehend rights as non-instrumental and second-personal norms. My argument unfolds as follows.

I begin by showing (in §1) that the puzzle about Claudius arises from a tension between the common view that rights are the logical correlates of relational duties (and vice-versa) and traditional philosophical views about the justificatory structure of rights. If, as Ronald Dworkin suggests, current moral theory is helpfully classified as either goal-based, duty-based or rights-based, then such views render it mysterious how rights and duties can be logical correlates of one another. As a result, they render mysterious how someone can wrong another. Goal- and duty-based theories make non-relational duties normatively basic and therefore deny that a judgment about duties must entail a judgment about the other's rights. Right-based theories tend to fare no better. Standard Interest Theories of rights appear committed to denying the thesis of correlativity because no judgment of rights can *entail* a judgment of duties. This is because rights, on this view, provide only a non-conclusive reason for imposing a duty on another. Standard Will Theories of rights tend to respect the thesis of correlativity, but, as we shall see, end up committed to the view that Claudius does not wrong Hamlet because Hamlet's claim to life cannot count as a right.

Given the plausibility of the view that Claudius wrongs Hamlet, we may deal with the puzzle in two ways: either we *solve* or we *dissolve* the puzzle. We *solve* the puzzle by reconstructing relational duties from non-relational ones, i.e., by showing how we can explain the phenomenon of *wronging* one another from merely wrong acts. We *dissolve* the puzzle by articulating its assumptions and by replacing such assumptions with alternatives that no longer generate the puzzle. I shall follow the strategy of dissolution. Accordingly, in §2 I articulate three assumptions behind the puzzle, assumptions about the fundamental form of a juridical judgment, about the form of justification of rights and about the value of the bearer of rights. Then, in §3 I articulate the three corresponding relational assumptions. More specifically, I

introduce a Kantian independence theory of rights according to which rights are not powers of enforcing or waiving the duties of others but rather enforceable first-order claims to independence correlated with a relational duty of non-domination.

I then offer three arguments for this Kantian view. In §3, I argue that the Kantian view of rights should be endorsed because it dispenses with the assumptions that give rise to our puzzle and thus enables us to understand the *possibility* of wronging one another. In §4 I defend the *necessity* of the independence theory of rights by showing that the non-relational idea of the person is explanatory of rights *only* by presupposing a relational concept of the person. And in §5 I respond to the charge that I have begged the question against a radical skeptic who questions the *actuality* of rights or of juridical personhood. When faced with the radical skeptic, our task ought not to be to *respond* by arguing from premises even the skeptic would accept but rather revealing her demand of justification to be unjustified. I carry out this more modest vindication in a second-personal register: in order to be consistent the radical skeptic would not even be able to think of herself as a possible subject of wrongs by another. The ultimate vindication of rights turns, then, on my thought of myself as simultaneously *addressing* and *being addressed by* you to respect our original right to independence.

1. OF RIGHTS AND SHADOWS

To recall, our puzzle about rights emerges from the conjunction of three thoughts. First, it appears as obvious that Claudius wrongs Hamlet. Upon reflection, we realize that the judgment that *A* wrongs *B* presupposes the thesis of correlativity. The thesis states that rights and relational duties are logical correlates, i.e., that they mutually *entail* each other. For *A* to wrong *B* is for *A* to breach a relational duty to *B*. If *A* simply breached a non-relational duty, then *A* would merely perform a wrong act rather than wrong *B*. And third, current moral theories tend to undermine the thesis of correlativity, rendering it mysterious how anyone could ever wrong you. I want to begin, then, by developing these three thoughts in more detail in order to sharpen the puzzle.

The thesis of correlativity is often traced to the work of Wesley Hohfeld, who analyzed basic legal positions as one pole in a relation of logical entailment to the position of another.³ Hohfeld called such relations “jural correlatives.” Thus, to occupy the position of bearing a right is thereby to be protected from someone else’s interference or someone else’s withholding of assistance or remuneration.⁴ For *A* to be endowed with a right is for *B* to owe a duty to *A*, and vice-versa. The thesis of correlativity, as I am calling it, is then the view that *A*’s rights are in a relationship of mutual entailment with *B*’s duties to *A*.⁵

I have claimed that the thought that *A* wrongs *B* presupposes the thesis of correlativity, but why should this be so?

³ Hohfeld, Wesley. "Some Fundamental Legal Conceptions as Applied in Legal Reasoning," 23 Yale Law Journal 16 (1913).

⁴ For illuminating discussion of Hohfeld’s legal positions, please see Matthew Kramer, “Rights Without Trimmings,” in M. Kramer, N. Simmonds and H. Steiner, *A Debate Over Rights* (Oxford: Oxford University Press, 2002), pp. 8-10.

⁵ In fact, the thesis of correlativity is of much more ancient pedigree, for it has found expression in a tradition of thinking of justice relationally that goes back through Hegel, Kant, Grotius, Aquinas and Aristotle. A handful of current thinkers have defended this tradition in different ways by upholding the view that a direct connection between two parties is normatively basic and fundamental to an understanding of juridical wrongs and rights. See Arthur Ripstein, *Force and Freedom: Kant’s Legal and Political Philosophy* (Cambridge, MA: Harvard University Press, 2009); Martin Stone, “The Significance of Doing and Suffering,” in G. Postema, ed., *Philosophy and the Law of Torts*, (Cambridge: Cambridge University Press, 2001), pp. 131-182; Michael Thompson, “What Is It to Wrong Someone? A Puzzle about Justice,” in R. Jay Wallace, P. Pettit, S. Scheffler & M. Smith, eds., *Reason and Value* (Oxford: Clarendon Press, 2004); and Ernest Weinrib, *The Idea of Private Law* (Cambridge, MA: Harvard University Press, 1995). Here, I mean to follow and develop this tradition.

In a classic paper, H.L.A. Hart invites us to imagine a society ruled solely by non-relational duties of natural or divine law.⁶ Hart argues persuasively that in such a society we would not be able to deploy the concepts of *rights* and *wrongs*, for we would only judge our actions as *right* and *wrong actions*. Since the only measure for judgment is whether the action conforms to an impersonal natural law, to act wrongly must be to infringe the law. Murder or adultery would be condemned as wrong actions, but never as wrongs to others. This is because the very thought of wronging you presupposes that you bear rights against me, and a society ruled solely by non-relational duties leaves no room for individual rights. Joel Feinberg illustrates the same point by invoking a traditional religious picture of a wedding, according to which each of the spouses-to-be acquires marital duties not to one another but *before* God.⁷ In such a society, adultery is a wrong act (construed as a wrong *before* God), but not a wrong to the spouse. In short, to put it now in our terms, a society ruled exclusively by non-relational duties effectively puts you in the position of the ficus tree: others can act wrongly by breaching duties with regard to you, but cannot wrong you.

The thought of wronging you presupposes the thesis of correlativity, then, because a wrong to another presupposes a breach of a relational duty, and a relational duty is the *jural correlate* of a right.

The third element of the puzzle is my claim that current moral theory tends to undermine the thesis of correlativity, thereby rendering mysterious how anyone could wrong you. Ronald Dworkin has famously classified political theories into duty-based, right-based, and goal-based theories, a classification others have extended to all moral theories.⁸ Dworkin's central idea is that in any political theory we may

⁶ H.L.A. Hart, "Are There Any Natural Rights?" *The Philosophical Review*, 64:2 (1955), p. 182.

⁷ Joel Feinberg, "The Nature and Value of Rights," *The Journal of Value Inquiry*, Vol.4 (1970), pp. 249-50.

⁸ Ronald Dworkin, *Taking Rights Seriously* (Cambridge: Harvard University Press, 1978), pp. 90-96. See also Joseph Raz, *The Morality of Freedom* (Oxford: Oxford University Press, 1986) chapter 5; John Simmons, *The Lockean Theory of Rights* (Princeton: Princeton University Press, 1992), p. 69; and Jeremy Waldron, *The Right to Private Property*, (Oxford: Oxford University Press), pp. 63-68.

distinguish judgment types that are *basic* from those that are *derivative*. A judgment is basic in a justificatory sense: it marks the end-point of justification in an order of judgments. Thus an *X*-based theory is a theory that gives pride of justificatory place to an *X*-type judgment and derives the rest of the theory from *X*. The basic judgments in our theory will be either about outcomes (goal-based), or about the duties of an agent (duty-based), or about the rights of a patient (right-based).

As we will now see, the reason goal-, duty-, and right-based theories undermine the thesis of correlativity is that they abstract away from the correlative relationship of right and focus instead on just one of the terms of the relationship. In so doing, they must deny the thesis of correlativity because a judgment of goals or of non-relational duties cannot entail a judgment of rights, while a judgment of rights (construed according to the standard Interest Theory) cannot entail a judgment of duties. These theories thus lose from view the direct nexus between Claudius and Hamlet.

Goal-based theories focus primarily on the outcomes in the world of Claudius's action. Although John Stuart Mill, for instance, defends the harm principle, his utilitarianism pushes him to regard as normatively fundamental the production of pain and well-being in the world. Goal-based theories undermine the thesis of correlativity, then, because the judgment that Claudius ought to produce well-being or minimize suffering in the world cannot entail a judgment about Hamlet's rights. On some occasions, aggregate well-being may be better promoted by infringing Hamlet's rights. The key point here is not the standard criticism that utilitarianism cannot defend the idea of rights, but the more modest one that judgments of goals cannot *entail* judgments of rights. For a goal-based theory, then, Claudius's duties are non-relational. Utilitarians like Mill will find it difficult to explain how Hamlet is a victim rather than simply the accidental location of diminished welfare in the world.

Duty-based theories focus primarily on whether Claudius violates one of the duties that emerge, say, from the divine law. John Locke, for instance, argues that we should understand the rights of others as

God's property.⁹ On at least this reading, a Lockean duty-based theory undermines the thesis of correlativity because our duties under the divine law are *non-relational duties*, and such duties entail no rights. As Hart and Feinberg argue, a society ruled exclusively by divine law turns all our duties into non-relational duties thereby leaving no room for judgments of rights. What looks like a wrong to another is in fact simply a wrong *before* or *to* God, since the other is God's property. Duty-based theories like Locke's will find it difficult to explain how Hamlet is a victim rather than the mere occasion of Claudius's breach of the divine law.

Right-based theories may be thought to fare better, but, perhaps surprisingly, they too generate the puzzle. To see why, let us consider the two main theories of rights, the Interest and the Will theory.

The basic idea behind Interest theories is that rights are always protections of aspects of a person's welfare, which may or may not include some aspect of that person's freedom.¹⁰ Joseph Raz offers what has become perhaps the standard formulation:

Definition. 'X has a right' if and only if X can have rights, and, *other things being equal*, an aspect of X's well-being (his interest) is a sufficient reason for holding some other person(s) to be under a duty. (*emphasis added*)¹¹

On Raz's view, rights play an "intermediate role" in our practical thought: while rights *ground* duties, rights themselves are grounded in the ultimate value of welfare.¹² The crucial aspect to notice for our purpose is that rights, on this view, cannot entail duties. Since rights play only an "intermediate" role in practical reasoning, they are merely defeasible grounds for imposing duties on others. When an aspect of your well-

⁹ John Locke, *The Second Treatise: An Essay Concerning the True Original Extent and End of Civil Government*

(Indianapolis: Hackett Publishing Company, 1980), §6.

¹⁰ Kramer, "Rights without Trimmings," p. 61.

¹¹ Joseph Raz, *The Morality of Freedom*, chapter 7, p. 166.

¹² *Ibid.*, p. 180.

being is better protected in some other way, your right cannot ground a duty on another. Simmonds has put this problem well:

... the Raz/MacCormick theory in effect concedes the impossibility of deducing specific duties (or permissions, powers, immunities, etc.) from the general rights that the theory favours. For, on the Raz/MacCormick view, the interests that constitute such general rights are only non-conclusive reasons for imposing duties: they do not *entail* duties.¹³

In short, the intermediate role played by rights means that rights offer only non-conclusive reasons for imposing duties, rather than signifying immediately the duty of another. If rights entailed relational duties, then they could not play a merely *intermediate* role, for my right would be a conclusive reason for your duty. Since rights cannot entail duties for standard interest theories, such theories undermine the thesis of correlativity.

By contrast, a standard Will Theory, such as that of H.L.A. Hart, may appear best situated, then, to explain how Claudius could wrong Hamlet. Somewhat tendentiously put, the basic idea behind the will theory is that rights are protections of a single interest, your interest in autonomy.¹⁴ More precisely, for the will theory *A* has the right to *X* if and only if *A* is competent and authorized to demand or waive the enforcement of the right.¹⁵ If you have a right, you thereby have normative control over someone else's duties, i.e., you have the power to demand enforcement of my duty or to waive my duty. Since the Will theory sees your rights as correlated with my duties, it seems well suited to uphold the correlativity thesis.

However, a standard criticism of the will theory is that it cannot account for inalienable rights and duties or for criminal wrongs.¹⁶ If you have an inalienable right to *X*, the mere fact that right is inalienable

¹³ N. Simmonds, "Rights at the Cutting Edge," p. 151.

¹⁴ H.L.A. Hart, "Are There any Natural Rights?," pp. 175-178.

¹⁵ M. Kramer, "Rights Without Trimmings," p. 62.

¹⁶ See, for example, M. Kramer, *ibid.*, pp. 70-72. Simmonds addresses this criticism (unconvincingly in my view) in "Rights at the Cutting Edge," pp. 230-31.

means you lack the power to waive my duty to respect your right to *X*. But if you lack the power to waive my duty, then you lack the right to *X*. Consider now the right to life. The will theorist is forced into a problematic position. If the right to life is going to count as a right, the will theorist must maintain that such right is *alienable*, rendering such phenomena as consensual murder morally permissible. The problem with this upshot is not that this is the morally incorrect view (for there is disagreement about this), but rather there seems to be something wrong with the view that the question whether there is a right to life depends on whether consensual killing is permissible. The upshot for our purpose is crucial. The will theorist seems committed to claiming either that Hamlet has no right to life or concluding that the problem with Claudius's act is that he did not seek permission first. The second upshot is problematic; the first makes Claudius's duty non-relational. Claudius does not wrong Hamlet (since Hamlet has no right to life) but rather Claudius performs merely a wrong action.¹⁷

In sum, I have advanced the claim that current goal-, duty-, and right-based theories undermine the thesis of correlativity because they abstract away from the relationship of right and focus instead on a non-relational aspect. Non-relational duties, then, cannot entail rights, and (interest based) rights cannot entail duties. These theories have a reductive character. Hamlet's rights are reducible to, mere shadows of, Claudius's duties. Alternatively, Claudius's duties are reducible to, mere shadows of, Hamlet's rights. None of these theories allow the initial correlative view that Claudius and Hamlet are embraced directly in a relationship of *perpetrator-victim*.

Nevertheless, it may be objected that my argument has moved too quickly. The objection is that nothing in the character of duty- or right-based theories makes them inconsistent with the correlativity thesis. Here is Matthew Kramer:

¹⁷ This upshot is unsurprising, for it is exactly the position will theorists adopt when it concerns the criminal law. Will theorists hold that no person bears rights under the criminal law. The problem, as Kramer puts it, is that under civil law persons bear rights, say, to be free from assaults, but under the criminal law persons bear, at most, a claim (not a right) to be free from assaults. See Kramer, *ibid.*, p. 72.

Hohfeld's Correlativity Axiom is entirely consistent with a justificational focus that attaches primary importance to rights (or duties) and secondary importance to duties (or rights); the Correlativity Axiom stipulates a *logical* and *existential* nexus of mutual entailment between rights and duties, in distinction from a nexus of *justificative* parity.¹⁸

Kramer's point is that acknowledging a logical nexus of mutual entailment between rights and duties is not inconsistent with assigning justificatory priority to one of the poles of the relationship. If this is correct, it would appear that at least duty- and right-based theories do not necessarily undermine the correlativity thesis, contrary to what I have argued.

This objection loses its force once we realize that Kramer fails to distinguish clearly between non-relational and relational duties. If duty- and right-based theories gave justificatory priority to *relational* duties or rights, then Kramer's point would in principle be correct. However, as I have been arguing, duty- and right-based theories in fact give justificatory priority not to relational but to non-relational duties and rights. The primary form of a duty for Locke is a non-relational duty grounded in the divine law; the primary form of a right for Raz is a non-relational right grounded in an aspect of your welfare. Such non-relational duties and rights do indeed undermine the correlativity thesis because they destroy the logical nexus of mutual entailment between rights and duties.

Our puzzle, then, is this: how is it possible for a person to wrong another rather than perform merely a wrong act? If the thought of wronging you presupposes the correlativity thesis, but current moral theories undermine such thesis, it becomes mysterious how anyone could possibly wrong you. Is it possible to construct Claudius's *wrong* to Hamlet out of the normatively basic material of Claudius's wrong *with regard* to Hamlet? ¹⁹ The puzzle is worrying because this project may be doomed. If rights and wrongs are

¹⁸ Kramer, "Rights Without Trimmings," p. 40.

¹⁹ A structurally analogous puzzle emerges in epistemology from empiricist and rationalist models of perceptual knowledge. On the one hand, we acknowledge that perceptual knowledge must be *relational*, i.e., perceptual knowledge is *my* knowledge of some object or state of affairs in the world. On the other hand,

irreducibly relational, the justificatory structure of standard theories appears to render us skeptics about rights and wrongs. Rights become shadows.

2. THREE NON-RELATIONAL ASSUMPTIONS

We may respond to our puzzle in three ways. The first is to try to *solve it*. We show how we can preserve the appearance that Claudius wrongs Hamlet by constructing relational rights and duties from the non-relational material of goal-, duty-, and right-based theories. If my arguments in the previous section are sound, the prospects for this strategy are not great, for the non-relational character of the theories render them inconsistent with the correlativity thesis. Indeed, this diagnosis may encourage a second response to the puzzle: skepticism. We should simply abandon the thought that Claudius wrongs Hamlet. Rights and wrongs are illusions. Although skepticism is an effective way of solving the puzzle, it also highly destructive, for it would render arbitrary and illusory our entire practice of claiming rights against one another.

Fortunately, there is a third option: *dissolving* the puzzle. Skepticism is not only inadvisable, it is also unnecessary, for there is a way to preserve the appearance that Claudius wrongs Hamlet. We dissolve the puzzle by showing how, to twist Kramer's terms, the *logical* and *existential* nexus of mutual entailment

the foundationalist structure of justification requires that the ground of perceptual knowledge be intelligible independently of the perceptual relation. Rationalists tend to focus on the *object*, while empiricists tend to focus on the subject's *sensations*. Hallucinations make the problem sharper, for my sensation is supposed to be the same whether or not the object is present. The puzzle, then, is this: if perceptual knowledge is by its nature relational but we justify our claims to know by dropping the relation entirely and focusing on only one of its terms (the object in itself or my sensations), how is it possible to get the relational back into the picture? The worry for the empiricist, for instance, is that once I have retreated into my phenomenal experience, it seems very difficult, if not impossible, to build perceptual knowledge out of mere sense-data. Kant called this common assumption of dogmatists and empiricists *transcendental realism*. We may call the assumption common to the views surveyed thus far *transcendental juridical realism*.

between rights and duties is indeed identical to the *justificatory* nexus. We dissolve the puzzle, that is, by showing how the ground of rights is *immanent to the relationship of right*, rather than external to the relationship and residing in one of its terms. We best comprehend the logical nexus of rights and duties by comprehending the justificatory parity of rights and duties, a parity that constitutes the form of the relationship of right. In order to articulate and defend this thought, in the remainder of this section I shall make explicit three crucial non-relational assumptions behind *X*-based theories, assumptions that generate the puzzle. In the following section, I shall argue that a Kantian independence theory of rights rejects the three non-relational assumptions, thereby opening a way for dissolving our puzzle and making intelligible the possibility of wronging you. Our task will not be to construct relational rights from right and wrong actions but to understand how relational rights and duties are normatively basic.

The first assumption concerns the fundamental form of a juridical judgment. The Monadic Assumption, as I shall call it, is the view that the fundamental form of a juridical judgment is monadic.

We should begin by drawing a distinction between two basic forms of judgment: relational and monadic. A monadic judgment represents the subject as bearing a certain property independently of any relations the subject may have to others (e.g., *Alice has blond hair*). A relational judgment represents the subject as bearing a certain property in relation to other subjects (e.g., *Toronto stands to the East of Vancouver*; *Alice gives a gift to Beth*). A relational judgment is not reducible to the conjunction of two monadic judgments. Toronto's standing to the East of Vancouver is identical with, not a separate fact from, Vancouver standing to the West of Toronto. Alice's gift-giving to Beth is identical with, not a separate fact from, Beth's receiving a gift from Alice.²⁰ A relational judgment represents two subjects as standing in an indissoluble relationship, a relationship that cannot be analyzed as the accidental conjunction of monadic judgments.

Although this logical contrast between monadic and relational judgments is abstract, it is perfectly familiar to any adult who observes two toddlers play. When we describe toddlers playing, it is common to

²⁰ For parallel distinctions, see Michael Thompson, "What is it to Wrong Someone?," pp. 335-6.

say that they are not yet playing together. Instead, they are “parallel playing:” they play the same game (building sand towers, cooking, having a tea party) separately. When toddlers parallel play, we describe their activity through monadic judgments: *A* is pouring tea, and so is *B*; *B* is eating a cookie, and so is *A*, etc. When they play together, we describe their activity through relational judgments: *A* is pouring tea in *B*’s cup; *B* gives a cookie *to A*, etc. The excitement of parents at seeing their own toddler suddenly play together with another has a key logical dimension: the parents now represent the child’s activity through relational judgments. This logical shift is a sign that the child is “growing up.”

Dworkin taught us that a theory is *X-based* when it gives pride of justificatory place to a specific type of judgment. A practical theory is derived from a judgment of goals, of duties, or of rights. All these judgments, we may now say, share a common form: they are all *monadic* judgments. They abstract away from the relationship between two persons and focus instead on *outcomes*, *agents* or *patients*. None of these judgments takes the relational form. This is precisely why the relationship between Claudius and Hamlet appears as normatively derivative and potentially insignificant.

Goal-, duty-, and right-based theories (implicitly) rest on what I shall call the *Monadic Assumption*, namely, the view that an order of juridical judgments is ultimately grounded in a *monadic judgment*. We may illustrate the Monadic Assumption through the following table:

Relational Judgment

Monadic Judgment

Claudius poisons Hamlet

Claudius produces a bad outcome in the world

Claudius breaches his duty (with regard to Hamlet)

Hamlet’s right is infringed

The two columns of the table illustrate the justificatory structure of *X-based* theories. The direction of justification is rightwards. Relational judgments are ultimately justified by one of three types of monadic judgments. Justification comes to an end in a monadic judgment about outcomes, duties or rights.

It is clear that goal-based theories make the Monadic Assumption, but why are duty- and right-based theories committed to it?

As I argued in the previous section, duty-based theories do not simply found the order of practical judgments in a judgment about duties. More precisely, the fundamental justificatory judgment is about *non-relational duties*. As Hart and Feinberg argued, the duties grounded in a divine law do not correlate with individual rights. This is the crucial point missed by Kramer's envisaged objection. Similarly, right-based theories found the order of practical judgments not just in a judgment about rights, but in a non-relational judgment about rights. Rights, as Raz put it, play an "intermediate role" in our practical thought, for they themselves are grounded in an aspect of your welfare. However, a judgment about your welfare is *monadic*. If rights are construed along the lines of a will theory, then such theory may not be committed to the monadic assumption. Whether such commitment is incurred will depend on whether rights are construed in Razian-fashion as playing an "intermediate role." If rights are grounded in your interest in autonomy, and if autonomy is understood in a non-relational way, then the will theory too makes the Monadic Assumption. I shall have more to say about this below.

The second assumption concerns the juridical status of the grounding judgment. By 'instrumentalism' I understand a theory that grounds rights in a non-juridical judgment, i.e., a judgment that represents a value that is intelligible independently of the rights in question.²¹

Current moral theories tend to make the instrumentalist assumption. Goal-based theories make the instrumentalist assumption because they justify your rights as means for the promotion of an independently intelligible goal, such as your welfare. Similarly, duty-based theories make the instrumentalist assumption because they ground juridical judgments in an extra-juridical value, the keeping of your non-relational duties. Suppose that we analyze your duty in terms of your doing God's will. You may fail to satisfy God's will even if, like Adam before the creation of Eve, you are the only person in the world. But if you are completely isolated, no other person's rights come into the picture of your doing

²¹ Arthur Ripstein, *Force and Freedom*, pp. 7-11, 217, and 225. Functionalism in the law is a (welfarist) species of instrumentalism as understood here. See Stone, pp. 133, 141; and Weinrib, *The Idea of Private Law*, pp. 4, 48-49.

God's will. The value of your acting in conformity with God's will is intelligible independently of the rights of others. Therefore, duty-based theories also seem to be instrumentalist. Interest-based theories of rights are avowedly instrumentalist, since they *define* rights as the protection of an aspect of your welfare. Finally, when will theories of rights ground rights in your interest in autonomy and when your autonomy is understood non-relationally, then will theories too acquire an instrumentalist structure. If your autonomy can be compromised not simply by the wrongs of others but also by natural events, then rights protective of this concept of autonomy are instrumentally justified.

The third and crucial non-relational assumption concerns the *value* of the person as a subject of juridical judgments. Consider James Griffin's contrast between what he regards as the two most fundamental ways of understanding the value of personhood.²² On what Griffin calls a "deontological" understanding, persons stand in contrast to things: while the value of a thing is its fungible price, the value of a person is its dignity. This understanding of the value of persons is "deontological" because when the value of personhood conflicts with any other value, the former always overrides the latter. By contrast, for what Griffin calls the "teleological" understanding of the value of personhood, such value stands on the same footing with any other instrumental value essential to the promotion of a good life. Since the value of personhood is instrumental to the promotion of a good life, there is no theoretical barrier to "trade-offs" between the value of personhood and other essential values, such as achievement, deep personal relations, authenticity, etc. Griffin's contrast between the two fundamental conceptions of the value of personhood, then, turns on the basic question of whether such value is vulnerable to trade-offs with other values and, if so, to what extent.

For our purposes, Griffin's contrast between deontological and teleological pictures of the value of personhood is deeply illuminating not because of what the contrast *captures*, but because of what it *assumes* and *leaves out*. Griffin's contrast turns on the assumption that *the normative significance of personhood must be represented in a monadic judgment*.

²² James Griffin, *On Human Rights*, pp. 35-6 and 57.

Setting aside the issue of whether the normative significance of personhood is subject to trade-offs, Griffin assumes that this significance is intelligible independently of any relationship one person bears to another. The significance of personhood may consist, as Griffin himself argues, at least partly in the person's *autonomy*. If so, the essential disagreement between deontological and teleological conceptions of the value of personhood rests on the normative status of autonomy, i.e., whether autonomy may be traded-off with other values or not. However, both conceptions assume that the value of autonomy must be expressed in a non-relational judgment, such as *a person is autonomous when she chooses her path in life*.²³ Other persons figure in this account as *incidental material* for the exercise of autonomy, either as enablers or as hindrances, but not as *essential partners* for the realization of autonomy.

The Monadic Idea of the normative significance of personhood, then, synthesizes the two previous assumptions. The significance of personhood must be represented through a *monadic judgment* (the Monadic Assumption), and such significance is intelligible independently of any rights or relational duties (the Instrumentalist Assumption). A juridical person is a particular kind of thing fit to bear rights, but the significance of personhood is intelligible independently of any relationship (of right) the person bears to others.

The *Instrumentalist* assumption, recall, is that a judgment of right takes this form: 'A has the right to X because ____' We fill the blank with an extra-legal value, and we usually represent such value through a monadic judgment about goals, duties or rights (interests or choices). But the monadic move rightwards raises further justificatory pressure: why must one produce such and such outcomes? Why must one bear such duty? Why must one possess such rights? The answer turns on the intrinsic normative significance of the bearer of duties or rights. Our instrumentalist judgment form becomes slightly more concrete: 'A has the right to X because A is ____' The blank will now be filled by another monadic judgment, one specifying the significance of *personhood*. For the Monadic picture, the Monadic Idea of the Person plays the role of ultimate ground in an order of juridical judgments.

²³ For this formulation, see Griffin, *On Human Rights*, p. 33.

If Griffin's distinction indeed represents the significance of personhood monadically, then it is easy to see how current moral theories assume the Monadic Idea of the person. Goal-based theories represent the significance of the person monadically, say, in terms of the person's well-being. Their main claim is that this value must be weighed against other intrinsic values. Duty- and right-based theories represent the significance of the person monadically, say, in terms of the person's autonomy. Their main claim is that this value is overriding. All three theories assume the Monadic Idea of the person, then, because such value (e.g., well-being, autonomy, dignity) is intelligible independently of any relationship the person bears to others and independently, more specifically, of any relationship of right. Your well-being and your autonomy can be compromised even in the absence of others.

Now that we have in view these three non-relational assumptions it is important to connect them with foundationalism as a model of justification for rights. To recall, foundationalism requires that the justification of rights involve three steps: rights must be grounded in a basic value, and this value must be extra-juridical and non-inferentially justified. In the previous chapter, I argued that foundationalism about rights must be *instrumentalist* in order to avoid the charge of vicious circularity. We may now see that foundationalist accounts of rights tend to make two additional assumptions: the basic value must be represented by a monadic judgment and must explain the juridical significance of personhood. Thus, goal-, duty-, and right-based theories tend to presuppose a foundationalist model of justification.

In sum, I have just argued that goal-, duty-, and right-based theories tend to make three non-relational assumptions (the Monadic and Instrumentalist Assumptions and the Monadic Idea of the Person). Since these theories undermine the thesis of correlativity, we may dissolve the puzzle and support the thesis of correlativity by rejecting these assumptions and replacing them with suitably relational alternatives. I shall now argue that a Kantian theory of rights accomplishes precisely such task.

3. RIGHTS AS JURIDICAL CLAIMS TO INDEPENDENCE

My first argument for a Kantian theory of rights will be that, unlike its alternatives, it upholds the thesis of correlativity and therefore makes intelligible the *possibility* of rights and wrongs. In the next section I argue that a Kantian theory of rights demonstrates better than its alternatives the *necessity* of rights.

The distinguishing mark of the Kantian theory is that, unlike its monadic alternatives, it is thoroughly relational and non-instrumental: the ground, basis or justification of rights is *immanent in the relationship of right rather than external to it*.

In the *Doctrine of Right*, Kant asks “What is right?” Here is his answer:

The concept of right, insofar as it is related to an obligation corresponding to it (i.e., the moral concept of right), has to do, *first* [1], only with the external and indeed practical relation of one person to another, insofar as their actions, as deeds, can have (direct or indirect) influence on each other. But, *second*, [2] it does not signify the relation of one’s choice to the mere wish (hence also to the mere need) of the other, as in the actions of beneficence of [sic] callousness, but only a relation to the other’s *choice*. *Third*, [3] in this reciprocal relation of choice no account at all is taken of the *matter* of choice, that is, of the end each has in mind with the object he wants... All that is in question is the *form* of the relation of choice on the part of both, insofar as choice is regarded merely as *free*, and whether the action of one can be united with the freedom of the other in accordance with a universal law.

Together, these three formal features of a claim of right negate the three non-relational assumptions.

The Monadic Assumption is the view that the fundamental form of a juridical judgment is monadic rather than relational. [1] may be taken as the negation of such assumption: the fundamental form of a juridical judgment is *relational*, “the external and indeed practical relation of one person to another.” To negate the Monadic Assumption is to regard the correlativity thesis as representing a basic normative phenomenon: for me to bear a right to *X* is *the same thing* as for you to owe me a duty to respect me with regard to *X*. Rights and duties are different perspectives of a *single juridical whole*.

We may capture the contrast here as one between the unity of a form and the unity of an aggregate, or between *formal* and *material unity*. Kant, following a long tradition stretching back to Plato and

Aristotle, conceives of forms as constituting a unique type of unity, the unity of a *totum*, as opposed to the unity of a *compositum*.²⁴ A form is a *totum*, a principle of unity that orders the parts of a whole in such a way that the parts are intelligible only as reciprocally determined by each other and by the whole. The unity of a *composite*, a material unity, is the unity of a whole that is merely an *aggregate* of independently intelligible parts. The whole *qua totum* is essential for the determination of the parts, while a whole *qua compositum* is accidental for the determination of the parts, since the parts are intelligible atomistically. A heap of sand is a paradigmatic example of a *compositum*, where each grain of sand is perfectly intelligible independently of the other parts. A plant might be an example of a *totum*, where each part is understood as an *organ* that determines and is determined by the other parts. Furthermore, when understood as a final cause or normatively, form *qua totum* represents a normative principle: the whole sets normative standards for judging members of a kind as embodying the form to a greater or lesser degree.²⁵ While a judgment about a heap of sand entails no normative judgment about the parts, a judgment about a normative formal unity entails normative judgments about the parts and their activities. A general judgment about a specific life form, such as the Eastern white pine, entails normative judgments of deficiency, health, etc. with regard to specific Eastern white pines and their parts.

Regardless of its applicability in the philosophy of biology, this contrast between formal and material unity sheds light on the relationship of right, for it invites us to ask: should we conceive of the relationship of right as a *composite* or as a *formal unity*, a *totum*? The Monadic Assumption renders the

²⁴ Immanuel Kant, *Critique of Pure Reason*, A438/B466: “When I talk about a whole which necessarily consists of simple parts, I understand thereby a substantial whole only as a proper composite, i.e., as a contingent unity of a manifold that, *given as separated* (at least in thought), is posited in reciprocal combination and thereby constitutes one entity. Properly speaking, one should call space not a *compositum* but a *totum*, because its parts are possible only in the whole, and not the whole through the parts.”

²⁵ See Immanuel Kant, *Critique of the Power of Judgment*, §§63-65. For a similar contrast between these two kinds of unity, see also Ernest Weinrib, *The Idea of Private Law*, §2.6.3.

correlativity of rights and duties a *mere aggregate* rather than a formal unity. It makes us focus exclusively on one of the terms of the relationship rather than on the relationship itself. The relationship to other parts in the whole is as *accidental* as is the relationship of a single grain of sand to other grains in the heap. As a result, the Monadic Assumption generates justificatory pressure towards reductivism: your duties are shadows of my rights or vice-versa. By contrast, the Kantian claim that right concerns a practical relation to others regards that relation as normatively basic, i.e., as a *formal unity*. My rights and your duties are reciprocally determining parts in a *formal*, in this case *juridical*, *unity*. And as in any formal unity, each part is unintelligible independently from each other and the whole. In our juridical context, the form is ideally instantiated every time we observe our relational duties to one another, but defectively instantiated every time we breach one of our relational duties. We may now comprehend the phenomenon of a wrong differently: a wrong is a defective instantiation of the juridical form constituting relations of right between persons.

The Kantian view of rights, then, regards the relationship of right as a *formal unity*, so that rights and duties *qua* parts are unintelligible independently of that relationship. There is no derivation here of a relational wrong from a wrong action. Your observance of your duties to me is normatively basic and stands on an equal footing with my claiming a correlative right against you.

We now begin to comprehend the normative structure of the thesis of correlativity. Rights and duties are *mutually entailing* because they are members of the same form, parts of the same formal unity. The Monadic Assumption forces us to think of rights and duties as independently intelligible parts thereby rendering it mysterious how rights could possibly *entail* duties or vice-versa. The Kantian view lets us see that duties and rights are in a logical relationship of entailment because they are *aspects of the same whole*.

We may still wonder, however, what *justifies* this relationship. The interest-theorist of rights defends the plausible view that rights are normatively binding because they are protections of important aspects of your well-being. What justifies rights on the Kantian account?

Kant addresses this question in the second and third aspects of the concept of right. In [2], he claims that right is limited to a “relation to the other’s *choice* (*die Willkür*).” The third aspect clarifies the

second by synthesizing it with the first. To say that right concerns only the external practical relation of one person to another [1] is to say that right focuses exclusively on the relation of the *choice* of the parties to the relationship of right, rather than to their needs [2]. And to exclude *needs* or any other *end* as the *ground* for the relationship of right is to say that the ground of such relationship is nothing other than *its form* [3].

Recall, the Instrumentalist Assumption states that rights must be grounded in an end that is intelligible independently of any rights. The interest theory of right appears plausible because it meets the justificatory demand of this assumption. The value of your well-being is intelligible independently of any rights you bear against others. Adam's well-being may be compromised or enhanced before Eve ever came into existence. When Kant claims that the concept of right concerns exclusively the "*form* in the relation of choice on the part of both," he is not simply rejecting *well-being* as a plausible candidate for grounding rights. Instead, Kant is rejecting altogether the instrumentalist model of justification. But what could it mean to reject instrumentalism?

We reject the Instrumentalist assumption when we realize that the ground of rights *cannot be external to rights*. As I have argued, the fundamental problem with any interest theory of rights (and with the Instrumentalist Assumption in general) is that it renders us skeptics about rights, or at the very least generates a serious puzzle about the possibility of rights and wrongs. The demand for an instrumentalist and non-relational ground undermines the thesis of correlativity, which proved essential to the possibility of rights and wrongs. Thus we begin to comprehend the possibility of rights and wrongs when we realize that the demand for such a justification is itself arbitrary. Instead, we ought to justify rights *formally*. The answer to the question *why* Hamlet has rights against Claudius cannot abstract away from the relationship in which Claudius and Hamlet stand.

To justify rights formally is to justify them as concerning not the matter but "the *form* in the relation of choice on the part of both, insofar as choice is regarded merely as *free*." In other words, to justify rights formally is to justify them as *claims to independence (free choice) against others*. The formal unity of a relationship of right is the whole correlating a basic right to independence with a basic duty of non-domination.

In order to make sense of this non-instrumentalist conception, we must resist the temptation to re-instrumentalize it by comprehending the *free choice* of the person in *monadic* terms. If rights protect your freedom, but your freedom is a monadic normative property, i.e., a property you can enjoy regardless of your relations to others, Kant's conception will be *material* rather than *formal*.

Kant makes this point by insisting that rights are aspects of your *external* rather than your *internal* freedom.²⁶ In general, the Kantian idea of freedom has two moments, one negative (independence) and one positive (dependence). Thus, you are *internally* free when your actions are not determined by your inclinations but rather are determined by (are dependent on) the moral law. Should your action be determined by the moral law, your *motive* (*die Triebfeder*) would not be an inclination but your representation of an action as practically necessary (your duty).²⁷ By contrast, your actions are *externally* free when your choice is *independent* from the choice of others, regardless of what your motives are.²⁸ Even in this negative articulation, external freedom is already a relational and interpersonal normative property. Your entitlement to set your own ends (the juridical quality of being your own master, *sui iuris*) is *relational* because it is necessarily an entitlement *against others*, an entitlement that is co-entailed with a duty on any other person to *not dominate you* by making you subject to their power of choice. Enslaving you, turning you

²⁶ The distinction between these two concepts of freedom is central to Kant's distinction between right and ethics, for each concept of freedom is the fundamental principle of each practical domain. For a detailed discussion of the Kantian contrast between right and ethics, please see Arthur Ripstein, *Force and Freedom: Kant's Legal and Political Philosophy* (Cambridge, MA: Harvard University Press, 2009), pp. 11-12. For a helpful discussion of the distinction between internal and external freedom, please see B. Byrd and J. Hruschka, *Kant's Doctrine of Right: A Commentary* (Cambridge: Cambridge University Press, 2010), chapter 3, §§2-3.

²⁷ See, for instance, 6:218-220. See also footnote 1 above.

²⁸ Kant defines external freedom as "independence from the constraining choice of another (*Unabhängigkeit von eines anderen nötiger Willkür*).” (6:237)

into an instrument of another's power of choice, is the paradigmatic infringement of your original right to independence. Unlike internal freedom, which can be compromised by your inclinations getting in the way of your better judgments (say, by eating a couple extra slices of cake), your external freedom can only be compromised by the deeds of others.²⁹

In short, we may say that Kant advances an *independence* theory of rights. Rights are justified non-instrumentally as claims to independence against others, claims that are logically correlated to others' relational duties of non-domination. Due to its formal and relational character, an independence theory of rights rejects both the Monadic and the Instrumentalist assumptions and stands in stark contrast to any version of the Interest theory of rights. Let me clarify this contrast.

For an instrumentalist theory of rights, such as an interest theory or some versions of the will theory, rights are *externally* related to a grounding value, which value is often represented by a monadic judgment. Rights *produce* freedom (or well-being) but cannot be identical to the grounding value. Rights, as Raz put it, play an "intermediate role" in practical thought, mediating between the fundamental value of well-being and the duties of others. The logical corollary of instrumentalism is that rights and their grounding value cannot *co-entail* one another, for sometimes the grounding value may be better promoted in some other manner. By contrast, the non-instrumentalist character of the independence theory of rights means that rights are *internally* related to independence. Independence can only be represented by a relational judgment, since your title to independence is always a title *against others*. Rights do not *produce* independence, but instead are identical with it. Rights do not play an intermediate but an ultimate role in practical thought, manifested in their *peremptory character*. The logical corollary of non-instrumentalism is that rights and independence *must co-entail* one another. The judgments *you are externally free (independent)* and *you bear an original right to independence* are one and the same judgment.

It may now be objected that the Kantian independence theory of rights is inconsistent. As we have seen, Griffin suggests that the two fundamental conceptions of the significance of personhood are

²⁹Ripstein, *Force and Freedom*, pp. 15 and 36.

deontological (Kantian) and teleological. As is well known, Kant represents the value of the person in terms of her *dignity* and contrasts it with the value of things, their *price*.³⁰ However, we must ask: must the dignity of persons be represented by a monadic judgment? Kant in fact appears to answer positively when he says: “that which constitutes the condition under which alone something can be an end in itself has not merely a relative worth, that is, a price, but an inner worth, that is, *dignity*.”³¹ The contrast appears to be this: price is relational; dignity is monadic. But if the value of dignity is monadic, the independence theory is inconsistent because, in spite of its alleged non-instrumentalism, rights will be grounded in a monadic and extra-legal value.

The appearance of inconsistency vanishes the moment we see that the contrast between price and dignity is not the contrast monadic/relational, but rather the contrast *conditional/unconditional worth*. The latter contrast reveals Kant’s transcendental argument for the status of personhood.³² Things like watches, chairs, and commodities have a conditional worth in the sense that their worth is determined *instrumentally*, i.e., by serving a purpose external to themselves. The worth of things is relative in a twofold sense: the worth is relative to the external purposes for which it can be used and its worth is relative in comparison to the other things that can serve those same purposes. If the purpose of a commodity like coal is producing energy, then its worth will be relative both in terms of the efficiency with which it produces energy and in terms of how much better overall coal is to other sources of energy, such as nuclear power or natural gas. Kant’s implicit argument here is that judgments of worth cannot be exclusively instrumental for they would generate an infinite regress. If the worth of *A* consists in *A*’s being a means for the production of *B*,

³⁰ For the classic statement of this contrast, see *Groundwork of the Metaphysics of Morals*, 4:434.

³¹ *Ibid.*, 4:435.

³² My reconstruction here is inspired by Stephen Engstrom, “The Complete Object of Practical Knowledge,” *unpublished*. Engstrom argues, persuasively to my mind, that this form of argument for unconditional worth is the same as Aristotle’s argument for the finality (non-instrumentality) of *eudaimonia*, as the highest good.

then in what does the worth of *B* consist? If *B*'s worth consists in being a means for the production of *C*, the question recurs, leading to an infinite regress. An infinite regress is problematic because it renders judgments of worth and the entire series unintelligible. The intelligibility of judgments of worth presupposes a *different form of normativity*, i.e. non-instrumental normativity. Judgments of worth must be grounded in a judgment about that which is not a means to a further end but is rather *necessarily an end*. A judgment about non-instrumental normativity is a condition of the possibility and meaningfulness of an instrumental judgment. As I read it, then, Kant's point is that dignity manifests this non-instrumental form of normativity and thereby grounds the series of instrumental judgments of worth.

The important point for our purpose is not whether the Kantian transcendental argument is correct in assigning dignity an unconditional worth, for something else may play that role (e.g., God, animal life, etc.). The key point is that the transcendental argument for unconditional worth does not presuppose that unconditional worth must be represented in a monadic judgment. Indeed, Kant's argument is the opposite: *dignity is not a monadic property but a relational status, namely, a constraint on the rightful conduct of others*.

It is of the utmost significance that Kant introduces the concept of dignity in the context of the third formula of the categorical imperative, the formula of the kingdom of ends. The *autonomy* of the rational being is construed in terms of *self-legislation*. But contrary to common beliefs about Kant, self-legislation is itself a *relational status*. To be self-legislating is to have the title as *member* of the kingdom of ends, and to be a *member* of such kingdom is to self-legislate, i.e., to give the laws to which one is subject. Similarly, a rational being counts as *sovereign* when "he is not subject to the will of any other."³³

Let us now weave these thoughts together. The judgment *X has relative worth* is an abbreviation of the instrumental judgment *X has worth insofar as X is a means for securing Y*. The judgment *X has inner worth* is an abbreviation of the non-instrumental judgment *X has worth in and of itself, as the condition of the possibility of anything else having worth*. Now, is the non-instrumental judgment *A's inner worth is A's dignity* monadic? Kant

³³ Ibid., 4:433.

states that the “idea of the *dignity* of a rational being [is the idea of he] who obeys no law other than that which he himself at the same time gives.”³⁴ The judgment *A has dignity* is identical, then, to the judgment *A is self-legislating*. But the concept of self-legislation, we have seen, is a relational concept: it is the idea of an agent who “is not subject to the will of any other.” To be self-legislating is to be a *member* in or a *sovereign* of kingdom of ends. And to be a member of a kingdom of ends is to enjoy the normative status of an equal to other members of said community. The judgment *A has dignity* is therefore identical to the relational judgment *A is a member of the kingdom of ends*. Thus, since *A has dignity* must be construed as a relational judgment, the concept of inner worth need not be monadic. The dignity of the person is the relational standing as an equal member of a kingdom of ends, as legislator of the laws to which she and all members are subject. The dignity of the person represents that person’s inviolable status of independence. Your independence sets a constraint on the rightful conduct of any other person. And since the juridical idea of the person and her value as dignity is itself relational, the idea of dignity does not generate an inconsistency in the independence theory of rights.

For the relational idea of the person, a person is not a thing bearing special normative properties; a person is a relational standing. As Michael Thompson puts it, the judgment *X is a person* is a de-relativization of a prior relational judgment *X is a person in relation to Y*, just like *X is a sister* is a de-relativization of the prior bipolar judgment *X is a sister to Y*.³⁵ The Kantian idea is that the judgments *X is a person*, *X has dignity*, and *X has rights against Y* express one and the same judgment. The concept of dignity is the concept of the subject of a practical (juridical) judgment. The judgment *A is a person* is a de-relativization of the prior relational judgment *A is a member of a kingdom of ends*. The juridical version of the

³⁴ Ibid., 4:434.

³⁵ See Michael Thompson, “What is to Wrong Someone,” p. 353.

idea of such community is the idea of a *totum*, i.e., the plurality of relations of right between *two persons* conceived as a unity.³⁶

If we return to my earlier contrast between two forms of unity (*compositum* and *totum*), we begin to see how the Monadic Idea of the Person understands persons on the model of a heap of sand: a grain of sand is intelligible independently of the relationships it bears to other grains of sand. Just as comprehension of the grain of sand presumably requires representation by a monadic judgment of the form *A grain of sand is ____* where the blank is filled by some non-relational property, comprehension of the person presumably requires representation by a monadic judgment of the form *A person is ____* where the blank is filled by some non-relational normative property. The heap (the relations of one grain to another) is purely external to the nature of the grain; the juridical nexus is purely external to the nature of the person. By contrast, the Relational Idea of the Person represents persons on the model of a formal unity. As Aristotle used to say, outside of the context of the living body, a foot is a foot only *homonymously*. We may say that outside of the context of the relationship of right, a person is a person only *homonymously*.

Now, the independence theory of rights rejects the Monadic and Instrumentalist assumptions and the Monadic idea of the person, but what distinguishes it from Will theories of rights, such as that of H.L.A. Hart's?

Kant famously argues that "there is connected with right by the principle of contradiction an authorization to coerce someone who infringes upon it." (6:231) Rights are claims to independence against others. Kant understands rightful coercion as a second-order normative power of *enforcing* rights. The second-order power of enforcement is internally connected to your first-order claims to independence because my wrong to you counts as a *hindrance to your freedom* and the power of enforcement counts as a *hindrance of a hindrance to freedom*. The second-order power of enforcement is thus an aspect of the self-sustaining character of your claim to independence against me.

³⁶ Cf. 4:436-7 for the *ethical* version of a community as a totality, and 6:315-6 for the *juridical* version of such community as the state.

Now, the central claim of the Will theory is that *A* has a right to *X* if and only if *A* has the power to enforce or waive other's duties to *A* with regard to *X*. The independence theory of rights, as I am constructing it here, departs from the standard Will theory in two key ways. First, although a power of enforcement is internally connected to your claim of right, it is not necessary that the right-bearer be the one to exercise said power, for a different party may enforce the right. Second, the independence theory does not require that you have the power to waive my duty in order for you to have a right. In the fundamental case, your original right to independence correlates with my co-original duty of non-domination. Although you bear this right, you have no power to waive my duty not to dominate you. Second-order waiving powers may be important to derivative rights, such as contract rights, but they are not necessary to every claim of right.

My first argument for the Kantian independence theory is that, unlike its non-relational alternatives, it renders intelligible the thought of wronging another. Will theories cannot make sense of Hamlet's claim to independence as a *right* because Hamlet presumably lacks the power to waive Claudius's duty not to murder him. Interest theories of rights, together with goal- and duty-based theories, cannot make sense of Claudius's wrong because they deem non-relational duties and rights normatively fundamental. By contrast, once we conceive of Hamlet's rights fundamentally as claims to independence against others, we can see Claudius's poisoning as a wrong to Hamlet rather than merely as a wrong act. In poisoning Hamlet, Claudius violates his relational duty of non-domination. Claudius dominates Hamlet because murder is a form of *biological slavery*: Claudius presumes himself the master of Hamlet by getting to decide whether Hamlet will live.

4. THE VERY THOUGHT OF YOU: THE RECIPROCITY CONDITION

My first argument for the independence theory of rights may be put in modal terms. The puzzle appeared to show that rights and wrongs are *impossible*. The thought of wronging you presupposes the thesis of correlativity (rights and relational duties co-entail one another), but the justification of rights or duties undermines the thesis of correlativity. The thought of wronging you is incoherent because it

simultaneously requires and undermines the thesis of correlativity. The independence theory of rights shows that there is no incoherence in the concept of a right or a wrong. Once we jettison the non-relational assumptions we envisage a form of justification of rights as relational and non-instrumental claims to independence, a model of justification that is perfectly consistent with the thesis of correlativity. Rights and wrongs are now shown to be possible.

Even if this argument is granted, it may now be objected that I have not sufficiently vindicated the independence theory of rights. To do so I must offer an argument not simply for the *possibility* of rights and wrongs but also for their *necessity*. In this section, I argue for the *necessity* of rights by showing that non-relational accounts, to the extent that they attempt to explain rights, are *disingenuous*: their appearance of explanatory power is due to the fact that they *surreptitiously rely* on a relational account. The argument for the necessity of rights is that the juridical idea of the person and the correlativity of rights and duties co-entail one another.

More specifically, my argument turns on the explanatory power of the monadic idea of the person, for this idea synthesizes the two previous assumptions. I argue that the monadic idea of the person captures what is normatively *sufficient* to juridical personhood only by surreptitiously relying on the relational idea that the relationship of right is constitutive of personhood. The crux of the argument is this: the monadic idea presupposes that the first-person juridical judgment *I am a person* cannot entail any second-person juridical judgments, such as *you are my equal in rights*. Nonetheless, I argue that the monadic idea is explanatory of rights only insofar as it presupposes such an entailment.

Part of the motivation behind the monadic idea of the person is that it is not just *me* who is entitled to certain rights by the mere fact of being a person. It is not something special to you as an *individual* that endows you with rights against others. Instead, the powerful moral thought behind this idea of personhood is its *generalized* version, the idea that every person possesses an *equal* entitlement to rights by the mere fact of being a person.

This means that the monadic idea of the person presupposes what I shall call the “Reciprocity Condition,” the view that you and I occupy juridically symmetrical positions. If I have the right to life and

you have the duty to respect my right to life, say, by not murdering or torturing me, I have the very same duties to you. But if I have the same duties to respect *your* life, this means that you must have the very same right to life against me that I have against you.

To appreciate the force of the reciprocity condition we should distinguish *general* from *special* rights and duties. Unlike *special* rights and duties which arise either from specific transactions between persons (e.g., a specific contract) or from specific standing relationships between persons (e.g., sergeant-troop, parent-child), *general* rights emerge simply from a person's standing *qua* person. General rights correlate to *general* duties.³⁷ When it comes to *special* rights and duties, the reciprocity condition most often fails because such right-duty pairs are *asymmetrical*. The rights and duties of a sergeant, a teacher or a parent are not those of a troop, a student or a teenage son. However, when it comes to *general* right-duty pairs, it is crucial to see that the reciprocity condition *must hold*. When it comes to general rights, rights attaching to your standing as a person, you and I stand in a perfectly *symmetrical* condition. We can state the reciprocity condition thus: if have a general right to *X* against you, you must have a correlative duty to me with regard to *X*, and consequently you must also have the same right to *X* against me, and I the correlative duty to you. You and I are one in general rights.

To comprehend the significance of the reciprocity condition, return to the monadic idea of the person. According to this idea, the first-person judgment *I am a person* is fully intelligible independently of any second-person judgments, such as *you are a person*. For the monadic idea, then, there can be no *entailment* between first- and second-person juridical judgments.

Notice, however, that the first-person judgment *I bear the right to life* does entail a second-person judgment. Indeed, when it comes to *general* rights, the reciprocity condition holds due to our juridically *symmetrical* positions. My first-person judgment *I have the right to life* entails the judgment *you have the right to life*. Similarly, the first-person judgment *I have a duty to respect the right to life* entails the judgment *you have the duty to*

³⁷ For this well-known distinction, see, for instance, H.L.A. Hart, "Are There Any Natural Rights?," *The Philosophical Review* 64: 2 (1955): 188.

respect the right to life. Furthermore, notice that once we comprehend that you and I are juridically symmetrically positioned, we also realize that our rights and duties are *relational*. For me to bear a right to life, as I have argued, is for me to have a claim *against you*. By the reciprocity condition, this means that for you to bear a right to life is for you to have a claim *against me*. Once I acknowledge that you too must bear a right to life, I must acknowledge that I owe *you* a relational duty: I must respect *your right to life*. And my commitment to my relational duty to you, by virtue of the reciprocity condition, entails that you owe *me* the duty to respect my right to life. The reciprocity condition, then, shows that I can only ascribe a right to myself if I take that right to *entail* a relational duty on you. And by ascribing to you a relational duty to respect my right to life, I must thereby acknowledge my duty to respect *your right to life*.

The reciprocity condition brings out the internal connection between first-person and second-person juridical judgments. Whenever I think of myself as a bearer of rights, I must think of you as an equal bearer of general rights. And you must think the very same thought. The key upshot, then, is that the thought of myself as a bearer of rights is not really, not fundamentally, a monadic judgment. Instead, such thought is always bound up with my thinking of you as an equal to me. The judgment *I am a juridical person* is not really monadic because it is a thought for two: you and I think the very same thought when you and I are in a relationship of right.

Put differently, the reciprocity condition brings out the *necessity* of rights by demonstrating the reciprocal relation of co-entailment between the juridical idea of the person and the idea of a right. For an instrumentalist theory, the idea of the person is only contingently related to the concept of a right. A right is usually a helpful instrument for securing the value of personhood, but a right is only a *contingent* instrument. Other instruments may occasionally perform the job just as well. The reciprocity condition shows the necessary relationship between the juridical idea of personhood and rights by showing that you can only think of yourself as a bearer of rights in a *relational manner*, that is, as a bearer of rights *against me* and as owing relational duties to me. If the monadic idea of the person explains rights, it does so only by surreptitiously relying on the relational idea.

5. THE VERY THOUGHT OF YOU: A MODEST SECOND-PERSONAL VINDICATION OF THE CONCEPT OF RIGHT

This way of putting the necessity of rights opens up space for a new form of skeptical charge. Suppose it is granted to me that there is a necessary relationship between juridical personhood and rights, such that first- and second-person juridical judgments logically entail one another. But what establishes *that* there are rights? Why must you think of yourself as a bearer of rights? The skeptical charge is that I have argued in a circle from juridical personhood to rights and relational duties and back again. The charge is that I simply beg the question against the skeptic who questions the very idea of rights or of juridical personhood.

This peculiar skeptical challenge generates a new and higher impasse. If we acknowledge the reciprocal relationship of entailment, the inner necessity, between juridical personhood, rights and relational duties, we are open to the skeptical charge that we have argued in a circle. But if we seek a higher ground, a normative basis *outside* of the circle of juridical concepts, then we will have re-introduced an instrumentalist model of justification. Rights will be justified as means for the promotion of an independently intelligible end. And as I have argued, instrumentalism renders unintelligible the idea of rights and wrongs. We appear besieged by the skeptic.

How could we respond to such radical skepticism? One way out of the siege is to argue that the skeptical charge is itself incoherent, self-contradictory. Christine Korsgaard appears to develop such a strategy in defense of the categorical imperative. Very roughly, her argument is that the very idea of instrumental rationality presupposes the normativity of an end whose validity is categorical.³⁸ However,

³⁸ Christine Korsgaard, “The Normativity of Practical Reason,” in *The Constitution of Agency: Essays on Practical Reason and Moral Psychology* (Oxford: Oxford University Press, 2009), p. 59: “hypothetical imperatives cannot exist unless there are also principles of reason determining our ends, since it means that nothing can be my end unless I can explain the reasons why I value it to others.” In 2008, nine years after writing this essay, Korsgaard clarifies the conclusion reached by her argument: “So let me here state the

this strategy cannot refute the skeptic. Korsgaard herself admits that even if her argument is successful, the proper character of its conclusion is *hypothetical*: “these arguments show only that unconditional and conditional requirements are mutually dependent. Complete practical normative skepticism is still an option, *although its price is high...*” (*emphasis added*)³⁹ We currently occupy a position parallel to the status of Korsgaard’s conclusion. My arguments support the hypothetical conclusion that personhood and rights co-entail each other, leaving room for complete juridical skepticism.

As Korsgaard too points out in her case, it is important to realize how peculiar *complete juridical skepticism* is and how incredibly high is its price. All the normative theories we have considered take for granted the phenomenon of rights. My argument in the first two sections is that these accounts, due to their monadic and instrumentalist assumptions, render us skeptics about rights *in spite of themselves*. So it is important to recognize that being a skeptic about rights or about juridical personhood comes at an *extremely high price*. The claim that the very idea of a right is arbitrary, that rights and wrongs are an illusion, is tantamount to the claim that you cannot possibly be wronged by another, regardless of the *content* of the wrong, from breaking a promise made to you to stealing what is yours or torturing, maiming, or murdering you. The denial of rights must amount to the claim that the entire juridical practice is illusory. We should begin to wonder what could possibly justify such a radical denial.

Even if the prospects of *refuting* the complete juridical skeptic are dim, recognition of the high price required by such skepticism opens up a new strategy of vindication. Following and adapting Immanuel

conclusion of my argument properly. There is only one principle of practical reason, and it is the categorical imperative.” (p. 68)

³⁹ Ibid., p. 65.

Kant's vindication of the concept of freedom, I shall call this strategy a *second-personal vindication of the concept of right*.⁴⁰

In 1785, Kant reached an impasse similar to ours. He managed to establish what Henry Allison calls the “reciprocity thesis,” namely that practical freedom (autonomy) and the moral law co-entail each other.⁴¹ However successful, the character of this conclusion is *hypothetical*: we can establish the *actuality* of the moral law only on the presupposition of our autonomy, but we can only establish the actuality of autonomy by presupposing the moral law. The thesis begs the question against the skeptical charge that autonomy (or the moral law) is a fiction.

Three years later, in the *Critique of Practical Reason*, Kant develops a new strategy for dealing with the skeptic.⁴² Crucially, the deduction of freedom is not a *refutation* of the skeptic, that is, the skeptic is not shown to be *incoherent as such*. The deduction of freedom proceeds from the skeptic's acknowledgement of the *Factum* of reason.⁴³

⁴⁰ My justification in fact is inspired also by Johann Fichte's own second-personal adaptation of Kant's deduction in his *Foundations of Natural Right*. Developing Fichte's deduction would take me too far afield, so I will not trace the parallels to his argument.

⁴¹ Henry Allison, *Kant's Theory of Freedom* (Cambridge: Cambridge University Press, 1990), chapter 11. See also Immanuel Kant, *Groundwork for the Metaphysics of Morals*, trans. and ed. Mary Gregor (Cambridge: Cambridge University Press, 2006), 4:450 and *CPrR* (5:29).

⁴² My brief presentation of this new strategy follows Paul Franks's interpretation of the *Factum of reason*. See Paul Franks, *All or Nothing: Systematicity, Transcendental Arguments, and Skepticism in German Idealism* (Cambridge, MA: Harvard University Press, 2005), §§5.2-5.3.

⁴³ See Book I of Kant's *Critique of Practical Reason*. Here Kant says: “This Analytic shows that pure reason can be practical – that is, can of itself, independently of anything empirical, determine the will – and it does so by a fact in which pure reason in us proves itself actually practical, namely autonomy in the principle of morality by which reason determines the will to deeds.” (5:42)

The deduction is complex. Its task is to demonstrate the *actuality* of freedom or the moral law in order to show that the skeptic is already caught up within the circle of the reciprocity thesis. Kant's crucial innovation, for our purpose, is that the skeptic is not committed to this fact of reason simply in virtue of *reasoning theoretically*. The *Factum* is not a state of affairs or a state of consciousness. Instead, the *Factum* is a *deed*, an act. Kant invites one to ask oneself the following questions. Even if you thought that you are entirely chained to your inclinations, such that you always pursue what you want when the opportunity is present, would you not resist your inclinations if you were threatened with the gallows for satisfying your desires? Furthermore, if the local authority now threatened you with the gallows unless you give "false testimony against an honorable man" whom the authority wants destroyed, would it be possible for you to overcome your love of life and resist the demand rather than wrong an innocent person?⁴⁴ Kant's point is to elicit from his readers the acknowledgement that for them the moral law can outweigh the love of life. Put differently, Kant's point is to show us that in thinking through the example, we come to recognize a unique form of feeling, the feeling of *respect for the law*, the consciousness of a "*free* submission of the will to the law."⁴⁵ As Franks puts it, "in considering the exemplary choice between duty and death, we actually *produce* the feeling of respect. So Kant is claiming that in reading the *Analytic*, we *demonstrate* the reality of freedom by *producing* an effect necessitated by the moral law."⁴⁶ The *Factum* of reason is the deed of producing in oneself the feeling of respect, the consciousness of a free submission to the moral law.

If successful, Kant's argument is circular but not vicious. Kant calls this a fact of reason precisely because "one cannot reason it out from antecedent data of reason."⁴⁷ If we could ground either the moral law or freedom in a more basic value, we would break out of the circle only by rendering the moral law *conditionally valid*, as a helpful instrument for securing a further end. So lest the moral law become

⁴⁴ *Critique of Practical Reason*, 5:30.

⁴⁵ *Ibid.*, 5:80.

⁴⁶ Paul Franks, *All or Nothing*, p. 287.

⁴⁷ *Critique of Practical Reason*, 5:31.

conditional and non-peremptory, the deduction of freedom must be circular. But the argument need not be vicious. Franks suggests that the argument is not vicious because the reader is *transformed* when thinking through it. By producing the feeling of respect, the reader has *enacted* freedom and attained cognition of it.

Notice furthermore that this enactive deduction of freedom must bear a peculiar *first-person singular* character. The cogency of the argument depends on the reader enacting freedom by feeling respect for the law. I can cognize my freedom *only* by considering first-personally the normative force of the law compared with that of all my inclinations.⁴⁸ The first-person singular form of my cognition of freedom, the self-conscious taking up of the practical standpoint, means that this cognition is not *theoretical*. The deduction does not *refute* the skeptic by showing that any skeptic is incoherent by denying her autonomy. The deduction leaves room in fact for rejection. But once freedom is enacted, you are caught up within the circle, and you can only deny freedom or the moral law on pain of incoherence.

Having briefly presented Kant's novel deduction of freedom, I now want to develop a structurally parallel deduction of rights. Like Kant's this vindication of rights will be *enactive*. The skeptic need not contradict herself by declaring the juridical practice arbitrary. Nonetheless, the skeptic does contradict herself once she acknowledges herself as a juridical person. Thus, *unlike* Kant's vindication, the one I will offer is *second-personal*, in the sense that *you*, the presumed skeptic, *will acknowledge yourself as a juridical person vis-à-vis me*.

Kant's deduction invites you to *enact* your freedom by becoming conscious of the moral law and *producing* the feeling of respect. I now want to invite you to ask yourself: if I stole one of your precious possessions, say, your laptop, would you think I have wronged you? If we made a contract for me to renovate your kitchen, but I took your money without ever doing the job, would you think I have wronged you? If I cut off your hair without your permission, or a security guard prevented you entry to a public building due to the colour of your skin, would you consider yourself wronged? And if so, would you think

⁴⁸ Franks, p. 296.

yourself entitled to demand some form of rectification, say, an excuse, an apology, or restitution of the lost good?

When you answer these questions in the affirmative, you manifest your acknowledgment of yourself as a *juridical person*. In thinking of yourself as a possible subject of a wrong from me, you enact the relationship of right, and you manifest that you already inhabit the circle of juridical concepts. You manifest this because you see yourself as *having addressed me* to not steal from you, break my contracts with you or discriminate against you. You have addressed me, that is, as an equal juridical person.

You acknowledge yourself as a juridical person rather than a *non-juridical person* because you judge yourself as a possible *subject of wrongs* rather than as the mere *sufferer of something bad*. You distinguish between your losing your laptop, say, when a rock falls from the sky and smashes it and me stealing it from you. Although what happens in a pre-normative register is the same, namely, you no longer have your laptop, you already conceive of yourself as a juridical person, as having addressed me to respect your independence. Otherwise, you would not judge yourself as a subject of a *wrong* and as entitled to demand some form of rectification.

But once you grant that I am bound to you to respect your basic claim to independence, the rest of the juridical structure follows by dint of the reciprocity condition. If I am bound to respect your independence, say, by respecting your property or contract rights, then you are bound to respect my independence by respecting my property and contract rights. You and I are one in general rights and duties. The reciprocity condition now reveals the reciprocal structure of the juridical address. Just as the thought *I am a person* was revealed to be the same as the thought *you are a person*, so too we now see that my *addressing* you to respect my independence is one with my *being addressed* by you to respect your independence.

The reciprocal form of the juridical address gives us further insight into the thesis of correlativity. The correlativity thesis that rights and relational duties co-entail one another is the manifestation of the reciprocal structure of juridical address. My rights correlate with your duties and vice-versa because my rights are my *address* to you to respect my independence and your being addressed is your duty to respect

my independence. Rights and duties logically co-entail one another because my juridical address to you and your being addressed by me are *one and the same act*.

Like Kant's, my vindication is circular. It does not ground juridical personhood or rights in a further value. The vindication is also *enactive*. The argument is not that the skeptic is refuted because we have revealed a latent contradiction in her position *as such*. It is *logically possible* to think of yourself non-juridically. Perhaps even a minimally practical agent is not committed to think of herself juridically. The crucial point is that it is *practically* impossible for you not to think of yourself juridically, insofar as you would be unrecognizable to yourself if you were not a possible subject of wrongs, but a mere recipient of unfortunate events. However, unlike Kant's vindication, mine is *second-personal*. The consciousness of your status as *independent is necessarily relational and second-personal*. Such consciousness has the structure of an address to me to recognize your equal claim to independence. When you see yourself as the possible subject of a wrong, your self-consciousness is parasitic on your consciousness of already having addressed me to respect your independence. My vindication is enactive and second-personal, then, in the sense that it recalls the address constitutive of your self-consciousness as a juridical person.

Let me underline the doubly *modest* character of this vindication. First, the vindication is modest in scope because it does not establish *specific rights*. Instead, it seeks to defend our generic entitlement to the juridical form of thought. Our puzzle suggested that wrongs might be impossible. My independence theory of rights shows there is no incoherence in the idea of wronging another. Further, my second-personal vindication reveals the necessity of rights to your consciousness of yourself as a possible subject of wrongs.

My vindication is *modest* in a second sense, by contrasting it with what we might call a *weak* and an *ambitious* vindication of the idea of a right. An *ambitious* vindication seeks to demonstrate that the complete juridical skeptic can only deny rights on pain of contradiction or deep conceptual confusion. For such a view, a proper vindication of the necessity of rights would have to begin from premises shared by the radical skeptic who denies the normative force of the practice of rights. A *weak* vindication merely says to the complete skeptic: "I have already reached bedrock and have nothing further to say to you." My vindication aims to be *modest* by striking a middle ground between the ambitious and the weak vindications.

Unlike the ambitious vindication, it is not necessary to demonstrate that the radical skeptic contradicts herself to repeal the skeptic, nor is it necessary to begin from premises the radical skeptic will accept. Unlike the weak vindication, it is not enough to simply declare one's spade to be turned. Instead, we can say something more than the weak vindication by revealing the radical skeptic's charge of vicious circularity to be ungrounded. I have attempted to do so by revealing how *original* and *basic* is the *relationship of right*, the practice of claiming rights.⁴⁹ To reject an original practice is unlike the rejection of contingent and optional practices such as playing baseball or chess, for to reject an original practice is to become unrecognizable. In order to be consistent, the radical skeptic would be unable to ever think of herself as the subject of a possible wrong. But why should the practice of rights be justifiable to someone with such extraordinary and eccentric self-understanding? None of the participants in the debate presuppose this self-understanding, since they take for granted the validity of rights. The figure of the radical juridical skeptic is thus not even that of the tyrant who declares might to be right, for such tyrants tend to be hypersensitive to possible wrongs. If the radical skeptic were right, the entire web of inter-personal juridical relationships would vanish in thin air: you could never be an employee or employer, a property owner, a buyer or a seller, a contracting party, a government official or a subject, a legally wedded or common-law spouse, a passport-holding traveller, the heir to your parents' fortune or, in that majestic phrase, an equal before the law.

⁴⁹ In his famous essay, "Freedom and Resentment," P.F. Strawson gives this characterization of the practice of holding one another responsible or of making inductive inferences: such commitment is "original, natural, non-rational (not *irrational*), in no way something we choose or could give up." P.F. Strawson, "Freedom and Resentment," in *Freedom and Resentment and Other Essays* (London: Routledge, 2008), n. 7. Like Strawson, my modest vindication insists that an original practice is not apt for "external 'rational' justification," without thereby entailing that the practice must be *irrational*. Its rationality is only seen, as it were, from the inside.

To put my point more precisely, the radical skeptic can only charge my argument of vicious circularity on the assumption that the practice of claiming rights is just as optional and contingent as the practice of playing baseball, on the assumption that the non-juridical form of self-consciousness is more basic than the juridical one. My modest vindication says slightly more than the weak one by revealing these assumptions to be problematic. And if this fails, at least I will have shown what is at stake in declaring my account to be viciously circular: you would never be entitled to think of yourself as a possible subject of wrongs.

CONCLUSION

I began by asking whether we should think of Claudius's poisoning as a *wrong* to his brother. The question was designed to elicit a puzzle that emerges from the combination of three thoughts: that it seems obvious that Claudius *wrongs* Hamlet rather than performs merely a wrong act, that the concept of a wrong presupposes the thesis of correlativity, and that current moral theories tend to undermine the correlativity thesis, thereby making it mysterious why we should think that Claudius wrongs Hamlet. I argued that current moral theories tend to undermine the correlativity thesis due to a set of non-relational assumptions: the Monadic and Instrumentalist Assumptions, and the Monadic Idea of the Person. The Kantian independence theory of rights, I argued, replaces these three non-relational assumptions with their relational alternatives. In the fundamental case, to bear a right is to have an enforceable title to independence against others, a right correlative to a co-original duty of non-domination.

I offered three basic arguments in defense of the independence theory of rights. First, it allows us to *dissolve* the puzzle and to comprehend the *possibility* of rights and wrongs. Second, it allows us to see the *necessity* of rights, by recognizing that the monadic idea of the person is explanatory of rights only by presupposing the relational idea of the person. Your original right to independence is constitutive of your self-consciousness as a possible subject of wrongs. And third, in response to the skeptical charge that my account is *viciously circular*, I offered a modest second-personal vindication of the juridical form of thought.

The ultimate vindication of rights turns on the enactive character of the pure act of juridical address. Your self-consciousness as a possible subject of wrongs manifests your commitment to the reciprocally entailing concepts of juridical personhood and rights. The complete juridical skeptic does not necessarily self-contradict, but the only way for the skeptic to formulate the charge of vicious circularity coherently is to never think of another as a bearer of relational duties or conversely to never think of herself as a possible subject of wrongs. In so doing, the radical skeptic reveals the impossible cost that comes with abdicating the juridical standpoint, reveals the *original* and *basic* character of the practice of claiming rights against one another. The very thought of you must be the thought of an equal juridical person, someone who owes me the duty to respect my independence and to whom I owe the very same respect. My self-consciousness as a juridical person is necessarily shared.

Chapter 3

Sub Specie Alteritatis: Two Forms of Relational Justice

The instrumentalist assumption shared by skeptics and foundationalists alike is that we must justify rights and rules of justice by grounding them in an independently intelligible end. The previous chapter introduced an alternative view. The very idea of wronging another is intelligible only if we justify rights non-instrumentally and relationally. I argued that we should follow the Kantian view that in the fundamental case rights are first-order claims to independence against others coupled with an authorization to enforce said claim. Thus, rights are ultimately grounded not in an independently intelligible end, but rather in the *original right* to independence. This form of justification is coherentist rather than foundationalist because the original right itself does not function as an extra-judicial and non-inferential ground. Such right is not extra-judicial for the simple reason that it is itself a right; such right is not a non-inferential ground because its justification turns on its logical role within a juridical order of judgments.¹ To claim a right is to make a relational claim against others to not be dominated.

My aim in this chapter is to develop further the idea of this original relationship of right by connecting it to a juridical and relational idea of justice in three distinct ways.

First, I explain the original relationship of right as a basic form of justice, a form I shall call *relational justice*.² While talk of rights invites us to focus on the patient of justice and talk of duties invites us to focus on the agent of justice, relational justice is simply the name for the original relationship of right: my original right to independence correlated with your original duty of non-domination.

I shall argue that the idea of relational justice is the principle of unity of two distinct forms of justice. Following a tradition initiated by Aristotle and followed by Aquinas and Kant, we should

¹ In the next chapter, I develop in more detail this coherentist form of justification for human rights and explain why it is that the original right to independence does not function as a non-inferential ground.

² This formulation aims to mirror what del Vecchio calls *recognitive justice*. Much of this chapter is indebted to del Vecchio's illuminating yet neglected discussion of justice. See Giorgio del Vecchio, *Justice: An Historical and Philosophical Essay*, Lady Guthrie (trans.) (New York: Philosophical Library, [1953] 1982), n.6, p. 88.

distinguish two forms of justice as two basic forms of relations of independence between persons.

Corrective justice, as I shall understand it following Aristotle and Aquinas, is the original relationship of right governing *horizontal* relationships, i.e., relationships between private persons. Corrective justice is perhaps a paradigmatic second-personal norm, a bipolar juridical relation. Distributive justice, as I shall understand it following Kant, is the original relationship of right governing *vertical* relationships, i.e., relationships between private persons and their public authority. While corrective justice manifests the bipolar form of the original relation of right, distributive justice manifests the omnilateral form of the original relation of right.

Appreciating how these two forms are distinct and yet unified by the original right to independence is crucial not only to further our non-instrumental and relational model of justification, but also to see how to integrate aspects of *naturalist* and *institutional* accounts of rights. While naturalists tend to explain the public in terms of horizontal relations, institutional accounts tend to explain the private in terms of public, vertical relations. Keeping these forms separate yet unified will give us a way of integrating the key insights of naturalist and institutional accounts of rights while shedding their reductive and instrumentalist character.

I should emphasize that my vindication of the relational idea of justice will be coherentist rather foundationalist. Rather than grounding relational justice directly in a self-evident, non-inferentially justified ground, my coherentist vindication reveals the *inner justificatory nexus* between the original relationship of right and the idea of relational justice. These two ideas are internally related for the simple reason that they are the very same relationship, the same idea. Conversely, rejecting relational justice while granting the idea of rights would be incoherent. Thus, if my second-personal vindication of the relationship of right was sound, it is not necessary to offer a further vindication of relational justice, since these two ideas are the same.

1. TOWARDS JURIDICAL JUSTICE

In spite of the venerable status of the tradition from which I draw this juridical (non-instrumental and relational) model of justice, I should emphasize that this model is practically forgotten in most contemporary discussions of justice. In the long run, Carneades and David Hume's instrumental model of justice triumphed so completely that it is now difficult to imagine an alternative. For that reason, I want to begin by introducing my topic, a non-instrumental account of juridical justice, historically. Naturally, this cannot be a comprehensive history of the idea of justice. Instead, my hope is that by delineating some key contrasts historically I can begin to loosen the grip of the Humean view and clear the ground for the non-instrumental account that follows.

The essence of justice, Plato argued in the *Republic*, is *doing one's task*. This formula was meant to capture alike the function of the three parts of society (philosophers, soldiers and workers) and of the three parts of the soul (reason, spirit and emotions). Justice is thus the condition of harmony where each part performs its own task well rather than the vicious condition where each part tries to usurp the task of the other parts, as when the desiring part tries to rule the whole soul or the workers try to rule the community.

Socrates introduces this account of justice to address the challenge posed by Glaucon and Adeimantus. Glaucon had argued that if we justify justice instrumentally, i.e., if the only things that matter are the consequences of justice and injustice, then injustice may be more reasonable when it has better consequences. Glaucon illustrated his point with the famous example of Gyges's ring, which renders Gyges invisible and allows him to have all the advantages of appearing just while enjoying the advantages of actually being unjust.³ Glaucon's problem thus anticipates Carneades's skeptical challenge. Socrates's response, very roughly, is that we can reject Gyges's problem because the proper justification of rules of justice is non-instrumental: justice is good not because of its consequences but rather because justice is good in itself. The relation between justice and the good is not of means to end, but rather justice is

³ Plato, *Republic*, Bk II, 359c-360d.

constitutive of the good.⁴ Put in the terms Aristotle would later craft, justice is not the *efficient* cause of the good, but rather justice is the *formal* cause of good: justice is the form taken by the good.

However, in accounting for the good, Plato seems to give normative primacy to the individual's soul. The good soul is the just soul, that in which spirit and the desiring part obey reason.⁵ It emerges that the paradigm of justice is a *self-relation*, the proper relation of the parts of the soul to each other. Justice in the political community is a derivative image of the individual's self-relation.⁶

If this reading is correct, Plato made the monadic move of reducing the ground of justice to a self-relation. And to the extent that the monadic assumption necessarily presupposes instrumentalism about juridical categories, Plato's account becomes unstable. In spite of Plato's efforts to give a non-instrumentalist account of justice, he may nonetheless end up doing so by making justice essentially a relationship one has to oneself.

Aristotle seems to have recognized this tension in Plato's model of justice. Plato's basic mistake, according to Aristotle, was to render the social aspect of justice a mere image of a relation one has to oneself.⁷ Aristotle thus elaborates a non-instrumental account of justice by focusing exclusively on the juridical and normatively basic relationship of one party to another.

For our purposes, then, Aristotle's main thesis is that justice is a virtue "in relation to another," (*pros allon*) rather than a self-relation.⁸ This claim is important because it enables Aristotle to distinguish the

⁴ See Terence Irwin, *The Development of Ethics, Volume 1: from Socrates to the Reformation* (Oxford: Oxford University Press, 2007), pp. 88-89.

⁵ Plato, *Republic*, (443c-d).

⁶ This, at least, is the view defended by Richard Kraut, *Aristotle: Political Philosophy* (Oxford: Oxford University Press, 2002), p. 100.

⁷ See Kraut, *Aristotle: Political Philosophy*, p. 122.

⁸ Aristotle, *Nicomachean Ethics*, T. Irwin (trans.) (Indianapolis: Hackett Publishing Company, 1999), V.1, 1129b27-28. See also Kraut, *Aristotle*, p. 161.

generic ethical idea of harming from the specific juridical idea of wronging. This distinction can be easily seen through the incontinent person.⁹ When the incontinent agent goes against what she knows is the right thing to do, such as abstaining from junk food or not smoking, there is a sense in which she harms herself. But in so doing, she is not *wronging* herself, because she is not acting unjustly. One wrongs somebody when one acts unjustly. And since one acts unjustly only towards others, one can only wrong others, not oneself, even if one can harm oneself.

We may draw out further Aristotle's point by distinguishing harming from wronging more generally. If I give you a cigarette when you ask me for one, I may be harming you, but I do you no wrong. For Aristotle, then, wrongs are only towards others and they are of a juridical nature. Wrongs are always forms of injustice. Justice is a form of maintaining rights.¹⁰ The idea of justice for Aristotle is a juridical one.

⁹ Ibid., V.9, 1136a32-35.

¹⁰ This point is controversial. Some claim that the idea of a subjective right only appeared in the thirteenth century. Richard Tuck, for instance, advances just this claim in *The Rights of War and Peace: Political Thought and the International order from Grotius to Kant* (Oxford: Oxford University Press, 2002), p. 1. On the other hand, others argue that although there is no term that may consistently be translated as *rights* in, say, Greek or early medieval Latin, philosophers such as Aristotle and Aquinas employed the *concept* of a subjective right in their reflections on justice. John Finnis, for instance, makes a compelling case for the view that Aquinas's *ius* connotes not only law and a relationship of justice, but also a subjective *right*. Finnis says: "When Aquinas says that *ius* is the object of justice, he means: what justice is about, and what doing justice secures, is the *right* of some other person or persons – what is due to them, what they are entitled to, what is rightfully theirs. This meaning of *ius* is made clear in the Roman law definition which Aquinas adopts: justice is the steady willingness to give others what is *theirs*." (p. 133) A little later, he says: "For to say that person *A* has a right *vis-à-vis* person *B* is to say that *A* has a kind of *equality with B*." (p. 136) For Aquinas, as we shall see, there is an internal connection between rights, law and justice, such that a relationship of justice correlates my duties with your rights in a direct juridical nexus. Since Aquinas adopts the

Aristotle thus implicitly rejects Plato's formula that justice is doing one's task and replaces it with two distinct ideas. In a broad sense, justice is lawfulness (*to nomimon*): performing virtuous acts required by the law in relation to another.¹¹ In a narrow sense, justice is a more specific form of lawfulness, namely, equality (*to ison*) in our relations to others. Aristotle will go on to specify two forms of equality more determinate still, one having to do with rectification in transactions (corrective justice), and another with the distribution of goods among the members of a community "who share in a political system" (distributive justice).¹² I shall turn to these forms below. For now, the main point is that Aristotle's account seems to preserve better the non-instrumental character of justice by making justice an exclusively juridical virtue. The purpose of justice is not the promotion of a positive self-relation, but rather the maintenance of relationships of equality among persons. And since equality itself is a form of justice, the justification of justice is formal and non-instrumental. Put now in our terms, Aristotle aims to meet Glaucon's demand for a non-instrumental account of justice by refusing to make Plato's monadic move and staying within our relational column.

Thomas Aquinas emphasizes even more than Aristotle the relational character of justice. Aquinas defended the Aristotelian thesis, contra Plato, that justice is a virtue governing our relations to others rather than a relationship to oneself. For justice, Aquinas argued, is equality and equality is a relational

Aristotelian concept of justice as a form of relational equality, it is reasonable to suppose that Finnis's argument carries over to Aristotle. Aristotle's formal justice, a form of equality, is also reasonably construed as an equality in rights. See John Finnis, *Aquinas* (Oxford: Oxford University Press, 1998).

¹¹ Ibid., V.1. "Since, as we saw, the lawless person is unjust and the lawful person is just, it clearly follows that whatever is lawful is in some way just; for the provisions of legislative science are lawful, and we say that each of them is just." (1129b13-15) "That is also why justice is the only virtue that seems to be another person's good, because it is related to another; for it does what benefits another, either the ruler or the fellow member of the community." (1130a2-7)

¹² Ibid., 1130b30-35.

rather than reflexive concept.¹³ Aquinas thus takes further the Aristotelian view by making justice the proper juridical virtue. The task of human laws is not to govern our motives (the way in which we perform certain actions) or those actions which concern only oneself but rather simply to govern unjust actions, those that wrong others.¹⁴ As a result, enacted laws should only restrict those acts which affect others regardless of their motivation instead of restricting vicious acts in general or those which involve only harm to oneself.¹⁵

The non-instrumentalist character of Aristotelian justice enables Aquinas to fuse the concept of *rights* with the concept of *justice* by deliberately exploiting the ambiguity in the technical term *ius*.¹⁶ Understood subjectively *ius* denotes my rights; but *ius* is also the name of the relationship of justice. *Ius* thus manifests the internal relationship between rights and justice: my rights are intelligible only as one pole in a relationship of equality with another, and this relationship of equality just is the relationship of justice. Justice and rights are not names of distinct creatures, but aspects of a single unity. Aquinas's *ius* thus

¹³ Aquinas, *Political Writings*, R. Dyson (trans.) (Cambridge: Cambridge University Press, 2002), pp. 159-60.

Summa Theologiae, IIaIIae57.1: "The proper function of justice, as compared with the other virtues, is to direct man in his relations with others. For justice denotes a kind of equality... and equality has to do with the relation of one man to another, whereas the other virtues perfect man in those things which pertain only to himself."

¹⁴ Ibid.: "And so a thing is said to be just as having the rectitude of justice, when it is the outcome of an act of justice, without regard to the way in which that act is done by the agent; whereas in the other virtues nothing is deemed to be right unless it is done by the agent in a certain way."

¹⁵ Aquinas, *Political Writings*, p. 140. *Summa Theologiae*, IaIIae96.2: "And so human laws do not prohibit all the vices from which virtuous men abstain, but only the more grievous ones ... and especially those which do harm to others, without the prohibition of which human society could not be maintained."

¹⁶ ST IIaIIae57.1: "For this reason, justice has its own special object proper to itself over and above the other virtues, and this object is called the just [*iustum*], which is the same as 'right' [*ius*]."

develops the Aristotelian program of accounting for justice non-instrumentally by making it a juridical virtue governing the relationship between persons. Instead of justifying justice instrumentally by its consequences, such as the promotion of welfare or a positive self-relation, we justify justice by showing how it constitutes an intelligible and articulated whole, one where you and I are equal in basic rights. Homicide and theft are vicious not because they have bad consequences, but rather because they destroy this basic relationship of equality.

As we have seen, Carneades's skeptical attack on the idea of natural justice marked a key departure from the classical project of accounting for justice non-instrumentally. Indeed, Carneades disrupts this project by insisting on the alternative assumption that justice and its ground are externally related. Set against the background of Glaucon's challenge, Carneades's position is that justice can only be justified by its consequences. But once this is admitted, Carneades shows that natural justice must be a fiction. With the advent of the modern period, Hugo Grotius and Thomas Hobbes disrupt the classical project once again by reviving the Carneadean stance.

In the attempt to meet Carneades's challenge in his own (instrumentalist) terms, Grotius begins the slide towards an instrumentalist conception of justice and begins to disrupt Aquinas's fusion of rights and justice in the concept of *ius*.¹⁷ Grotius thus appears to occupy a transitional space between the

¹⁷ Hugo Grotius, *On the Rights of War and Peace*, W. Whewell (trans.) (Cambridge: Cambridge University Press, 1853), Prolegomena, §5: "But since our discussion of Rights is worthless if there are no Rights (*si ipsum ius nullum est*), it will serve both to recommend our work, and to protect it from objections, if we refute briefly this very grave error [that might makes right (*id aequius quod validius*) and that there are no rights in war (*bellum ab omni iure abesse*)]. And that we may not have to deal with a mob of opponents, let us appoint them an advocate to speak for them. And whom can we elect for this office, fitter than Carneades... He, then, undertook to argue against justice; and especially the kind of justice of which we here treat; and in doing so, he found no argument stronger than this: -- that men had, as utility prompted, established Rights, different as their manners differed (*iura sibi homines pro utilitate sanxisse varia pro moribus*)... but Natural Law

Aristotelian tradition of thinking about justice as good in itself and the instrumentalist Hobbesian doctrine that justice is a means towards self-preservation.

Grotius suggests that there are three senses of the term *ius*. The first sense of *ius* is that which is just.¹⁸ The second meaning of *ius* is derived from the first and refers to the person; in this sense, *ius* means a moral quality by which a person can have or do something justly.¹⁹ So far, Grotius appears to be following the Thomistic thesis about the internal relationship of rights to justice in *ius*. And yet, Grotius goes on to introduce a surprising third sense of *ius*: *ius* in the “strict and proper sense” is the *sum*, which Whewell translates as a Jural Claim belonging to anyone.²⁰ Whewell’s translation is misleading because, as Hohfeld has taught us, the logical structure of claim-rights is different from that of liberty-rights. Whereas the former makes a claim on another who bears a correlative duty, a liberty-right has no correlative duty. That Grotius has the latter in mind is clear from his explanation of the *sum* as, paradigmatically, “a power over one’s self, which is Liberty.”²¹ When Grotius identifies the third and proper sense of *ius* paradigmatically with *liberty*, a power over oneself, he appears to break from the classical tradition: justice is not internally related to rights, for rights are now understood paradigmatically as liberties, a self-relation, rather than a relation one has to another.²² It seems that for Grotius one can have rights, in the strict and proper sense, in the absence of justice.²³

there is none (*ius autem naturale esse nullum*): for all creatures, men and animals alike, are impelled by nature to seek their own gratification (*ad utilitates suas*)...”

¹⁸ Ibid., 1.1.3: “*ius hic nihil aliud quam quod iustum est significat*”

¹⁹ Ibid., 1.1.4: “*ius est Qualitas moralis personae competens ad aliquid iuste habendum vel agendum*”

²⁰ Ibid., 1.1.5: “*Facultatem Iurisconsulti nomine Sui appellant.*” Grotius never speaks of “Jural Claims,” but instead suggests that what jurists call *sum* is the perfection of a moral quality, a faculty.

²¹ Ibid.: “*sub quo continentur Potestas, tum in se, qua libertas dicitur.*”

²² John Finnis comments on this break from Aquinas’s view of *ius* in his *Natural Law and Natural Rights* (Oxford: Oxford University Press, 1980), p. 207: “This shift of perspective could be so drastic as to carry

If it is unclear to what extent Grotius breaks from the classical understanding of *ius*, Thomas Hobbes makes the break perfectly clear. For Hobbes the paradigmatic understanding of *ius* as rights is that of natural liberty, my liberty to do as I please without any external interferences.²⁴ Not only is *ius* as rights different from justice and law, the other two senses of *ius* in the classical understanding, but rights are in fact conceptually opposed to justice and law. In a state of nature unimpeded by others, Hobbes implies, you would enjoy your natural rights to the maximum degree, even when this is a condition devoid of law and justice.²⁵

the right-holder, and his right, altogether outside the juridical relationship which is fixed by law (moral or posited) and which establishes *jus* in Aquinas's sense: 'that which is just'."

²³ If this reading is correct, it suggests that Grotius departs from the classical tradition by making the Carneadean, instrumentalist assumption that the grounds of justice (self-preservation, *libertas*) are external to justice. Grotius's debate with Carneades would then concern the proper upshot of making the assumption: while Carneades concludes that no rule of justice could be natural, Grotius insists that grounding rules of justice in self-preservation and liberty is still compatible with *ius naturale*. Surprisingly, Grotius never constructs (to my knowledge) an argument against Carneades, but simply insists on the importance of natural law. To the skeptic, this may seem plainly arbitrary.

²⁴ Thomas Hobbes, *Leviathan*, ch. 14: "The RIGHT OF NATURE, which writers commonly call *jus naturale*, is the liberty each man hath to use his own power, as he will himself, for the preservation of his own nature, that is to say, of his own life, and consequently of doing anything which, in his own judgment and reason, he shall conceive to be the aptest means thereunto."

²⁵ *Ibid.*, ch. 13: "To this war of every man against every man, this also is consequent: that nothing can be unjust. The notions of right and wrong, justice and injustice, have there no place. Where there is no common power, there is no law; where no law, no injustice." (78) Hobbes goes on to argue that justice is possible only when I renounce or transfer my natural rights. Only on the condition of such transfer are *duty*

Having disrupted the internal relations between rights, justice and law implicit in the classical idea of *ius*, Grotius and Hobbes thus inform not only the instrumentalist paradigm of justice but also the instrumentalist paradigm of rights. Although we currently identify H.L.A. Hart as the classic exponent of choice-based theories of rights, Hart was really drawing from an understanding of *ius* originated by Grotius and Hobbes. Almost without argument against the classical background with which their audience would have been familiar, Grotius and Hobbes introduce the monadic assumption that the strict and proper sense of rights is your *liberty*. Liberty, as Hobbes makes clear, is simply negative: the lack of external impediments, rather than a relation of equality to others. If the importance of Grotian and Hobbesian liberty is comprehended monadically and if Hart's conception of the significance of choice descends from the Hobbesian idea, then Grotius and Hobbes set up the context for thinking of rights instrumentally even when we think of them in terms of the choice theory. In attempting to meet Carneades's challenge in its own terms, Grotius and Hobbes depart from the Aristotelian tradition and reconstruct justice and rights in instrumental terms.

In sum, this brief and rough history of the idea of justice was meant to illustrate the basic contrast between instrumentalist and non-instrumentalist models of justice. Although instrumentalist models seem to have colonized our imagination, they were radically novel when Grotius and Hobbes began to argue for them, especially because their instrumentalist model of justice was originally defended by the skeptic as an attack on the idea of natural justice. The modern instrumentalist model developed against the background of the classical understanding of *ius* as the representation of an articulated whole where rights, justice and law are reciprocally and internally related. Where Grotius and Hobbes make the monadic and instrumentalist assumptions, Aristotle and Aquinas preserve the non-instrumentalism to which Plato had aspired by understanding justice as a fundamentally relational norm. In so doing, they articulated the basic elements of a properly juridical account of justice. Against Plato, we ought to maintain that justice is not a

and *justice* possible. Natural right, what "writers commonly call *ius naturale*," is thus necessarily opposed to justice.

self-relation; and against Carneades, Hobbes and Hume, we should insist that justice is not justified by its consequences, such as the maximization of self-preservation and peace, but is rather internally justified. We justify justice internally, as Aristotle and Aquinas teach us, by understanding how justice forms a coherent and articulated whole. In the narrow and properly juridical sense, justice is the norm of equality, an equality of rights. Injustice is the name of a wrong of one party to another, rather than of mere harm.

Having set up historically the contrast between, on the one hand, a relational and non-instrumental model of justice (Aristotle and Aquinas) and, on the other, a monadic and instrumental one (Carneades, Hobbes and Hume), I shall develop in the remainder of this chapter the non-instrumental model in three stages. First, I introduce the idea of relational justice as the original relationship of right. Then I show why the original right must take two forms of justice: corrective justice is the horizontal and bipolar form, while distributive justice is the vertical and omnipolar form.

2. RELATIONAL JUSTICE

As scholars have pointed out, Aristotle's account of justice seems to have left a gap, for Aristotle never articulates the principle that unifies his two forms of justice (corrective and distributive justice).²⁶ If the two forms of justice are versions of the norm of equality, in what sense are the parties equal? Aristotle never explicitly addresses this question. Following my defense of a Kantian independence theory of rights in the previous chapter, I would like to suggest that the basic norm of equality that unifies both forms of justice is *equality in the original right to independence*. Assuming the Thomistic fusion of rights, justice and law in the idea of *ius*, we may call "relational justice" that original form of justice which is simply the relationship of equality in the *original right to independence*.²⁷

²⁶ Del Vecchio, *Justice*, p. 53, and Weinrib, *The Idea of Private Law*, pp. 76-80.

²⁷ Immanuel Kant calls this original right the sole "innate right": "*Freedom* (independence from being constrained by another's choice), insofar as it can coexist with the freedom of every other in accordance

The reciprocity condition represents the normative structure of relational justice. Relational justice and the reciprocity condition aim to capture the same normative phenomenon. When I think of myself as a juridical person, I must think of myself, as del Vecchio put it, *sub specie alteritatis*; I must think of myself under the aspect of otherness.²⁸ Just as you are an other, a second person, to me, in the basic case I am equally an other, a second person to you. In terms of the original right to independence, you and I are perfectly fungible. To put it in the idealist terminology deployed by del Vecchio, when I posit myself as a juridical I, I thereby posit the *alter*, you, as my equal. Both you and I are simultaneously subjects and objects to each other. Relational justice is precisely this *original form of equality in rights*. Relational justice represents the demand that I think myself *sub specie alteritatis* and thereby as an equal to you.

As I mentioned in the previous chapter, the original right to independence is a *relational juridical title*. The Kantian idea of independence thus contrasts with two familiar understandings of freedom.

In his influential “Two Concepts of Liberty,” Isaiah Berlin argues that there are two principal ideas of freedom, one negative, the other positive.²⁹ On the one hand, according to the negative idea, I am free when I am not subject to *interference*. As we have seen, Thomas Hobbes pioneered this understanding of freedom when he characterized any form of interference as an infringement on natural freedom. He could thus claim that right and duty, liberty and the law, always form inconsistent pairs.³⁰ For defenders of

with a universal law, is the only original right belonging to every man by virtue of his humanity.” Kant, *Doctrine of Right*, 6:236.

²⁸ Del Vecchio, *Justice*, p. 84: “That is so because the self here posits itself *sub specie alteritatis*, and the self and the *alter* become, so to speak, fungible entities, because of the essential *objectivity* of the relation which binds them.”

²⁹ Isaiah Berlin, “Two Concepts of Liberty,” in *Liberty*, H. Hardy (ed.) (Oxford: Oxford University Press, [1958] 2002), pp. 166-217.

³⁰ Thomas Hobbes, *Leviathan*, ed. E. Curley (Indianapolis: Hackett Publishing Company, 1994), chapter XIV.

the negative idea, the mere fact of interference is sufficient to infringe freedom. Thus, when you purchase the last remaining car I had picked or when the law tells me to pay taxes, I am less free than I was before. On the other hand, according to the positive model, I am free when I enjoy a positive form of self-relation. Thus, I am free to the extent that I *am autonomous, authentic, flourishing, etc.* Plato's view of the just soul might count as a positive account of freedom.

However, Berlin's famous taxonomy appears to be misleading, for the Kantian idea of freedom as independence does not fit neatly into either of Berlin's categories.³¹ The Kantian, republican idea of freedom as independence thus departs from the categories familiarized by Berlin. In contrast to negative freedom, not every interference counts as an infringement of Kantian independence. Instead, my freedom is compromised only by the domination of others. Kant had put this point by saying that my independence is compromised not by the mere *constraining* choice of others, but by those *constraining* choices of others that are inconsistent with the freedom of everyone under a universal law.³² Contemporary readers of Kant like Arthur Ripstein have put the point by saying that my independence is compromised not by your interference with my *purposes*, but only by your interference with my *purposiveness*.³³ My freedom is not

³¹ For a recent elaboration of this charge, see Philip Pettit, *Republicanism: A Theory of Freedom and Government* (Oxford: Oxford University Press, 1997), chapters 1 and 2; and Ripstein, *Force and Freedom*, p. 43. David Dyzenhaus has argued that Pettit's republican idea of freedom as non-domination is not substantially different from Hobbes and Berlin's idea of negative freedom. See his critical notice of Philip Pettit, *On the People's Terms: A Republican Theory and Model of Democracy*, unpublished. Dyzenhaus may be right about Pettit. However, I am not sure his argument would work for assimilating a Kantian idea of freedom to the Hobbesian idea. The basic reason is that in Thomistic fashion Kant understands freedom juridically, as internally connected with rights, law and justice, while Hobbes understands natural (negative) freedom as externally connected with law and justice.

³² 6:237.

³³ Arthur Ripstein, *Force and Freedom*, p. 41.

compromised when my purposes are frustrated, say, because you purchased in an auction the painting I had wanted. My freedom is compromised when you interfere with my purposiveness by dominating me, i.e., by setting for me the purposes I am to pursue. A key upshot of this view is that, unlike Hobbes, a Kantian is not committed to viewing the constraints of the law as intrinsically inimical to freedom. Instead, as we shall soon see, the law is a necessary condition of independence.

Similarly, in contrast to positive models of freedom, the Kantian view of independence is juridical and relational rather than a positive form of self-relation. Failures of cultural recognition count as compromises to freedom only when they embody forms of *domination*, not merely when they have as a consequence a truncated or inauthentic identity. Likewise, in contrast to the Platonic view, my freedom is not compromised when my soul is an inner state of disharmony. To use Aristotle's point, the weak willed agent harms herself by picking up smoking again. Still, although the weak willed agent harms herself, such agent does not wrong herself and for that reason remains as independent as before. Independence is not an inner condition of my soul; it is a standing I have *sub specie alteritatis*, in relation to the other.

Relational justice, then, is that form where two persons respect the other's equal right to independence. Relational injustice is a defective instantiation of the form, where one party breaches her relational duty to the other by failing to respect the other's right to independence. And failing to respect the other's independence is simply a form of domination. Relational justice, we might say, is a thoroughly second-personal norm: it is a norm unintelligible independently of your address to me to respect your independence, rather than a norm tracking a value intelligible independently of our relationship to each other.³⁴ And due to the reciprocity condition your address to me is simultaneously my address to you. Relational justice is thus a two-way second-personal address.

Indeed, if we set aside Aristotle's deplorable views on slavery, there are some traces of relational justice in his work, particularly in his treatment of *pleonexia*. Aristotle characterizes the vice associated with

³⁴ See my note above on Darwall. Introduction, n. 4.

injustice as *pleonexia*, which Irwin translates as ‘overreaching.’³⁵ It is easy to misinterpret *pleonexia* as a form of greediness, a tendency to want more than one’s fair share as such. We might say that on this reading *pleonexia* is a third-personal vice, the vice of wanting more than one’s fair share as such, where the proportion of that share is intelligible independently of any relations I have to others, for instance, as an instantiation of the formula *to each according to his need*. The overreaching agent simply wants more than what is appropriate for her, such as an extra slice of cake or a more powerful political position, etc. But as Kraut argues, Aristotle’s view of *pleonexia* is more complex, for it has a clear interpersonal component. The overreaching agent does not simply seek more than her fair share, but seeks to do so *at the expense of others*. We might say that this is a *second-personal* reading of *pleonexia*: I overreach by putting myself in the condition of a superior over you, by taking myself to be an exception to the rules of justice.³⁶ The overreaching agent seeks more than her fair share because she thinks herself above the law, as master over others. Those who follow the law are not equals, but fools and weaklings, inferior to the overreaching agent who rises above the law. If this second-personal reading is correct and adapted now to our terms, *pleonexia* is the vice of domination, the vice of taking oneself to be entitled to dominate others. *Pleonexia* is a disruption of relational justice in the sense that one of the parties takes the other to be *unequal* in the original right to independence, takes herself to be the master of the other.

³⁵ Aristotle, *Nicomachean Ethics*, V.1 1129b1-7.

³⁶ Kraut, *Aristotle*, pp. 140-141: “That is, when someone exercises the vice of *pleonexia*, he does so by violating a law or rule that is generally observed in his community. He regards such rules as illegitimate restraints on his behavior. He has no admiration for his fellow law-abiding citizens, but regards them as mere fools and weaklings. The pleasure he takes in getting the better of them derives from his general contemptuousness towards the law and those who respect the law. His injustice is an expression of his sense of superiority to others, and the pleasure he takes in his act derives not only from gaining some good (money, honor, safety) but from the satisfaction he takes in exercising his contempt for others.” (140-141)

Relational justice, the original right to independence and the Kantian idea of freedom as independence are three different ways of describing the very same norm, the irreducibly relational, juridical bond between two persons. We comprehend Claudius's wrong to Hamlet not simply as the breach of Claudius's duty and Hamlet's correlative entitlement. We may now comprehend that same murderous act as an act of relational injustice. Claudius *overreaches*, for in the act of poisoning, he proclaims himself the superior to his brother, untouched by the requirements of justice. Claudius infringes Hamlet's original right to independence by deciding for Hamlet that he shall die.

Before going on to develop the idea of original relational justice, let me pause to preempt an objection. My historical introduction to this chapter draws a sharp contrast between the Aristotelian tradition (developed by Aquinas and Kant) of thinking of justice non-instrumentally and the Carneadean tradition (developed by Hobbes and Hume) of thinking of justice instrumentally. So far, I have simply presented the non-instrumental idea of relational justice without giving much in the way of an argument for it. The objection is that I have yet to vindicate this non-instrumental conception of justice, for otherwise I beg the question against the Carneadean tradition.

The objection loses its force once we keep firmly in view the internal relation between original right and relational justice. Just as Aquinas fused in the idea of *ius* rights, justice and law, so too I have argued that relational justice is nothing other than the reciprocal relation between two persons entitled to the original right to independence. Any act that respects the other's right to independence will be an act of relational justice, while any act that fails to respect the other's independence by dominating the other will be an act of relational injustice. The internal relation between the original right to independence and this original form of justice means that the vindication of the former is thereby the vindication of the latter.

In the previous chapter, I offered three main arguments in order to vindicate the juridical form of thought. The first shows that once we understand rights in a Kantian manner, by seeing them as instances of the original right to independence, the idea of wronging another is no longer incoherent. The second shows the necessity of rights by showing that the non-relational grounds of rights are explanatory of rights only by surreptitiously relying on the relational idea of the person. The relationship of right is necessary to

your self-consciousness as a possible subject of *wrongs*, as having always already addressed others not to wrong you and simultaneously having been addressed by others to not wrong them. The third shows the necessity and actuality of rights by vindicating rights *second-personally*: so long as you address others to respect your original right to independence (so long as you think of yourself as possible subject of wrongs), you can only deny the validity of rights on pain of contradiction. Your self-understanding as a juridical subject is so basic that the practice of rights must be thought of as an *original* practice, a practice constitutive of our own self-understanding as persons. For this reason, the radical skeptic's demand to justify said practice from the outside is itself problematic, for it would have to show that it is plausible to shed our self-understanding as simply optional. In short, if these arguments are sound not only do they vindicate the generic idea of a right, they also vindicate the relational form of justice, since relational justice is simply the relation of equality between two persons reciprocally entitled to not be dominated by the other.

3. CORRECTIVE JUSTICE AS THE BIPOLAR AND HORIZONTAL FORM OF RELATIONAL JUSTICE

The instrumentalist tradition of Carneades, Hobbes and Hume understands justice as a conventional instrument for securing some desired independent result. By contrast, I have been following Aristotle, Aquinas and Kant in articulating the idea of justice non-instrumentally. The basic form of justice is *relational*: the representation of our equal right to independence. I now want to suggest that this spare original form of justice has a more concrete expression in the traditional Aristotelian conception of corrective justice. As I shall understand it, corrective justice is a bipolar, horizontal and private form of relational justice.

Aristotle presents the idea of corrective justice by contrasting it with distributive justice. One way in which he marks the distinction is by means of a mathematical analogy: while distributive justice involves a geometrical form of equality, corrective justice involves an arithmetical form of equality.³⁷ Aristotle's

³⁷ Aristotle, *Nicomachean Ethics*, V.4, 1132a1-3.

contrast is formal. Distributive justice fixes what is appropriate *proportionally*, for example assigning political offices in proportion to varying personal merit. Corrective justice fixes what is appropriate *non-proportionally*, such that an act of theft, for instance, would be equally a wrong to another regarding of the merits of my disposition. Corrective justice treats all persons as equals.

I take it that this is Aristotle's point when he claims that in corrective justice:

It does not matter if a decent person has taken from a base person, or a base person from a decent person, or if a decent or a base person has committed adultery. Rather, the law looks only at differences in the harm [inflicted], and *treats the people involved as equals*, if one does injustice while the other suffers it, and one has done the harm while the other has suffered it.³⁸

If I understand him, Aristotle's point is that a corrective wrong is a disruption of a relational or second-personal equality: the equal status of the parties. Claudius's murderous act remains equally wrong regardless of how vicious or virtuous Claudius tends to be. By abstracting from the motivations and characters of the persons involved, corrective justice simply focuses on their status as juridical equals. Putting it in a more Kantian manner, corrective justice is relational in the sense that corrective justice is the self-maintaining juridical condition where neither party has authority over the other. We may understand the equal status of the parties as their equal right to independence from the other.

We may also add that corrective justice takes a *bipolar form*, for it governs the relation between two, and only two, parties.³⁹ Seen under the light of the distinction between relational and non-relational duties, Aristotle's conception of corrective justice requires him to advance two claims.

The first is that corrective justice must always be represented *through relational judgments*. Acts of corrective justice are not simply *right actions*; they are fundamentally acts that respect the right of another. This flows from the fact that corrective justice is an instance of relational justice. The parties to corrective

³⁸ Ibid., 1132a2-6 (emphasis added).

³⁹ I am drawing here on Weinrib's excellent analysis in his *The Private Idea of Law*, chapter 3, especially pp. 65-66.

justice do not stand to each other as the couple wedded before God in Feinberg's example. Understood that way, their act of getting married may be represented through the conjunction of two monadic judgments. The act of corrective justice is not acting rightly before an abstract law, but is an act in accordance with a *relational duty to another*. In the basic case of relational justice, this is an act of respecting the other's original right to independence. In any case of corrective justice, this is an act of respecting the other's right, regardless of its content, such as a property or a contract right.

Notice that this relational structure is not a feature peculiar to corrective justice, but is rather a logical feature of deploying a relational judgment. When we judge that *A* stands to the left of *B*, that the sun warms a stone, that a leaf produces chlorophyll, or that *A* gives a gift to *B*, it is uniformly mistaken to analyze that judgment as the conjunction of two monadic judgments, such as *A* stands here and *B* stands there, or the sun produces heat and the stone receives heat. Doing so would be like reducing the single activity of two children playing together to the conjunction of two separate activities, where each child simply "parallel plays." Any such reduction misses what the judgment was supposed to represent.

Aristotle's point here is the same. We cannot represent an act of corrective justice as an independently assessed right act that happens, by accident, to be in agreement with the patient's rights. An act of corrective justice is *relational*, an act that respects the other's right. Similarly, we cannot represent a corrective injustice monadically, as merely a wrong act that happens, by accident, to infringe the other's rights. An act of corrective injustice is *relational*, an act that breaches a duty of respect to the other. Aristotle thus refuses to think of justice monadically. The monadic assumption, recall, reduces the patient of justice to the position of your ficus tree, the object of a non-relational duty. Corrective justice is necessarily relational, making the patient of justice always at the same time an *agent of justice*.

Aristotle's second and more specific point is that corrective justice is not simply relational, it is also *bipolar*. Judgments of a game of soccer, for example, require connecting 22 people into a single activity. By contrast, judgments of corrective justice require connecting two and only two parties. Both judgments are relational, but only the latter is bipolar.

A bipolar relationship has only one member at each end, only two poles as parts of the whole. The two poles are linked in a single juridical unity, the agent and patient of justice, a development of the reciprocal original relation of right. And the reciprocity condition means that the patient of justice (the bearer of a right, the beneficiary of the relational duty) must always also be an agent of justice (an agent owing the same relational duty owed to her by the other).

The bipolar character of corrective justice is made crisper by considering the form of acts of corrective injustice. Such acts wrong only the person standing at the other end of the corrective relationship, rather than anyone who happens to suffer harm from the act. If I steal money from you or fail to perform the contract to which we had agreed, I wrong you and only you. Even if I harm others by my corrective wrong, say, because you had saved the money to give away to your favorite charity, I wrong only you and not the prospective recipients of your benevolence.

With one foot still on the Aristotelian tradition, Hugo Grotius made this same point beautifully when he distinguished “damage directly caused” from “damage caused by consequence.” Grotius says:

I call that a damage directly caused (*damnum directe datum*), by which any one is deprived of a proper right (*ius proprium*) which he has; a damage by consequence (*damnum per consequentiam*), that by which any one has not that which he would have had: namely, by the cessation of the condition, without which his right cannot subsist. We have an example in Ulpian: If in my ground I have opened a well, by which the springs which would have come to you are cut off: he denies that, by the effect of my operations, a wrongful damage is done to you, since I was using my own right in my own property.⁴⁰

Grotius’s point is that direct damages (juridical wrongs) disturb a bipolar relation, breach a relational duty to another and therefore breach a *proper right*, a right the other already has. By contrast, damages by consequence are not properly relational, for they track a right that you would have had, or more precisely put, a harm you suffer regardless of whether the harm signifies a breach of a relational duty. Ulpian’s

⁴⁰ Hugo Grotius, *On the Rights of War and Peace*, Bk. 2, ch. 21, §10.

example is meant to illustrate this distinction between a bipolar, relational wrong and the monadic suffering of harm. Although in cutting off springs that would have come to you I harm you, this is an indirect consequence of my act (an act to which I was entitled as an exercise of my property right), rather than a breach of a relational duty I owed to you. I lack a relational duty to you because you lack an actual right to the springs; your right to the springs is not actual but hypothetical, one you would have had. So the absence of a relational duty entails that I do you no wrong.

Having laid out some of the formal features of corrective justice, it is now time to depart from Aristotle and to add a further feature of corrective justice.⁴¹ Following Ernest Weinrib, I would now like to suggest that this bipolar form of correlativity is the normative form of private law.⁴² As Weinrib suggests, the most distinctive feature of private law is precisely the bipolar character of the relationship between plaintiff and defendant. Corrective justice thus brings out the normative standard implicit in the juridical interaction between two private parties. A wrong is a disturbance of the equality of two private persons, a breach of the duties one owes the other. For this reason, we may say that corrective justice governs a *horizontal* form of juridical relations, the relation between private parties.

Fusing the Aristotelian idea of bipolar corrective justice with the Kantian original right to independence, we may now see how corrective justice expresses a more determinate form of relational justice. Acts of corrective justice are bipolar and horizontal: they are more specific versions of respect for the other's original right to independence. Your property right to your laptop is not an *original* right, a right you possess in virtue of your standing as a person, but rather an *acquired* right, a right requiring a specific transaction on your part. Corrective justice governs your relationship as owner of your laptop and any other party. Every other person has a bipolar or relational duty to respect your property right. And

⁴¹ Aristotle does not align, as I will now do, forms of justice with private or public forms of relations.

Aspects associated with public law, such as punishment, figure for Aristotle as elements of corrective justice. As far as I know, such alignment was first and most clearly carried out by Kant's philosophy of right.

⁴² Weinrib, *The Idea of Private Law*, p. 76.

whenever someone breaches that relational duty by using your laptop without your permission or just by stealing it from you, that person disturbs the equal standing both parties enjoy under corrective justice. The thief dominates you by infringing your independence, by presuming to have authority over you in deciding unilaterally how your property is to be used. Thus, while relational justice is the generic form of justice governing the relationship of two parties as exclusively bearing the original right to independence, corrective justice is a bipolar and horizontal relationship linking two parties who bear any type of right against one another.

4. DISTRIBUTIVE JUSTICE AS THE OMNILATERAL AND VERTICAL FORM OF RELATIONAL JUSTICE

In spite of the necessary relationship between relational and corrective justice, corrective justice cannot be the complete manifestation of relational justice. By itself, corrective justice is normatively incomplete, imperfect, incoherent. It continues to allow forms of interaction inconsistent with the original right to independence constitutive of relational justice. In this final section, I want to show why distributive justice should be understood non-instrumentally as the completion or perfection of corrective justice and thus as a necessary aspect of relational justice. Where the two marks of corrective justice are the bipolar and horizontal form of the juridical relation, the two marks of distributive justice, as I shall understand it, are the omnipolar and vertical form of the juridical relation. Distributive justice introduces the unique, non-instrumental normativity of *public institutions*. Since it was Immanuel Kant who most clearly understood distributive justice in this way, in this section I shall turn to Kant's formulation of this non-instrumental conception of distributive justice.

It should remain clear that both corrective and distributive justice are necessary expressions of relational justice, two formal ways of rendering coherent a system of right. For that reason, both corrective and distributive justice remain relational or, in a sense, second-personal norms: rather than tracking independently intelligible values, they simply manifest two forms of interpersonal relations required by the original right to independence.

In order to bring into view Kant's distinctive, non-instrumental concept of distributive justice it is important to present and set aside three familiar ways of understanding the normativity of public institutions. Each of these accounts justifies a public authority by appealing to a familiar way in which one private person acquires an obligation from another.⁴³

The first type of account focuses on the normativity of a contract, understood as a voluntary transaction by which private parties acquire rights and obligations in exchange for an expected benefit. The second type of account focuses on cooperative fairness. If you and I profit from a common venture, you and I should bear equally the burdens requisite to such venture. The third type of account focuses on authorization. If you authorize me to act on your behalf, then you must accept responsibility for any act I perform as your agent. As a result, the first account justifies a public authority as a special type of contract, a "social" one; the second as a special cooperative venture, a specially large one involving everyone in a certain territory; and the third as a special authorization, an authorization where the other party gets to make laws for you.

Since our project is to formulate a non-instrumental and relational account of justice, we should reject these accounts for two reasons. First, they are unduly reductive. Their shared structure of explanation reduces the normativity of public institutions to that of private transactions. They all seek to justify the authority of the state as a form of private transaction. In our terms, the only form of normativity envisaged is *horizontal*, the form of interaction between private persons. But to the extent that corrective justice is incomplete, as we shall now see, such solutions will beg the question. The second and principal reason for considering an alternative is that these contractualist accounts deploy an instrumental form of justification. Public institutions are justified because they promote a purpose external to them. Thomas Hobbes justified the absolute authority of the state as the best means for individual self-preservation, desire satisfaction and peace. John Locke justified the limited authority of the state as the best means for the

⁴³ I am indebted here to Ripstein, *Force and Freedom*, p. 184.

protection of one's rights, but understood one's rights instrumentally, as grounded in my self-ownership, liberty and happiness.

Setting aside these standard accounts requires not only seeking an alternative answer to the question concerning the normativity of public institutions, but also formulating the question differently. As we have seen, David Hume sets up the problem of public institutions and justice in a familiar way. Given our empirical conditions of limited benevolence and scarce resources, to what rules of justice would agents like us agree? The answer to this question determines the content of our conventionally agreed rules of justice. But such rules are instrumentally justified: they are the best means of advancing our individual interests in such circumstances.⁴⁴ Such rules of justice provide the normative structure for public institutions. Public institutions are the best means of advancing our individual interests in such circumstances. Hume's way of framing the problem has been so influential that it is now difficult to frame the problem differently. Even "Kantian" theorists of justice like John Rawls appear to formulate the problem of justice and public institutions in a similarly instrumentalist way. At least early Rawls's account of the rules and circumstances of justice is avowedly Humean.⁴⁵

Immanuel Kant offers perhaps the clearest example of how to formulate the problem of distributive justice and public institutions non-instrumentally: is a system of corrective justice, a system of strictly horizontal relations, internally coherent? Kant's answer is that it is not: a purely horizontal system is partly inconsistent with the original relationship of right because it continues to permit forms of

⁴⁴ David Hume, *A Treatise of Human Nature* (Oxford: Oxford University Press, 1978), Bk. 3, §2, p. 494.

⁴⁵ John Rawls, "Justice as Reciprocity," in *Collected Papers*, Samuel Freeman (ed.) (Cambridge: Harvard University Press, [1971] 2001). "Since in the discussion of the common good, I draw upon another aspect of Hume's account of justice, the logical importance of general rules, the conception of justice which I set out is perhaps closer to Hume's view than to any other." (196) "In this description of the situation of persons, I have drawn on Hume's account of the circumstances in which justice arises ... It is, in particular, the scarcity of good things and the lack of mutual benevolence which lead to conflicting claims..." (200)

domination.⁴⁶ Public institutions are necessary precisely in order to make the system of right internally coherent.

A central aspect of the problem with a system of corrective justice concerns its unilateralism in the adjudication and enforcement of rights. Within a system of merely *horizontal* relationships, i.e., a system of rights composed entirely of private persons, the adjudication and enforcement of rights easily degenerates into a condition of domination. When two people disagree about the scope and content of rights, the decision of one can easily become an *arbitrary imposition* on the other and thus a form of domination.

The problem may be framed in terms of the skeptic's trilemma of justification. Begin from the thought that you and I share an original right to independence. As Kant puts it, this right means that you and I are equally entitled to act independently of the other's opinion and thus to do "what seems right and good."⁴⁷ But when you and I disagree about what our respective rights are, what course of action is compatible with our equal independence? If I simply assert that my interpretation of my right is correct, I shall beg the question against you, for you will disagree. My argument for my right, so to speak, is viciously circular. Put differently, if I stand on my right by acting on my interpretation of it, then my act will be *arbitrary*, for I have yet to justify my particular interpretation. And crucially, when we act on our respective readings of our rights and enforce them on the other, we are no longer interacting as equals. Each *dominates* the other. The arbitrariness in question is expressed in my domination of you or your domination of me. Right collapses into might, the right of the stronger. Alternatively, we could avoid this problem of circularity and arbitrariness by appointing a third, private party to resolve our dispute and enforce rights.

⁴⁶ For Kant's formulation of this question, see his *Doctrine of Right*, §41. Kant formulates this problem in 18th century terminology, namely, the transition from a "state of nature" to a "civil or rightful condition." It bears emphasizing that the transition is not historical or social, but normative. His question is about the normativity of the public institutions constitutive of a "rightful condition." His answer, which I will develop here, is that public institutions bear a unique normative form, the form of distributive justice.

⁴⁷ *Ibid.*, 6:312.

But this solution is also unstable. Given our equal entitlement to do what seems right, should the arbiter disagree with my reading of my rights, I have avoided one dispute only to create a new one with the arbiter. This impales us on the third horn of the trilemma, for it generates an infinite regress. Now we need to find a fourth party, one to arbitrate my dispute with the first arbiter, and so on. This is a perfect recipe not only for an infinite regress, but also for a multiplication of domination. Any private party that enforces rights will do so arbitrarily and to that extent dominate others. If I may put it this way, a pure system of corrective justice is incoherent because it generates a trilemma about adjudication and enforcement of the rights of private persons and permits systematic forms of domination.

Notice two key features of formulating the problem of the normativity of public institutions non-instrumentally. The first is that the problem emerges from a structural feature of corrective justice rather than from empirical features of the Humean “circumstances of justice” concerning our dispositions and the state of the world. The problem emerges because corrective justice is not fully consistent with relational justice by permitting forms of domination. As Kant claims, this problem would arise “however well disposed and law-abiding human beings might be.”⁴⁸ The problem of unilateralism in the adjudication and enforcement of rights makes no reference to our dispositions (how benevolent we tend to be) or our material circumstances (how scarce material resources tend to be). Instead, the problem of unilateralism arises due to the normative structure of corrective justice. The formal structure of corrective justice together with corrective rights and duties means that this same structure is subject to a number of interpretations. Consider as an example the rights to life and freedom of religion. The right to life clearly precludes murder, but when does the killing of another count as murder? Is the death-penalty murder?

⁴⁸ Ibid., 6:312. Cf. Rawls, “Justice as Reciprocity:” “Justice is thought of as a pact between rational egoists, the stability of which pact is dependent on a balance of power and a similarity of circumstances.” (204) “Among an association of saints, if such a community could really exist, disputes about justice could hardly occur.” (205)

And how about euthanasia? Since conflicting interpretations are open up space for domination, they are not merely of academic interest. In a purely private system of right, when you and I disagree about our rights, the only way to adjudicate our dispute and enforce our rights is to resort to force. But when I simply enforce my interpretation of my rights on you, I dominate you. I breach my original duty to respect your independence. A purely private system is partially incoherent, then, because it is partly incompatible with our equal independence. This is because with regard to the adjudication and enforcement of rights the corrective form of justice does not have the resources to solve this problem. Relational justice thus *necessarily* requires a new form of justice, one that introduces public institutions as a solution to this problem of *unilateral adjudication*.

The second is that this way of framing the problem also enables us to conceive differently the role of justice in practical thought. For the Humean and the two-level foundationalist, rules of justice figure in a “mid-level” of practical thought: rules of justice are valid *conditionally*, for they are contingent on functioning as proper remedies to problems generated by our empirical circumstances. When we change these circumstances, as I tried to do with Batistan, the rules of justice lose their validity. For the Kantian and coherentist, rules of justice figure in a basic level of practical thought: rules of justice are valid *unconditionally*, for their validity is not contingent on empirical circumstances. Instead, rules of justice derive their validity from the fact that they are necessary requirements of relational justice, the original relationship of right. Corrective and distributive justice are not third-personal remedies for life in conditions of limited generosity and scarce resources, but rather they are second-personal requirements for life in community consistent with our original right to independence.

This non-instrumentalist way of framing the problem of the normativity of public institutions also gives us the form of its solution. If the reason why purely corrective justice is partly incoherent is the problem of unilateralism generated by the exclusively *private* judgments of each party, the solution to the problem of unilateralism is the introduction of a *public* and *omnilateral* form of judgment. Public institutions are justified because they render a system of right coherent by replacing the private and unilateral judgments of disputing parties with a public and omnilateral judgment.

A dispute about rights requires not simply a third party for its resolution, but a *public* party. A public party solves the trilemma about the adjudication of rights because, unlike private parties, its own judgment about rights is *public* and *final*. The public character of such judgment lies in the fact that a public authority resolves the dispute by appealing not to her own judgment, but to the judgment of everyone. The judgment is public precisely in virtue of its *omnilateral* form. The judgment appeals to public rules available for *everybody* and thus appeals to rules that have the character of *law*. And the judgment is made by a judge who acts on behalf of everyone, and thus whose judgment is binding on everyone.

This is not the place to offer a detailed account of the normative source and status of a public authority. However, for our purpose it may be helpful to remark that this Kantian way of understanding distributive justice as the introduction of an omnilateral and public form of judgment exploits the republican connection between law and freedom. Where Thomas Hobbes arguably thinks of law necessarily as an impediment on our natural freedom, the republican tradition sees the law as *necessary* for freedom. We can be free from the private domination of others only by living under laws. Ideally, the rule of law is a condition where, as Rousseau and Kant had put it, we become independent from each other by depending instead on public laws.⁴⁹

But as republicans always cautioned, since public officials are themselves human beings, there is a constant danger that they may act for their private purposes rather than for public ones. A public authority is thus a double-edged sword: it makes possible our original right to independence by enabling a condition of private independence and dependence on public laws, but a public authority also brings with it the possibility of new forms of domination. This new form of domination is the domination by a private person disguised under the trappings of public law. In the classical understanding of Aristotle and Aquinas,

⁴⁹Jean-Jacques Rousseau, *Social Contract*, ed. and trans. V. Gourevitch (Cambridge: Cambridge University Press, 2009), I.8; and Pettit, *Republicanism*, pp. 173-178. For a non-instrumentalist reading of the rule of law, see also Kant's idea of the original contract as a form of "dependence on laws" rather than dependence on others, *Doctrine of Right*, §47.

this form of domination is the mark of the tyrant. Whereas proper political rule is directed to the “common good,” the tyrant exercises public power for private purposes.⁵⁰

Note, however, that saying that political rule is directed to the common good need not commit us to an instrumentalist picture. As Kant put the point, when persons representing a public authority pursue public purposes, they foster the well-being of the state,

by which it forms and preserves itself in accordance with laws of freedom... But the well-being of a state must not be understood as the *welfare* of its citizens and their *happiness*; for happiness can perhaps come to them more easily and as they would like it to in a state of nature (as Rousseau asserts) or even under a despotic government.⁵¹

Kant’s point here is the same one I made with regard to Batistan. Kant applies it to public institutions. If the justification of the public institutions of the state is instrumentalist (e.g., the promotion of individual welfare), we lose from view their immanent normativity. Individual welfare may be better attained through other means, such as a strictly private arrangement or a despotic public arrangement.

The central point is that corrective and distributive justice are equally required by relational justice and yet manifest different formal features: corrective justice is bipolar and horizontal, distributive justice is omnilateral and vertical. Whereas the horizontal form represents our bipolar relation of equal independence *vis-à-vis* each other, the vertical form represents our equal freedom *before the law*. Whereas the horizontal form is a two-place relationship, linking you and I in an indivisible juridical whole, the vertical form is a three-place relationship: you and I under *public* law, where the law and the public authority is a form of *we*. The introduction of this *we* means the introduction of a fundamental *asymmetry* into the system, for a public authority enjoys normative powers and duties no private person enjoys, such as the power to legislate, arbitrate juridical disputes, tax and so on. In short, through corrective justice our original right to independence sustains itself in bipolar relations of (arithmetical) equality, while through

⁵⁰ Aristotle, *Politics*, 3.7; and Aquinas, *Political Writings*, p. 8.

⁵¹ Kant, *Doctrine of Right*, 6:318.

distributive justice the original right to independence sustains itself in omnilateral relations of equality before public law. The paradigmatic form of corrective injustice is slavery, while the paradigmatic form of distributive injustice is tyranny.

It may help to further sharpen the non-instrumentalist character of this Kantian idea of distributive justice by contrasting it with the two familiar conceptions of distributive justice as a mechanism for the allocation of independently valuable benefits and burdens. On the one hand, neo-Lockean libertarians, such as Robert Nozick, try to account for distributive justice in exclusively private terms. A pattern of distribution is just only to the extent that it preserves the just holdings of private persons, and private persons have just holdings either in acquisition or in transfer.⁵² In turn, Nozick justifies the right to acquisition by appealing to the Lockean idea of self-ownership, your ownership of your body.⁵³ Nozick thus appears to make what I called the Monadic Assumption: he justifies justice in terms of rights and rights in terms of a monadic self-relation. And since the Monadic Assumption is necessarily instrumentalist, Nozick's account of distributive justice appears to acquire an instrumentalist character as well. On the other hand, egalitarian arguments, often attributed to Rawls, account for distributive justice in exclusively public terms. Distributive justice governs exclusively institutional arrangements to secure an equal distribution of benefits and burdens. Such views tend to be reductive, insofar as they reduce the normativity of private relations to public ones, and instrumentalist, insofar as they account for distributive justice in terms of the value of independently intelligible benefits and burdens.⁵⁴

By contrast to these accounts, the Kantian idea of distributive justice is not a mechanism for the allocation of extra-juridical benefits and burdens. Instead, it represents the duty of a public authority to preserve and perfect a rightful condition, a condition where the rights of all are protected by public laws.

⁵² Robert Nozick, *Anarchy, State, and Utopia* (New York: Basic Books, 1974), p. 151.

⁵³ *Ibid.*, pp. 149-182.

⁵⁴ John Rawls, *A Theory of Justice Revised Edition* (Oxford: Oxford University Press, 1999), §46, p. 226.

The ideal of distributive justice here is the ideal of the rule of law, where persons cease to depend on one another by depending on omnilateral and public law.

CONCLUSION

The model of justice defended by Carneades, Hobbes, Hume, and most contemporary theorists of social justice implicitly assumes that an order of juridical judgments must be grounded in a monadic judgment representing a value intelligible independently of any juridical categories. Justice is the best means, the most appropriate remedy, for self-preservation, individual welfare, personal autonomy or the satisfaction of basic needs. Similarly, to the extent that corrective justice represents a bipolar and horizontal juridical nexus, instrumentalist accounts collapse corrective justice into distributive justice and then account for distributive justice as a mechanism for the allocation of independently valuable benefits and burdens.

As I have been arguing, lest we give up the original practice of claiming rights against one another and our self-understanding as possible subjects of wrongs, we must acknowledge the validity of the original right to independence. I have argued in this chapter that once we acknowledge our equal authority, our equal title to independence from the domination of the other, we must also acknowledge the validity of relational justice. There is no need for an additional argument for relational justice for the simple reason that relational justice is the name of the original relation of right: our shared, reciprocal original right to independence correlated with the original duty to not dominate the other. So long as we act in accordance with such original duty, we act consistently with our equal standing as persons. In turn, I argued that a system of rights is incoherent unless relational justice branches out into two distinct forms of justice, one corrective (bipolar and horizontal), the other distributive (omnipolar and vertical). The argument for these two forms of justice is equally non-instrumental: both forms are equally required by the original right to independence, for denying them would be tantamount to permitting a form of domination. Given the identity of rights and justice, beautifully captured by Aquinas's fusion of both concepts under the idea of *ius*, we may now see that these three forms of justice are just as necessary as original right: giving them up is tantamount to giving up the practice of rights and your self-understanding as a juridical subject.

As should be clear, this form of justification of justice is coherentist rather than foundationalist. I have argued that the reason why we should endorse rules of justice is not that these secure independently intelligible goods better than their alternatives, but rather that they are necessary to render a system of rights internally coherent. Revealing this web of necessary relationships means that commitment to one entails a commitment to the others. The moment you address another to respect your rights, you manifest your commitment to the original right to independence and to the three forms of justice. It is now time to extend this coherentist form of argument to the next and crucial step: human rights. We are now in a position to see why human rights matter. Just as the three forms of justice are constitutive of the practice of making claims of right against one another, so too we justify human rights by revealing them to be the constitutive norms of that same practice. Human rights are those rights which are necessary and universal, the conditions of the possibility and meaningfulness of making even a single claim of right.

Chapter 4

Why Human Rights? A Constitutive Vindication

Our initial puzzle about human rights was that it appears to belong to the very concept of a human right that such right must be valid *universally*, and yet the familiar accounts, relying on standard foundationalist and coherentist models, appear unable to yield a right that could be universally valid. The central problem was the instrumentalism of foundationalism and the arbitrary particularism of coherentism. Our puzzle also contained the form of its resolution: we should account for rights non-instrumentally and relationally without succumbing to the arbitrary particularism of standard coherentist accounts.

Having vindicated the generic idea of a right – as an enforceable claim to independence – and the three forms of justice – as necessary forms of relations of right – my aim in this chapter is to return to our puzzle and offer a relational account of human rights as the puzzle’s solution. On the relational account, we justify human rights non-instrumentally and second-personally as those rights which function as constitutive conditions of the relationship of right, that is, as constitutive conditions of claiming any rights against others and holding others to be under juridical duties.

The relational account avoids the perils of foundationalism because it is non-instrumentalist. Human rights matter not because they secure independently intelligible goods, but rather because they are necessary to just relations to others. Without them, the relationship of right is impossible: you cannot claim rights against others and others cannot hold you to be under a duty to respect their rights. Similarly, the relational account avoids the perils of standard coherentism by presenting human rights as *a priori*, that is, as constitutive conditions of any specific form taken by the relationship of right. While it is easy to reject the practices to which standard coherentists key human rights (e.g., liberalism or the current state system), it is impossible to reject the practice of claiming rights without giving up our most essential self-understanding as subjects of possible wrongs. Contrary to what skeptics typically suppose, we cannot give up the idea of human rights while preserving our standard practice of claiming rights against one another. Without human rights, relations of justice, any form of claiming rights against others, become impossible.

My argument proceeds in three steps. First I seek to vindicate the idea of a human right by justifying human rights as constitutive conditions of the relationship of right. Following Kant, I develop a version of coherentism I shall “*a priori* holism,” a form of coherentism that gives the *a priori* a key

justificatory role. In this way, I offer what might be understood as a “transcendental deduction” of the idea of human rights. Then, I further justify my relational account by showing how it is dialectically superior to its familiar foundationalist and coherentist alternatives, since it meets the universality constraint with much more ease and provides a powerful refutation of regular skeptical critiques of human rights. In the final section, I distinguish two forms of skepticism – regular and radical – in order to show that the form of argument against each must be different. While we refute the regular skeptic by revealing a latent incoherence (the regular skeptic cannot coherently deny the validity of human rights while affirming the validity of ordinary rights), we refute the radical skeptic not by uncovering a latent incoherence, but rather by revealing the radical skeptic’s demand for *external justification* to be itself unjustified. Should this two-fold refutation of the skeptic succeed, it would vindicate my claim to have offered a virtuously circular justification of human rights.

1. HUMAN RIGHTS AS *A PRIORI* RIGHTS

In this section, I want to elaborate an *a priori* holistic account of human rights and to offer what might be understood as a “transcendental deduction” of the idea of a human right. In doing so, I shall draw inspiration from Immanuel Kant’s non-foundationalist concept of the *a priori* and his conception of *a priori rights*.¹ However, I should clarify that my purpose is not strictly speaking historical, a faithful rendition of Kant’s doctrine. Instead my purpose is to articulate a form of justification for human rights that solves our puzzle. For this reason, I shall not defend my reading of Kant, but focus on the force of the argument itself.

Before going on to explain what I mean by an *a priori* right, I should briefly defend the juridical understanding of human rights, that is, the view that human rights function as *proper claim rights*. Some argue that we should understand human rights more loosely, as consisting primarily of high priority goals. Thus, James Nickel, for instance, claims that forcing human rights into the “narrow conceptual framework”

¹ I develop a more textually based account of a Kantian conception of human rights in “Kant’s Juridical Idea of Human Rights,” in *Kantian Theory and Human Rights*, *forthcoming*.

of rights (strictly construed) does not serve well “the human rights movement and its purposes.”² The problem with non-juridical views is that they have structural difficulties distinguishing human rights from other high priority goals such as the maximization of GDP, finding the cure for cancer or the pursuit of love and friendship. As I have argued, rights have a unique normative structure, for they bind parties in a relationship of juridical correlativity. My right entails and is entailed by your duty. Non-juridical accounts are problematic, then, not only because they miss the correlative and relational function of human rights, but also because they lack the means for distinguishing human rights from other high priority goals. In a related way, Joseph Raz offers the following *reductio*: “... if the love of my children is the most important thing to me then I have a right to it.”³ The basic problem of non-juridical views, then, is that by conceiving of human rights as protections of what is most important in life, they become *overinclusive* and collapse the concept of a human right into that of any high-priority goal.

I am suggesting, then, that the first criterion for any human right is that it bear the juridical structure of juridical right. Such a right places others under a relational duty of respect and generates an

² See James Nickel, "Human Rights", *The Stanford Encyclopedia of Philosophy* (Spring 2013 Edition), Edward N. Zalta (ed.), forthcoming URL = <http://plato.stanford.edu/archives/spr2013/entries/rights-human/>, at §3. I use Nickel’s entry to the Stanford Encyclopedia to signal that Nickel’s view is representative of many others and that, if Nickel advances such a claim in the presumably “neutral” terrain of an encyclopedia entry, Nickel takes this claim to be relatively uncontroversial. For a recent defense of the view that human rights ought not to be understood as claim-rights but rather as generic political goals, see for example Christine Chwaszcza, “The Concept of Rights in Contemporary Human Rights Discourse,” *Ratio Juris* 23:3 (2010), pp. 333-364.

³ Joseph Raz, “Human Rights Without Foundations,” in S. Besson and J. Tasioulas (eds.), *The Philosophy of International Law* (Oxford: Oxford University Press, 2010), p. 365.

authorization to enforce such duty. The second criterion is that human rights will be those rights which enjoy *a priori* status.

The second criterion may appear surprising, since the standard conception of the *a priori* is foundationalist. Rationalist and empiricist philosophers following René Descartes or John Locke tend to understand the *a priori* in a foundationalist manner. On this understanding, the *a priori* has three key characteristics. First, it is *non-inferentially* justified: empirical judgments depend on the *a priori* for their justification but the *a priori* depends on no other judgments for its justification. We might say that the self-justified status of the *a priori* is an atomic property the judgment in question bears in isolation from any other judgments. Second, the *a priori* is self-justified in the sense that it is supremely *evident* or *certain*. And third, the *a priori* must be comprehended through a special form of *intuition*. In short, the *a priori* amounts to foundational bedrock, a self-justifying proposition whose supreme evidence is simply intuited, to borrow a Cartesian and Lockean metaphor, by the “natural light of reason.”

By contrast the conception of the *a priori* I wish to deploy here is *non-foundationalist*, since the *a priori* as I shall understand it bears none of these three features. The *a priori* is discursive rather than intuitive and need not be supremely evident or certain. On this coherentist conception, the *a priori* is *inferentially justified* in virtue of its unique function in a discursive practice: the *a priori constitutes and normatively governs a certain form of activity*. We might say that *a priori* stands to activity as form stands to matter. Crucially, comprehending the *a priori* through its constitutive, normative function means that the *a priori* must be justified inferentially, since the *a priori* is not justified in virtue of a property enjoyed atomistically, but rather in virtue of its inferential relations to other judgments.

This non-foundationalist concept of the *a priori*, which we may now call the *constitutive a priori*, is arguably the concept deployed by Immanuel Kant.⁴ Kant’s use of the *constitutive a priori* is perhaps better

⁴ I rely here on Graciela De Pierris’s illuminating discussion of the *constitutive a priori*. See her “The Constitutive A Priori,” *Canadian Journal of Philosophy*, Supplementary Volume 18, December 1992, pp. 179-214.

known through his theoretical philosophy. In the now familiar phrase, the *a priori* plays a constitutive function in the sense that it “makes experience possible.” And since Kant understands *experience* normatively, the *a priori* is a condition of the *meaningfulness* and *objectivity* of empirical knowledge. Furthermore, the two marks of the *a priori* for Kant are universality and necessity.⁵ Putting these thoughts together, we may interpret the claim that the concept of causality, for example, is valid *a priori* as the claim that causality is a *constitutive condition* of empirical knowledge. The abstract concept of a cause is universally and necessarily valid because it is a constitutive condition of the *meaningfulness* and *objectivity* of any possible empirical cognition.

I shall call *a priori holism* the form of justification that appeals to the constitutive function of the *a priori*. As I have just remarked, *a priori* holism departs from foundationalist models because the *a priori* is justified inferentially and is therefore discursive and not necessarily self-evident. And yet, *a priori holism* also departs from standard coherentist models to the extent that coherentism need not assign any special inferential role to the *a priori*. Thus, W. V. Quine’s *naturalist* (or *a posteriori*) *holism*, for example, is the coherentist view that any (theoretical) belief ought to be justified in essentially the same *empiricist* manner. In his classic statement, Quine argues that our statements about the external world, regardless of their centrality in our empirical web of beliefs, should “face the tribunal of sense experience not individually but only as a corporate body.”⁶ Quine’s naturalist holism was designed explicitly as a rejection of the Carnapian concept of analyticity, but Carnap, significantly for our purpose, had conceived of analyticity in terms of the *constitutive function* of the logical sentences of a given formal language.⁷ Quine’s coherentism is a

⁵ Immanuel Kant, *Critique of Pure Reason*, B4: “Necessity and strict universality are therefore secure indications [*Kennzeichen*] of an *a priori* cognition, and also belong together inseparably.”

⁶ W. V. Quine, “Two Dogmas of Empiricism,” *The Philosophical Review* 60 (1951): pp. 20-43, at p. 38.

⁷ Rudolf Carnap, *The Logical Syntax of Language* (New York: Routledge & K. Paul, 1937), §§82-83. For discussion, see Michael Friedman, *Dynamics of Reason* (Stanford: CSLI Publications, 2001), p. 32. Friedman

posteriori, then, in the sense that Quine leaves no room for the justification of certain judgments in virtue of their constitutive function. Instead, all judgments must be justified *empirically*. For this reason, *a priori* holism promises to offer an alternative justification for human rights.

My *a priori* holistic proposal, then, is that human rights are justified in virtue of their *constitutive function*, or more precisely, in virtue of their role as the conditions of the possibility and meaningfulness of the relationship of right. Without human rights juridical rights and duties are meaningless.

But how do we establish the constitutive status of a certain kind of judgment? Unlike foundationalist models, we cannot appeal to a special intuition. Instead, we must appeal to a special discursive function. Kant called the vindication of a certain concept in virtue of its constitutive function the “transcendental deduction” of said concept.⁸ I use this term reluctantly because it tends to conjure the image of a mysterious, super-logical formal deduction, but Kant’s idea is in fact straightforward. By ‘deduction’ Kant does not mean a rigorous deduction in the mathematical or logical sense of the *deduction* of a theorem from axiom, but rather the quasi-legal defense of our entitlement to a certain claim, the insight into the normative *necessity* of the concept.⁹ This defense is “transcendental” in the sense that we vindicate the concept in question by revealing it to function as the “condition of the possibility of experiences,” or in our terms, by revealing it to be the constitutive normative condition of a certain activity.¹⁰ Such defense proceeds in two moments: one is objective or regressive (a regression to the ground as the unconditioned condition of possibility and meaningfulness of the activity) and the other subjective or

argues that Immanuel Kant’s constitutive understanding of the *a priori* directly influences Carnap’s treatment of analyticity for a formal language.

⁸ Kant, *Critique of Pure Reason*, A84-5/B116-8.

⁹ Dieter Henrich, “Kant’s Notion of a Deduction and the Methodological Background of the First *Critique*,” in *Kant’s Transcendental Deductions*, Förster (ed.) (Stanford, CA: Stanford University Press, 1989).

¹⁰ *Critique of Pure Reason*, A94/B126.

progressive (a progression from ground to the grounded activity).¹¹ This sets up the task for a vindication of the idea of a human right: we must reveal human rights to function as the conditions of the possibility and meaningfulness of any claim of right first *regressively* and then *progressively*.

The *regressive* argument can be put as follows. The relationship of right presupposes human rights as its constitutive condition. Since the relationship of right consists in the correlative relation right-duty, the argument may be run equally from either pole. I shall do so only for claims of right, since the parallel argument for duties would be identical.

Any specific claim of right presupposes a human right as its constitutive condition. For example, begin with any property right, such as your right to the land you own, to the watch you inherited from your grandfather or to the clothes on your back. When you have a property right to your watch, this is a specific (empirical) right, a right that is contingent on your having acquired (purchased or received as gift) a specific watch. No one else (hopefully!) has a property right to *your* watch. However, your *specific* property claim presupposes a *generic* human right to own property. The generic human right is not empirical in the sense that it is not a right to a specific object in the world, but rather it represents your generic title to acquire property. Were you not entitled to this generic human right to own property, it would be impossible for you to have any specific property rights. If you had the status of a slave, who lacks the generic right to own property, it would be impossible for you to ever acquire a watch as your property. Your continued possession of your watch would always be subject to your master's grace in not taking it from you. Thus, the property right to specific empirical objects presupposes your human right to property. The *generic* human right to property is a condition of the possibility and meaningfulness of your specific

¹¹ See for instance A149/B188, A336/B393-4, and A411/B438. Kant also explains the necessity of both moments to a defense of the *a priori* by contrasting philosophical principles with mathematical theorems. A philosophical principle has the "special property that it first makes possible its ground of proof, namely experience, and must always be presupposed in this." (A737/B765)

property rights. In *claiming* your right to your watch, you *proclaim* your generic human right to own property.

The same argument can be repeated for other human rights. Your specific property rights also presuppose your generic human right to life and security of the person. If anyone had the title to take your property by depriving you of your life or interfering with your person, then it would be impossible for you to have any stable specific property rights. Whether or not you own your watch would be contingent on someone else's not deciding to kill you or forcibly take it from you. Similarly, if you are to enjoy your right to your watch, it must be possible for you to settle disputes with others about who is the rightful owner of the watch or in less definite cases, as in property of land, it must be possible to settle disputes about where your property ends and mine begins. Specific property rights presuppose, then, that we can arbitrate our dispute in a manner consistent with our generic right to own property. This reveals that specific property rights also presuppose human rights to due process. Without the right to due process, without our treatment as equals under the law, the process of arbitration would regard one of us as *more entitled to property than the other*. And if the rules that arbitrating our dispute are going to be truly fair and impartial, the argument can be made that these rules must be the result of a democratic process of legislation, where the rules do not represent some but all in the community. This would also reveal the constitutive function of a human right to political participation.

But now we must take the regressive argument a step further. What unifies all these *a priori* rights? What makes human rights a *system* rather than a random aggregate of rights? The ultimate constitutive condition of any claim of right is what we might call the *original right to independence*. Kant called this the sole *innate right*.¹² The original right to independence functions, as it were, as a *meta-right*, the right to have rights. Your independence is not the metaphysical property of being an uncaused cause, but nothing other than your status as an equal rights-bearer. Another way to put the point is to say that you are independent in the sense that others lack *authority over you*: your independence means that no one is entitled to set the ends

¹² Kant, *Doctrine of Right*, 6:237.

you are to pursue.¹³ Kant says that this original right immediately involves the following authorizations: original *equality* and thus “a human being’s quality of being *his own master (sui iuris)*.”¹⁴ Thus the basic form of violating this original right is *domination*, acting as if one were the other’s master. A slave is the exemplary figure of one who is not entitled to have rights and is therefore wholly subject to the will of the master. The master proclaims supreme *authority over* the slave by making the slave an *instrument of her will*.

Needless to say, your original right to independence is the *supreme constitutive condition* of any claim of right, for if you did not have the right to have rights you would have no rights whatsoever. The principle of independence offers a plausible gloss on the organizing principle enshrined in the first article of the Universal Declaration of Human Rights (UDHR), “all human beings are born free and equal in dignity and rights.” To be born free and equal in dignity and rights just is to enjoy the original right to independence, the equal title to have rights. Whenever you claim a right against another you *proclaim* your original right to independence as the supreme condition of the possibility and intelligibility of any claim of right.

Let me sharpen this regressive argument by clarifying its scope and preempting an objection. So far I do not claim to have vindicated any *specific* right, but rather merely the *idea* of a human right. Human rights are universally and necessarily valid as the constitutive conditions of any claim of right. If successful, the regressive argument reveals that if a *single* claim of right is valid, such as your claim to your watch, then some human rights must be valid. Furthermore, human rights may now be seen as the *direct requirements* or *direct aspects* of the original right to independence. And since the original relation of right is identical with relational justice, human rights also function as direct requirements of relational justice. The original right is not a *further ground*, an end to which human rights are means. Instead, human rights *specify* what it means

¹³ Kant defines external freedom as “independence from the constraining choice of another (*Unabhängigkeit von eines anderen nötiger Willkür*).” (6:237) Arthur Ripstein provides an illuminating discussion of this relational, republican idea of freedom as independence in *Force and Freedom*, chapter 2.

¹⁴ *MM* 6:238.

for you to enjoy the title of independence in your relations to others. Put negatively, human rights constitute protections against more determinate yet generic *forms of domination*, such as the denial of your independence qua property owner, qua equal under the law, qua member of a religious community of believers, or qua equal participant in the political community. Remove the right to independence and human rights and ordinary claims of right vanish in thin air.

The objection I want to preempt is that the regressive argument proves too much, for it may be used to justify as human rights certain rights not normally attributed this special status, such as the right to bear arms. Does my regressive argument not help to vindicate a generic right to bear arms as the constitutive condition of the specific right, say, to bear your grandfather's rifle?

The problem with this objection is that the envisaged case never reaches the level of the *a priori*. The right to bear arms is not *a priori* partly because it does not have a constitutive function and partly because it is not sufficiently generic. It counts as a guise of a generic property right, a right to own a *certain type of thing*. Similarly, your property right to your iPhone does not presuppose a generic right to bear cell-phones, but rather the generic right to own things, regardless of the *type of thing owned*. More substantively put, were you denied the right to bear arms, it is at least not clear that you would be denied your title to independence, for if everyone is denied by law the right to bear arms, you are not thereby made subject to the will of another. All are subjected equally to the coercive authority of a public authority, which is arguably not a form of domination. The problem illustrates that human rights function as constitutive conditions of claims of right precisely by specifying the direct requirements of your original right to independence. Human rights function as the direct requirements of relational justice.

We now possess a more thorough articulation of the second criterion for a human right. *R* functions as a human right if and only if *R* is a constitutive *a priori* condition of the possibility and meaningfulness of the relationship of right (that is, of any claim of right or any relational juridical duty whatever), and *R* is a direct requirement, an aspect, of your original right to independence.

In order to make my “transcendental deduction” more complete, let me now briefly formulate the *progressive* version of the constitutive argument for human rights. The progressive argument must reveal

how it is that the original right to independence and the specific human rights that function as its aspects *constitute* a system of rights. In particular, I argue that we should vindicate human rights as constituting three forms of relations of right: horizontal relations of equal authority among private persons, vertical relations of unequal authority between private persons and a public authority, and public horizontal relations of equal authority among states.

That human rights must have the first two relational dimensions follows from my previous discussion of the three forms of justice. If human rights are direct requirements of relational justice, but relational justice is internally related to corrective and distributive justice, then human rights must also function as direct requirements of corrective and distributive justice. In other words, human rights must possess both a bipolar-horizontal and an omnilateral-vertical dimension.

If the original right to independence is the supreme organizing principle of a system of right, it follows that every person bears equally this very same right, that is, no one has *authority over another*. Such authority would be a breach of the original duty of non-domination. From this it follows that every person stands to any other in a *horizontal relation of equal authority*.

Corrective justice is not necessarily symmetrical, for my specific property or contract rights may be different from yours. However, the horizontal relation characteristic of corrective justice means that when it comes to human rights you and I stand in a perfectly symmetrical situation: my human rights are your human rights, and my duties of respecting your human rights are identical to your duties. For example, when you claim a right to life you thereby presuppose that every other person bears the very same right you have claimed for yourself, and you have the same duty to respect others' lives as others have to you.

However, we have also seen that a system of right structured exclusively by horizontal relations is incoherent for it permits forms of domination. Respecting our equal original right therefore requires introducing a new form of relationship to the system of rights, namely, the form of distributive justice. Unlike corrective justice, distributive justice is vertical and omnilateral.

It is important to note that the point I am making is not the *naturalist* one that public institutions are instrumentally necessary for the *enforcement* of otherwise perfectly determinate rights. Indeed, the point

is that a public authority is essential to determining what your *specific human right* is. My account is not naturalist, then, because public institutions are necessary both for the enforcement and for the articulation of the content of a human right. For example, to bear the right to life and security of the person is not to have a title to be alive or to live well, but minimally to not be deprived of one's life *arbitrarily*. The object of the right is not a *monadic value*, but a guise of independence. The right to life thus protects not a value you enjoy in isolation from life with others, but rather a specific form of relation with others, namely, a life without domination. A public authority is essential to the content of such right, first, because only a public authority can authoritatively interpret what an arbitrary termination of life means, and, second, because public authorities are also the standard culprit in breaching the duties correlative to this right. In *enforced disappearances*, the state secretly deprives a person from her liberty without informing anyone of the arrest. This is a form of domination because agents of the state subject you to their private choice, without the mediation of public laws.

Human rights, then, are the constitutive conditions of a second form of relationship of right, the vertical relationship between private persons and their public authority. And as we have seen, unlike the horizontal relationship of equal authority, the vertical authority governs the *unequal* authority of private persons and their public authority. As a result, this relationship is asymmetrical. A public authority enjoys second-order normative powers (of legislation, adjudication and enforcement) that no private person enjoys, while private persons enjoy rights (to life and security of the person, education, freedom of expression and so on) that no public authority bears. Similarly, this means that a public authority bears second-order duties of protection and promotion that no private person bears, such as the establishment of a judicial system for the protection and enforcement of rights.

And finally, once a public authority is introduced into a system of rights, a new form of relation emerges, namely, the relation among public authorities themselves. Explaining this form of relation shall be my topic in the last chapter. For now, it should suffice to say that human rights constitute and govern a third form of relation of right among independent persons: *the international relationship of equal authority among public authorities*. The protection and promotion of the human rights of persons under its jurisdiction is the

constitutive and regulative condition of any public authority. However, when a public authority flagrantly infringes this regulative condition, a duty gets triggered for other states to protect the rights of the affected persons.

These remarks about the three forms are undoubtedly sketchy. A proper articulation of each form would take us too far afield.¹⁵ The crucial point for our purpose is only to point out the proper *form of the argument*. A progressive vindication of human rights must reveal how a human right constitutes and governs each of the forms of relations of right: horizontal, vertical and international. As I have presented them, these forms are too abstract and indeterminate, but the main point is that each is a necessary requirement of the previous form and together the three constitute the proper development of the original right to independence. Thus, any human right that makes reference to only one form would be incomplete, and its complete development would have to show all three dimensions of the right.

In sum, in this section I have attempted to elaborate a “transcendental deduction” of the idea of a human right. As I have understood it, a transcendental deduction is not a mysterious super-logical and quasi-mathematical argument, but rather an insight into the constitutive necessity and universality of a certain concept. As Kant argues, there are two moments to such vindication, one regressive and the other progressive. My regressive argument is that any claim of right and any juridical obligation whatever presupposes human rights as the constitutive conditions of the possibility and meaningfulness of the relationship of right. My progressive argument is that the original right to independence, the supreme organizing principle of a system of rights, directly requires human rights, and that human rights constitute and govern three forms of relations of right: horizontal, vertical and international. The complete development of the idea of a human right would reveal the right in question to constitute these three forms.

2. *A PRIORI* HOLISM AND THE PROBLEM OF UNIVERSALITY

¹⁵ The task of the two next chapters is precisely to deliver on this promissory note by explaining how human rights constitute these three forms of relations of right.

Our puzzle was that neither of the two standard models of justification, foundationalism and coherentism, appear able to meet the minimal universality constraint. The problem for foundationalism is its instrumentalism, while the problem for coherentism is its arbitrary particularism. In this section I want to further develop my constitutive argument for the relational account by showing that it meets the universality constraint more easily, since it is neither instrumentalist nor ethnocentric.

The trouble for foundationalist accounts, I have argued, is their *instrumentalism*, the wedging of a justificatory gap between human rights and their ground. This gap exposes two foundationalist flanks for skeptical critique. First, the grounding value must itself be *universal*. Naturalist accounts offer as candidates the value of the natural human good (Finnis), of the perfection of our capabilities (Nussbaum), or of normative agency (Griffin). And second, to be universal, human rights must be the most effective response *anywhere* to threats to the grounding value. The skeptic can then mount a formidable critique of human rights by questioning the universality of the founding value and/or of human rights as the universally effective protections of said value.

What matters for my purpose is not whether this critique is *fatal* to the foundationalist (I suspect it is), but rather that my relational account occupies a dialectically superior position. Its non-instrumentalist character leaves no room for such skeptical critique, for universality is built into the very idea of a human right. Human rights are universally valid because they are the constitutive conditions of *any* claim of right *anywhere*. On my relational account, there is no deeper justificatory bedrock than the original relation of right, namely, the right to independence correlated with the duty of non-domination. Since this relationship is itself juridical, there is no *extra-juridical* ground for human rights, no ground *external* to the practice of claiming rights. To borrow a biological metaphor, the body of human rights is self-maintaining and self-organizing.

This solution to the problem of universality may appear illegitimate, insofar as I may be charged with having parachuted out of nowhere the original right of independence in order to help myself to universal human rights. But here is where the justificatory power of *a priori holism* begins to shine through. This objection would be forceful if I had only provided a *progressive* argument. Had I simply begun from the

original right to independence and then proceeded to justify human rights from it, the question naturally arises: “and why is the right to independence *original* or *justificatory bedrock*?” The regressive argument blocks this line of critique. Unlike foundationalist models, which would suppose the justification of the original right to be *atomistic* (say, in terms of its supreme self-evidence or intuitive character), my vindication of such right turns on its unique discursive function: the right to independence is an *original* right in the sense that it is the supreme organizing principle of a system of right. Without such meta-right to have rights, no right whatever is possible. Begin with any right whatever. Then start to strip the right of its empirically contingent features and concentrate on its constitutive form. The original right to independence emerged as the ultimate constitutive form of any claim of right. For that reason, universality is built into the very idea of a human right.

Human rights, then, do not operate at a “middle level” of practical reasoning, as foundationalist (interest) theorists such as Joseph Raz and Charles Beitz are prone to say. Human rights are universally valid because they are the ultimate, bedrock constitutive conditions of any claim of right whatever. For this reason, it is unconvincing to simply protest that I have arbitrarily postulated the original right to independence. A forceful critique would have to show that my regressive argument is incorrect, that is, that the original right to independence is not the supreme condition of the possibility any rights. A mere protest of *petitio principii* is not enough. I shall return to another version of this objection in the next section.

For the moment, let me strengthen this argument by showing how the constitutive account gives us the resources for responding more convincingly than foundationalism to three standard skeptical critiques: Zizek’s charge that human rights are a cloak for Western imperialism and hence culturally relative, the Benthamite charge that human rights are fictions, and the Marxist charge that human rights presuppose the fantastic picture of an atomic self.¹⁶

¹⁶ For an elaboration of these skeptical critiques, see above, chapter 1. See also Marie-Bénédicte Dembour, “Critiques,” in D. Moeckli, S. Shah and S. Sivakumaran (eds.), *International Human Rights Law* (Oxford: Oxford University Press, 2010).

Žižek speaks of human rights as “a false ideological universality, which masks and legitimizes a concrete politics of Western imperialism...”¹⁷ Instead of having to defend the universality of the foundation or of human rights as universal means to the grounding value, my relational account opens up two alternative lines of response.

The first is that the skeptic presupposes the validity of rights as a condition for the intelligibility of her criticism. Since ordinary rights presuppose the validity of human rights, the skeptic cannot coherently deny the validity of human rights while affirming the validity of ordinary positive rights. Differently put, the skeptic pursues an unmasking strategy: allegedly universal human rights are nothing other than the particular positive rights of a specific culture. But if the skeptic deprives herself of an appeal to ordinary rights, then her unmasking strategy cannot work: one cannot coherently claim that human rights are nothing but ordinary positive rights while denying that there are any positive rights whatever. And once the skeptic grants that there are positive rights, she has thereby committed herself to human rights.

The second argument does not require that the skeptic presuppose the validity of ordinary rights in order to formulate the charge of relativism. Instead, we need only point out in a different way that the skeptic cannot coherently deny human rights while affirming ordinary rights. Regardless of the culture from which the criticism is launched, so long as a single claim of right is made, the validity of human rights is thereby vindicated.

The second form of skeptical charge I wish to consider is the Benthamite objection that human rights are “non-sense upon stilts.” With characteristic rhetorical flair, Bentham declares natural rights to be mere fiction:

Right, the substantive *right*, is the child of law: from *real* laws come *real* rights; but from *imaginary* laws, from laws of nature, fancied and invented by poets, rhetoricians, and dealers in moral and

¹⁷ Slavoj Žižek, “Against Human Rights,” *New Left Review* 34 (2005), pp. 128-129.

intellectual poisons, come *imaginary* rights, a bastard brood of monsters, ‘gorgons and chimaeras dire.’¹⁸

Bentham’s objection here is that any right worth the name requires institutional recognition, but since natural rights do not require such recognition, they cannot count as “real rights.”

While this is a powerful criticism of naturalist accounts of human rights, whether foundationalist or coherentist, my relational account avoids it. Human rights, I have argued, make essential reference to a *public authority* (the vertical form of jural relationship). So unlike the naturalist, I have argued that human rights are essentially institutional norms.

Where a Benthamite and I depart is on our understanding of the role of legal recognition. The Benthamite objection presupposes a *positivist* or a *posteriori* understanding of rights: the claim is not simply that rights are unintelligible independently of institutions, but also that the validity of a real right is contingent on a specific, empirical legislative act. Bentham’s criticism assumes that the validity of every right must be a *posteriori*. We could only determine whether you bear a right to *x* by checking whether the right to *x* is legally protected in the jurisdiction under which you live. My regressive argument mounts a formidable challenge to this assumption. If that argument succeeds, it reveals Bentham’s assumption to be false, for ordinary *a posteriori* rights are not possible unless we presuppose the validity of *a priori* rights. Remove *a priori* rights and ordinary *a posteriori* rights vanish from view. So my reply to the Benthamite charge is that so long as Bentham is committed to the validity of ordinary positive rights (what Bentham calls ‘real rights’), the Benthamite skeptic can only deny the validity of human rights on pain of incoherence.

Finally, the third, Marxist skeptical objection is that any defense of human rights presupposes an implausible view of the self. The subject of human rights must be “abstract man,” a person whose agency is fully intelligible independently of any social relations or embodiment. Since naturalist accounts usually

¹⁸ Jeremy Bentham, *Anarchical Fallacies*, in Jeremy Waldron (ed.), *‘Nonsense upon stilts’: Bentham, Burke, and Marx on the Rights of Man* (London: Methuen, 1987), pp. 46–69, at §620.

suppose that you bear human rights in virtue of your humanity alone, they tend to spouse *essentialist* pictures of the human and open themselves to this Marxist objection. Foundationalist institutional accounts may fare no better, since Pogge's "basic needs" or Raz's "basic interests" appear to belong to the human as such independently of any social and historical conditions.

Now, since my relational account is not foundationalist, it does not ground human rights in the *human essence*. Instead, the justification of human rights turns simply on their function as constitutive conditions of the relationship of right. Indeed, bearing a right, to use a Heideggerian metaphor, is a form of *being-with-others*, a way of relating to others in a condition of non-domination and freedom. My account is thus shot through with sociality, for human rights constitute three forms of relationships (horizontal, vertical and international). Should we abstract from these relations, human rights would disappear. Therefore, my account requires no commitment to a noumenal, disembodied, and asocial self as the subject of right. The subject of human rights is an embodied person interacting with others under the supreme principle of the original right to independence.

My relational account thus appears to be dialectically superior to foundationalist accounts because it meets the universality constraint and responds to the three standard criticisms of human rights with much greater ease.

Since I have rejected foundationalism about human rights in favor of *a priori* holism, my position may be confused with a standard coherentist account. This would be problematic, for I have argued that coherentist accounts are vulnerable to the charge of *arbitrary particularism*, or *vicious circularity*. Rorty's liberal ironism is vulnerable to the charge of vicious circularity because Rorty's defense of human rights is only forceful for the liberal, who is already committed to human rights. If understood as a coherentist theory, Beitz's practice conception is vulnerable to a similar charge. If human rights are the constitutive norms of a historically contingent social practice (contemporary international relations), then human rights cannot be authoritative for those who stand outside the practice in certain respects, such as North Korea, China and the United States.

Once again, it is important to emphasize that I am not claiming to have *refuted* coherentist accounts by revealing them to be viciously circular. My argument is modest but more effective: a constitutive *a priori* account of human rights is dialectically superior to standard coherentist accounts because it resists more easily the charge of vicious circularity for two reasons.

The first is that *a priori* holism retains a role for the *a priori*, so that the justification for *a priori* human rights must be different from that of *a posteriori* rights, such as the right to bear arms or your right to your grandfather's watch. The second reason is that my *a priori* holism begins from what we might call a *basic or original activity*, rather than from a derivative or contingent fact. Standard coherentism begins from activities the skeptic can easily find suspect, or at least can easily question *from the outside*. *A priori* holism avoids the charge of vicious circularity by beginning from a *basic activity* the skeptic tends to take for granted.

Rorty begins from a contingent sociological fact that is relatively easy to challenge: *liberalism*. Liberalism is not only *diachronically or historically contingent* (for liberalism is a recent ideological invention), but is also *synchronically contingent* (for even in predominantly liberal states there is always a non-liberal portion of the population). Beitz begins from a contingent sociological fact that is relatively easy to challenge: *the modern international order*. This order is not only *diachronically contingent* (the modern order of states is a recent invention), but also *synchronically contingent*. It is not clear there is a single order, nor that this order is constituted by human rights norms. Even its most liberal members, such as the United States, refuse to recognize fully the normativity of human rights, for example by not ratifying the International Convention on Social, Economic and Human Rights or the Statute of Rome, which instituted the International Criminal Court. So it is easy to challenge Beitz's claim that there is currently a single sociological practice structured by human rights. And once the unity of this practice is broken, the coherentist has no non-question-begging way of justifying human rights to those who perceive themselves as outsiders of the practice. Thus, the fact that the coherentist tends to begin from relatively contingent facts renders their accounts plausible targets for the charge of vicious circularity.

The key contrast with my relational account should now be clear, for I begin from the *basic activity* our three skeptics (cultural relativist, institutional and Marxist) tend to take for granted: the relationship of right, claiming rights against others and holding them to be bound to respect our rights.

This may invite the immediate objection that the relationship of right is not really basic. Richard Tuck, for instance, argues that the concept of a right only emerged in the thirteenth century and was utterly absent from ancient politics.¹⁹ But even if this historical thesis is true, it does not establish that the practice of claiming rights only appeared at that time. We ought to distinguish the philosophical concept of a *subjective right* from the *ordinary activity* of claiming a right against another. It would be absurd to suggest that when an ancient Greek claimed a title to have her lent property returned this was not a juridical act of claiming a right or that such exalted body of juridical thought as Roman law made no reference to a practice of claiming rights.²⁰

More formally put, while a skeptic can charge Rorty or Beitz with vicious circularity, none of the skeptics we have encountered can raise such charge against my account. This is because none of these skeptics denies the validity of ordinary rights. If the skeptic herself presupposes the validity of at least one claim of right, then she has allowed my regressive argument the foothold it needs in order to vindicate the idea of a human right.

3. A PRIORI HOLISM AND THE RADICAL SKEPTIC

Let me pause to reflect on the structure of my constitutive argument thus far. The argument has two stages. In the first stage, I offer a “transcendental deduction” of the idea of a human right, which itself has two stages, regressive and progressive. The regressive argument begins from any activity in the relationship of

¹⁹ Richard Tuck, *The Rights of War and Peace: Political Thought and the International order from Grotius to Kant* (Oxford: Oxford University Press, 2002), p. 1. See chapter 3, n. 10 above.

²⁰ The example I have in mind is Plato’s first formulation of the idea of justice as *giving back what is due to another*. See Plato, *Republic*, 331a-c.

right – claiming a right against another or being under a relational duty to another – and shows that the relationship is impossible without the idea of a human right. Human rights are revealed to function as the constitutive conditions, the conditions of the possibility and meaningfulness of any claim of right. When we carry out the regressive argument further, we see that human rights are organized by a single principle: the co-original right to independence and duty of non-domination. The transcendental argument is formal and general, so in its current shape it does not vindicate any particular human right. Instead, if sound, it vindicates the generic idea of a human right. The progressive argument shows that human rights structure three forms of relations of right, developing further the three forms of justice: the horizontal relation of equal authority between private persons, the vertical relation of unequal authority between private persons and their public authority, and the international relation of equal authority among states.

In §2, the second stage, I offer an additional, dialectical argument for the relational account: it meets the universality constraint with greater ease than familiar foundationalist and coherentist accounts, and it repeals the skeptic about human rights more effectively.

If sound, the transcendental and the dialectical arguments are extremely powerful vindications of the idea of human rights, for not only do they reveal the (non-instrumental and relational) normative structure of human rights as they function in juridical relations, they also refute the standard skeptic of human rights by beginning from terms to which the skeptic would agree. The skeptic of human rights supposes that we can abandon the idea of human rights without much ado. If sound, the transcendental and dialectical arguments show that the skeptic's position is problematic, for they show that we can only abandon the idea of human rights by also abandoning the relationship of right. My coherentist argument is virtuously circular, then, because it is not question-begging: it begins from the skeptic's taking the relationship of right for granted and denying human rights. My argument is that this denial is incoherent. Any claim of right presupposes human rights, and human rights presuppose the validity of ordinary rights and duties. So we cannot deny one while affirming the other.

If sound, then, the two versions of the constitutive argument (one transcendental, the other dialectical) vindicate the idea of a human right. Nonetheless, before closing, I want to address a new objection and further strengthen my constitutive argument by responding to it.

The objection is this: I am correct to dismiss the charge of vicious circularity because the skeptics we have encountered all take for granted the validity of ordinary rights, but why should they? My constitutive argument for human rights will appear viciously circular to any skeptic who questions not only the validity of human rights but also the *validity of any rights whatever*. In relation to such a skeptic, my account will appear arbitrary.

This objection requires extremely delicate handling, for the strategy for responding to it cannot be the same as my strategy for responding to the skeptics we have encountered so far. This is because by agreeing to the radical skeptic's terms – the need to justify externally the relationship of right – we may have already abandoned any hope of vindicating said relationship. The key issue, however, is that it is not clear that the radical skeptic's demand is itself warranted. Indeed, my central argument will be that this radical form of skepticism requires a different form of response: revealing the radical skeptic to be incoherent is not necessary for the virtuous circularity of my coherentist account. This is because, unlike the standard skeptic, the radical skeptic makes a demand for justification that is itself unjustified.

We should begin by noticing how unique is this skeptical charge and how different from the ones we have encountered. While the other three take for granted the relationship of right, the current skeptic can formulate her critique only by denying the relationship of right, by treating it as contingent and optional. If my constitutive argument is sound, one cannot launch a charge of vicious circularity from *within* the relationship of right, but can launch it only by questioning the validity of even this basic phenomenon, only by standing *outside* the relationship. We should distinguish, then, two forms of skepticism: the *regular skeptic* who denies the validity of human rights without denying the validity of the *basic practice* of claiming rights and the *radical skeptic*, who denies the validity of human rights *by denying the validity even of the basic practice*. Having distinguished these two forms of skepticism, we should pause to ask: what would count as a satisfactory response to a *radical skeptical objection* in the first place?

We might answer this question by distinguishing three strategies of response to the radical skeptic.²¹ An *ambitious* strategy seeks to answer the radical skeptic in essentially the same manner I have replied to the regular skeptic. When the radical skeptic challenges our position, we should dig deeper for a ground the radical skeptic and we share in common and then reveal the radical skeptic's denial of human rights to be incoherent. In order to avoid the skeptical charge of arbitrary supposition, foundationalists tend to deploy this ambitious strategy: the task is to unearth a deeper foundation that not even the radical skeptic can challenge coherently.

A key problem with the ambitious strategy is that it is unlikely to succeed: if the task is to begin from premises the radical skeptic cannot challenge, we risk requiring ever deeper foundations and triggering an infinite regress. Similarly, if the starting point for an account of rights must be one to which the radical skeptic agrees, we seem to have already conceded defeat before the account gets off the ground.

A recoil from the ambitious strategy is to adopt a *weak* strategy, where we simply declare our spade to be turned by the radical skeptic's challenge. At times, Rorty's vindication of human rights sounds this way: "From a pragmatist's point of view, the notion of 'inalienable human rights' is not better and no worse a slogan than that of 'obedience to the will of God'. Either slogan, when invoked as an unmoved mover, is simply a way of saying that our spade is turned – that we have exhausted our argumentative resources."²² There is nothing left to say to the radical skeptic, but simply to leave the backdoor of our practice open, should she wish to join us. The trouble with the weak strategy is that it says *too little* against the radical skeptic. Adapting Rawls's description of a *modus vivendi*, we may say that the weak strategy

²¹ I am grateful to Phillip Clark, Hasko von Kriegstein, Devlin Russell and Sergio Tennenbaum for helping me to distinguish these three strategies.

²² Rorty, *Irony, Contingency and Solidarity*, p. 83. I think Rorty's aestheticism offers something slightly stronger than the weak strategy: we should reel the skeptic in by telling stories of suffering.

seems to make our entitlement to the idea of human rights too “dependent on a fortuitous conjunction of contingencies.”²³

I think the best response to the radical skeptic occupies a middle ground between the ambitious and weak strategies. Without requiring that we provide a foundation the radical skeptic will accept, we can still say something more than the weak response. The middle ground, or “modest,” response is this: we can show that the radical skeptic’s demand for justification itself lacks proper warrant and should be rejected for that very reason.

One way to construct such an argument is to highlight a distinction I have relied upon but not yet made explicit, the distinction between a *basic or original activity* and a *derived or contingent activity*. We might say that certain activities we carry out are *original* in the sense that they are so basic that they are essential to our interpersonal relations, while others are *contingent* in the sense that we can stop doing them without challenging the basic character of such relations.

The first version of my constitutive argument is a *transcendental deduction* of the idea of a human right. Such argument reveals human rights to be *constitutive conditions* of the relationship of right. The radical skeptic prompts us to develop a new form of a constitutive argument, which we might call, somewhat reluctantly, a *meta-transcendental deduction*. Such constitutive argument reveals the constitutive function of the practice of claiming rights itself. In this new technical sense, a meta-transcendental deduction reveals the *original status* of a certain activity, the special role of that activity in constituting our ordinary interpersonal relationships.

Notice, however, a key contrast with the ambitious strategy. A meta-transcendental deduction vindicates a certain form of activity by revealing its original character, its constitutive function. As such, the argument remains constitutive and thus aims to justify the activity *from the inside*, as it were. By contrast,

²³ Rawls, “The Idea of an Overlapping Consensus,” in *Collected Papers*, ed. Samuel Freeman (Cambridge: Harvard University Press, 2001 [1987]), p. 421.

the ambitious strategy concedes to the radical skeptic's terms that the practice in question must be justified *from the outside*.

In vindicating the practice of holding one another responsible, P.F. Strawson appeals to the original status of such activity when defending it from the radical skeptic. In our newly minted terms, we may say that Strawson's argument is a *meta-transcendental deduction*. Here is what Strawson says:

But questions of justification are internal to the structure or relate to modifications internal to it.

The existence of the general framework of attitudes itself is something we are given with the fact of human society. As a whole, it *neither calls for, nor permits, an external 'rational' justification*. Pessimist and optimist alike show themselves, in different ways, unable to accept this... Compare the question of the justification of induction. The human commitment to inductive belief-formation is *original, natural, non-rational* (not *irrational*), in no way something we choose or could give up.

*(emphasis added)*²⁴

Strawson's response is not to offer a foundation the radical skeptic will accept nor simply to declare his spade to be turned. Instead, Strawson repeals the radical skeptic by arguing that the practice of holding one another responsible is *original* and "in no way something we choose or could give up." As such, the practice "neither calls for, nor permits, an external 'rational' justification." We might say that *original activities* are constitutive conditions of the activity of justification: they are not externally justifiable due to their constitutive status.

Let me put Strawson's point into sharper relief by comparing it with Rawls's early *practice conception* of rules. Rawls's basic thesis was a two-level foundationalism: rules are to be justified in virtue of their constitutive function in a certain practice, but the practice itself must be externally justified in order to be rational. Furthermore, Rawls had offered the game of baseball as the paradigmatic expression of a

²⁴ P.F. Strawson, "Freedom and Resentment," in *Freedom and Resentment and Other Essays* (London: Routledge, 2008), p. 25.

constitutive rule. We may now see the radical skeptic's objection as drawing from Rawls's practice conception: appealing to the constitutive function of rules cannot be enough for justification, since the practice must be "externally" justified. Applied now to my case, the skeptic argues that appealing to the constitutive function of human rights in the practice of claiming rights is not enough for justification, since the practice must be 'externally' justified, must be justified from premises the radical skeptic will accept.

Strawson's point gives us a way of constructing a modest response to the radical skeptic. The radical skeptic's charge lacks proper warrant insofar as the radical challenge collapses the distinction between original and derived activities. While derived activities (e.g., baseball) are susceptible to external justification, original activities (e.g., holding one another responsible, inductively forming beliefs, or claiming rights) are not. To the extent that we can reasonably distinguish original from derived activities and we can identify the practice of claiming rights as an original activity, we can declare the radical challenge (the demand for an "external" justification) as itself arbitrary.

The demand for an external justification of an original activity is arbitrary because it supposes without warrant that *all* forms of activities must be treated as *derived* activities, as apt for *external* justification. Carried to a logical extreme, the iterated demand for external justification generates an infinite regress. But if such demand generates an infinite regress, the demand itself must be unjustified. Once we unmask the radical skeptic's demand and see it is unwarranted, we should conclude that it is not necessary to a vindication of human rights that I begin from premises the radical skeptic will accept.

Indeed, Strawson's point strengthens my position even further, for there is not merely a similarity of strategy, there is a substantive similarity between Strawson's argument and my own. If Strawson succeeds in his vindication of the practice of holding one another responsible, he will thereby have vindicated the relationship of right, for the relationship of right is a subset of the practice of holding one another responsible. Thus, if Strawson's (meta-transcendental) argument succeeds in rejecting the radical skeptic about holding one another responsible, it also vindicates my position vis-à-vis the radical skeptic. Conversely, Strawson's practice of holding one another responsible encompasses much more than the more spare (and subset) practice of claiming rights against one another. We might say that where holding

one another responsible is the core of our interpersonal relationships, the practice of claiming rights is the core of such core: the most basic version of holding one another responsible. Dialectically, this means that even if it were possible for the radical skeptic to reject non-arbitrarily Strawson's practice at the level, say, of friendship, it would be considerably more difficult for the radical skeptic to reject non-arbitrarily the practice of claiming rights.

CONCLUSION

In chapter 1, I argued that foundationalist and coherentist attempts to justify human rights end up undermining the idea of human rights due to their apparent inability to meet the minimal universality constraint. Where we wanted a *universally valid* right, they yield merely a *locally valid* right.

Following Kant, I have argued that the most promising path to a vindication of human rights lies in a constitutive argument that deploys a version of coherentism I called *a priori* holism. I offered here three versions of that argument. The first is a transcendental deduction of the idea of a human right, which branches into two argumentative movements, one regressive and the other progressive. The second is a dialectical argument, revealing how my relational account meets the universality constraint with greater ease than the familiar foundationalist and coherentist accounts, while refuting regular skeptical critiques of human rights. The third version I labeled a *meta-transcendental* deduction. Instead of seeking to begin from premises the radical skeptic accepts, the task of such constitutive argument is to reveal the *original status* of the relationship of right. The radical skeptic's demand consumes itself, reveals itself as unwarranted, due to its problematic assumption that every practice must be *externally* justified. Such assumption is problematic because it generates an infinite regress, rendering the radical skeptic's demand unjustified.

The constitutive argument uncovers the latent normative unity of any human rights claim. Human rights matter not because they secure an independently intelligible end, but rather because they are the conditions of the possibility of our claiming rights against one another. Do away with human rights and you destroy the possibility of holding another to be under a duty to you.

The progressive version of the constitutive argument establishes that human rights constitute three forms of relations of right: horizontal relations of equal authority, vertical relations of unequal authority and international relations of equal public authority. In this way, human rights function as the conditions of the possibility of our relating to each other as equals, to our counting as equals before the law, and to the establishment of an international order of peace. The progressive argument offered in this chapter was deliberately provisional. The task of the next two chapters is to develop in detail the progressive argument. In chapter 5, I defend the indivisibility of human rights by arguing that human rights of all five traditional categories – civil, political, social, economic and cultural – fit the same form of thought, constitute equally the horizontal and vertical forms of justice. In chapter 6, I defend the thesis that human rights are matters of international concern by arguing that human rights constitute the form of international justice.

Chapter 5

The Unity and Indivisibility of Human Rights

Human rights, we are now frequently told, are indivisible: human rights encompass the five categories of civil, political, economic, social and cultural rights. In 1968, the Proclamation of Teheran was the first international instrument to assert that human rights are indivisible.¹ The second world conference, held 25 years later in Vienna, stated even more emphatically that all human rights are “universal, indivisible, and interdependent and interrelated.”² The UN General Assembly resolution that established in 2006 the Human Rights Council underlines that “all human rights are universal, indivisible, interrelated, interdependent and mutually reinforcing.”³

Although international lawyers and legal instruments frequently assert the indivisibility of human rights, philosophers tend to deny it. Prominent Kantian thinkers like John Rawls and Onora O’Neill argue that genuine human rights must be restricted to civil and political rights.⁴ Social, economic and cultural

¹ Art. 13.

² Vienna Declaration and Programme of Action, §5.

³ GA Res 60/251 (3 April 2006) preambular para 3. This and the previous two references are indebted to Theo Van Boven, “Categories of Rights,” in D. Moeckli, S. Shah and S. Sivakumaran (eds.), *International Human Rights Law* (Oxford: Oxford University Press, 2010), pp. 178-9.

⁴ John Rawls, “The Law of Peoples,” in S. Shute and S. Hurley (eds.), *On Human Rights: The Oxford Amnesty Lectures 1993* (New York: Basic Books, 1993), pp. 67-70. Rawls does not elaborate an explicit argument against “welfare rights,” but confines them to the status of political aspirations simply by excluding them from his list of genuine human rights. Onora O’Neill, by contrast, does elaborate an important argument against welfare rights focusing on the logical structure of a claim of right, which we shall encounter below. For a recent and succinct statement of the argument, see her “The Dark Side of Human Rights,” *International Affairs* 81:2 (2005): 427-439.

rights, usually lumped under the heading of “welfare” rights, remain important but only as “political aspirations.”

In contrast to these thinkers, my aim in this chapter is to vindicate the view expressed in international legal instruments that human rights are indivisible. More precisely, I shall argue that contrary to what is commonly thought, “liberty” and “welfare” rights fit under the same form of thought: all such rights count as human rights because they all play the same constitutive function as conditions of the possibility and meaningfulness of the relationship of right. The indivisibility of a system of human rights is guaranteed by the fact that all human rights are direct requirements of a single principle, namely, relational justice: the original right to independence and the co-original duty of non-domination.

My argument proceeds in three steps. First, I show why the two standard arguments for the indivisibility of human rights fail due to their instrumentalist character. Then, I present my formal argument for indivisibility, namely, that rights from all five categories fit under the same form of thought, play the same discursive function as constitutive conditions of the relationship of right.

Having introduced this distinctive conception of indivisibility, I consider in §3 what I shall call the “formal exclusion” objection that my formal solution is too formal because it cannot rebut formal arguments against indivisibility. Indeed, I develop four versions of the objection, which deploy the same structure of argument. They begin with a claim about the form of a judgment of human rights, and then they show that an alleged category of rights cannot count as a human right due to its lack of the formal feature. In the third step of my argument, then, I buttress my indivisibility thesis by showing how each version of the formal exclusion objection fails and in the process offer a more determinate picture of the form of the human rights judgment. Human rights are juridical norms because they correlate exclusively with perfect duties of justice. Human rights are double-barreled rights, correlating with both general, negative duties and special, positive duties. And finally, a system of human rights requires a single group right: the right to self-determination born by a public authority.

Let me pause to situate the current chapter in the argumentative structure of the whole dissertation. My argument in chapters 2 to 4 claims to vindicate the generic juridical form of thought – the

generic idea of a right, the three forms of justice and the generic idea of a human right. Even if such argument is sound, it is too indeterminate, for it does not establish which rights are to count as human rights. Rather than surveying a list of every single human right, the task of this chapter is to fill that gap by showing how and why rights from the five categories must count as human rights. The necessity of indivisibility lies simply in the fact that without human rights from each of the five categories, a system of right remains incoherent by permitting a form of domination. In addition, this chapter should fulfill my promissory note in the previous two chapters, that human rights are structured by the two forms of justice: the horizontal-bipolar form of corrective justice and the vertical-omnipolar form of distributive justice. In so doing, my relational account will integrate the key insights of naturalist and institutional accounts, which favor one type of relation over the other, without falling into their problematic instrumentalism. The justification of human rights remains non-instrumentalist as a version of *a priori holism*: rights from the five categories are justified non-instrumentally as the constitutive conditions of the relationship of right.

1. THREE INSTRUMENTALIST ARGUMENTS FOR INDIVISIBILITY

A standard form of argument against the indivisibility of human rights runs as follows. We begin with a rough distinction between “liberty” (civil and political) and “welfare” rights (social, economic and cultural). Then we observe that liberty rights possess a certain formal feature characteristic of human rights, such as generality (e.g., *everyone has the right to freedom from slavery*) or being correlated exclusively to negative duties (e.g., *everyone has the duty not to enslave others*). And finally, we conclude that “welfare” rights lack the formal feature in question.

An argument against, say, the human right to water might insist that human rights are general but the right to water is special, being held only against specific institutions, or that human rights correlate exclusively with negative duties not to harm but the right to water correlates necessarily with positive duties of help. For these reasons, we should not consider the right to water as a human right. By extending this form of argument to other candidate welfare rights, we would conclude that welfare rights cannot count as human rights.

My aim in this section is to briefly introduce three standard arguments for indivisibility and to argue that they fail due to their instrumentalist structure. Should my argument succeed, it would clear the ground for my own relational and non-instrumental defense of indivisibility.

Perhaps the most well known argument for indivisibility is that offered by Henry Shue. The argument proceeds in three stages.⁵ First, Shue identifies a basic value which rights (whether basic or not) are meant to protect, namely, basic needs. Basic rights, Shue maintains, “are social guarantees against actual and threatened deprivations of at least some basic needs.”⁶ The basic needs protected by rights are the *object* of rights, and enjoying the object of the right is therefore *enjoying the right* in question, rather than merely being entitled to the right. Second, Shue distinguishes basic from non-basic rights by suggesting that rights are basic “only if enjoyment of them is essential to the enjoyment of all other rights.” Shue’s point is that although basic and non-basic rights may be equally important in an axiological order, it would be self-defeating to sacrifice a basic right for the sake of enjoying a non-basic right. A basic right has a lexical priority in the protection of a basic need. And finally, Shue argues that the right to physical security counts as a basic right no more and no less than subsistence rights. Unless your enjoyment of water, health and food is guaranteed against standard threats, you cannot (fully) enjoy any other rights. If you suffer from thirst, hunger and disease, you cannot enjoy (fully), say, the rights to political participation, freedom of expression, or freedom from torture. If successful, this strategy provides a formidable argument for indivisibility. Shue argues that four different classes of objects (liberty, subsistence, security and political participation) meet his criterion for a basic right. Basic rights are indivisible because subsistence rights are just as basic as liberty rights.

⁵ Henry Shue, *Basic Rights: Subsistence, Affluence, and U.S. Foreign Policy*, 2nd Edition (Princeton, NJ: Princeton University Press), chapter 1. Shue also offers a second argument for indivisibility, based on the duties correlated to human rights. I will consider this argument below.

⁶ Ibid, p. 18.

However, as commentators have pointed out, this strategy is flawed, for Shue's criterion for a basic right is problematic.⁷ The central problem is that you can lack the substance of any basic right while actually enjoying the substance of other rights.⁸ If you lack freedom of association, adequate housing, or political participation, you may still enjoy freedom from torture, slavery or arbitrary detention. More poignantly, it seems that you can lack subsistence rights to adequate standards of food, water, health and shelter, while enjoying fully civil rights such as the right to due process or freedom of association. Conversely, suppose you are arbitrarily detained in Batistan, but that every prison in Batistan provides inmates with first-rate food, shelter and water. Furthermore, inmates have unparalleled access to a free and non-discriminatory health system. In such case, you would be denied the right against arbitrary detention while enjoying the rights to an adequate standard of living. If Shue offers the best form of argument for indivisibility, then we may begin wondering whether indivisibility is defensible.

However, more recently followers of Shue have formulated an alternative strategy for defending indivisibility, a strategy that is more explicitly instrumentalist. It focuses on the supreme weight of the interest(s) behind the questioned category of rights.

Thus, Elizabeth Ashford, for instance, tries to defend Shue's insistence on indivisibility by offering a more "substantive" approach.⁹ Ashford grants that it is *conceptually possible* to fully secure certain civil rights, like the right against torture, without securing the right to subsistence. Instead, she focuses on the *substantive* enjoyment of the rights in question. Developing, like Shue, an interest-based account of rights,

⁷ Thomas Pogge articulates this objection forcefully in his "Shue on Rights and Duties," in C. Beitz and R. Goodin (eds.), *Global Basic Rights* (Oxford: Oxford University Press, 2009).

⁸ Ibid., pp. 118-121.

⁹ Elizabeth Ashford, "The Alleged Dichotomy Between Positive and Negative Rights and Duties," in C. Beitz and R. Goodin (eds.), *Global Basic Rights* (Oxford: Oxford University Press, 2009).

her main argument is that the right to subsistence protects an interest so basic that “it is liable to outweigh the interests protected by any other right, where those interests come into conflict.”¹⁰

The argument, then, appears to be the following. Although it is conceptually possible for you to enjoy, say, the right against torture or slavery without fully enjoying subsistence rights (contra Shue), it is not *normatively* possible for you to fully enjoy such civil rights without subsistence rights. Given the supreme weight of subsistence interests, were your subsistence rights not fully met, you would be justified in waiving your rights against torture in order to meet your subsistence interests. If you are starving, you may reasonably accept to be tortured should this secure you food. Subsistence rights, then, should count as full human rights due to the supreme weight of the subsistence interest.

The key problem with the more “substantive” approach is that it has the paradoxical upshot of effectively denying indivisibility. By granting the subsistence interest a supreme weight to the extent that this interest alone should trump any other conflicting interest, Ashford unwittingly defends the mirror-image of the common argument for *divisibility*. The common argument begins from the supreme weight, say, of the interest in autonomy and then establishes that only civil and political rights should count as human rights because only such rights are necessary for the protection of the autonomy interest. Welfare rights are important but unnecessary, so they only count as political aspirations. Ashford reproduces this argument form but on the side of subsistence. The supreme weight of subsistence leads to the argument that only social, economic and cultural rights (“welfare” rights) should count as human rights, whereas “liberty” rights should count merely as political aspirations. Transplanted to the context of contemporary international politics, this argument would support the policies of countries like China and North Korea that deem the right, say, to political participation and due process as political aspirations to be sacrificed at the altar of the much weightier interests in economic development.

In response, it might be argued that a pluralist instrumentalist theory would account better for the alleged indivisibility of human rights. If human rights are grounded not only in the autonomy interest but

¹⁰ Ibid., p. 97.

also in the subsistence interest, then it would be easier to defend the thought that human rights may belong to all five categories. This appears to have been the original insight of Shue's account. It also appears to be Griffin's strategy for defending a version of indivisibility, since autonomy and minimum provision are equally important values of "personhood."

But I doubt that pluralist strategies are more likely to succeed. The central difficulty is with the instrumentalist character of the account. Any instrumentalist account grounds human rights in an independently intelligible value, most often characterized as an "interest." Thus, instrumentalist accounts make the justificatory nexus between human rights and their ground *external* and *contingent*. As a result, in some circumstances the grounding value may be better protected by violating or not recognizing human rights of a certain category. This is a version of the problem of instrumentalism we encountered in chapter 1. In those contexts, then, rights from the given category will not count as human rights because they will lack the proper instrumental necessity, that is, they will not be the best means for protecting the grounding value. If this analysis is correct, instrumentalist accounts simply cannot defend the indivisibility of human rights. No matter how the grounding value is characterized, whether it is autonomy or subsistence, whether there is one ground or many, so long as the justificatory nexus between human rights and their ground remains external, the system of human rights cannot be unified. Some categories of rights at one time or another will be rendered arbitrary.

2. A FORMAL VINDICATION OF THE INDIVISIBILITY OF HUMAN RIGHTS

If my argument is correct, any instrumentalist account fails to vindicate the indivisibility of human rights. We might conclude from this that we simply cannot defend indivisibility. But this would be premature. As I shall now argue, once we shed an instrumentalist account of human rights, we shall see that a system of human rights *must* be indivisible, that is, must contain rights from each of the five traditional categories.

My basic argument for indivisibility is formal. According to my relational account, there are two central criteria for a human right. The first is that it have the relational structure of a *claim-right*. The second is that said claim right be *a priori*. As discussed in the previous chapter, the idea of the *a priori* here is

non-foundationalist and inferential, referring to the constitutive function of a certain concept. *A priori* (or human) rights, I proposed, function as the constitutive condition of the relationship of right, that is, as the condition of the possibility and meaningfulness of any claim of right or juridical duty. Alternatively put, any human right functions as the specification and direct requirement of the original right to independence and the co-original duty of non-domination. The formal argument for indivisibility is then straightforward: rights from all five categories should count as human rights because they all meet these two criteria, manifest the same juridical form of thought, play the same constitutive function.

Another way to put the formal argument for indivisibility is that rights from all five categories are direct requirements of the original relation of right, namely, your original right to independence and the co-original duty of non-domination. Conversely put, human rights are indivisible, then, because eliminating any one of the categories of human rights would permit a form of domination.

Consider two standard liberty and welfare rights, such as the right to due process and labour rights respectively. On the relational account, both must count as human rights because they play the same inferential function: without them, your equal status as a rights-bearer is undermined and a form of domination is permitted. Without the right to due process you cannot be regarded as a full rights-bearer, because your status as an equal is undermined. You are deprived of an impartial and fair system for the enforcement of your rights. If some people are given special favors by the courts or if you can be imprisoned arbitrarily, then you are subject to domination, for in claiming your rights you become subject to the arbitrary will of others. There is a sense in which without the right to due process, you cannot have the status of full rights-bearer, for the enforcement of your rights is entirely arbitrary.

Similarly, consider the most basic form of the denial of labour rights: the permission of slave labour. A system that permits slave labour obviously permits domination. Once you are reduced to the status of a slave, you are deprived of the original right to independence, the *meta-right* to have rights. As a slave, you are subject to the will of your master and can claim no rights whatsoever. The rights to due process and labour rights (at least minimally understood) manifest the same form of thought: they are both

claim-rights necessary for your status as an independent rights-bearer. They are both *a priori* rights, constitutive conditions of the relationship of right.

Let me sharpen my formal argument by contrasting it with the standard instrumentalist accounts. Like Shue, I am claiming that human rights function as *presuppositions* of ordinary claims of right. Unlike Shue and Ashford, I give an account that is relational and non-instrumental.

The relational character of my account means that the *objects* of human rights must also be represented by a relational judgment. The object of subsistence rights, for instance, is not access to food, water and housing *per se*, as independently valuable goods, the satisfaction of *basic needs*. Instead, the object of a human right is always a guise of a claim to independence. “Subsistence” rights are then characterized relationally. A human right to food, for instance, would be justified not because hunger is a bad state of affairs, but rather because hunger subjects you to the will of another, by making you depend on the good grace of another to secure food. A human right to health would be justified not because disease is a bad state of affairs, but rather because disease subjects you easily to the will of another, by making you depend on the good grace of others to secure proper treatment. A monadic account like Shue’s has structural difficulties explaining why if subsistence rights are rights to food and water as independently valuable goods, the right to health or to life are not rights to be *healthy* or to be *alive*, which are clearly not human rights. Your human right to health cannot be violated every time you get sick, nor can your right to life be infringed if you die of natural causes.

The non-instrumental character of my account means that human rights are never justified by securing an independently valuable good. Human rights matter because they are specifications of what it means to respect one’s original and juridical duty to not dominate others, to act consistently with our equal authority to any other private person. The non-instrumental character of my account therefore means that it can explain indivisibility with far greater ease. Human rights are indivisible because rights from all five categories are *equally necessary* as specifications of the original right to independence. Without such rights, a system of rights is incoherent by permitting systematically a form of domination.

These two differences with the standard instrumentalist accounts have the crucial upshot that I, unlike Shue, do not need to claim that that without a human right no ordinary right can be fully enjoyed. In fact this may be possible. You may be deprived of the right to due process while enjoying your right to health. My relational and formal account allows us to characterize the problem differently: the issue with such a situation is that by denying the right to due process, the system of rights becomes incoherent. Although it is factually possible for you to enjoy a discrete right fully while being denied a certain human right, it is *normatively* impossible, for the denial of a human right involves an incoherence by contradicting the original right to independence.

We might say, then, that indivisibility is a property of the system of (human) rights as a whole. Indivisibility is necessary because if rights were divisible the system of human rights would be incoherent. To repeat, the system would be incoherent for the simple reason that it would contradict the organizing principle of such system – the original right to independence – by permitting systematically a form of domination. The idea of indivisibility represents, then, the idea of an organized system where every part (every human right) is normatively necessary for the whole (the co-original right to independence and duty of non-domination), and where the whole is necessary for every part.

3. THE FORMAL EXCLUSION OBJECTION

Before developing my formal argument in more detail, let me consider an important objection. One could accept my formal argument for indivisibility and yet maintain that all this argument shows is the indivisibility of human rights within a *limited category*. Should we focus on the form of the human rights judgment, we would see that “welfare” rights, say, cannot bear such form and, for that reason, cannot count as human rights. The objection, then, is that my formal approach is empty and cannot rule out such formal denials of indivisibility. Call this the “formal exclusion” objection.

Unlike the standard instrumentalist arguments, the formal exclusion argument, like my own, focuses on the form of the human rights judgment. But unlike my formal argument, this one defends *divisibility*. Although critics of indivisibility usually do not frame their arguments formally, I believe it is

fruitful to unify their objections in this manner. Considered formally, we encounter four main arguments in support of the formal exclusion objection. They follow a single strategy. They begin with a claim about the proper form of a human rights judgment. Then they show that a certain category of rights lacks this formal feature, and they conclude that member rights of said category cannot count as human rights. The four arguments focus alternatively on the form of duties appropriate to a human rights judgment (either perfect or imperfect; negative or positive) and on the form of the subject of a human rights judgment (either general or special; individual or group).

Since the formal exclusion objection has as its basis the validity of one of these formal arguments against indivisibility, its warrant is proportional to the soundness of these arguments. I shall now consider these formal arguments in turn and argue that they all fail and that, as a result, the formal exclusion objection has no force. The point of this exercise is not purely dialectical, for with the consideration of each formal argument a more determinate picture of the form of the human rights judgment should emerge.

4. THE FORM OF THE HUMAN RIGHTS JUDGMENT I: PERFECT DUTIES

Let me begin, then, with the argument against welfare rights that focuses on the perfect nature of the duties correlative to human rights. Call it the “perfect duties argument.”

The argument unfolds from two premises. First, it is claimed that human rights correlate exclusively with perfect duties. The distinction between perfect and imperfect duties is often attributed to Immanuel Kant.¹¹ The distinction is said to mark the difference between those duties that are exceptionless and whose content is fully delineated and those that are contingent on circumstances and

¹¹ See Griffin, *On Human Rights*, p. 51; Ashford, “The Alleged Dichotomy Between Positive and Negative Rights and Duties,” p. 100; and Onora O’Neill, “The Dark Side of Human Rights,” *International Affairs* 81:2 (2005): p. 430.

partially indeterminate.¹² Second, welfare rights, we are told, correlate exclusively with imperfect duties. As Griffin puts it, “the content of a welfare right, being a claim of the needy to be helped, does not indicate who of all those able to help has the duty to do so.”¹³ Welfare rights correlate exclusively with imperfect duties, then, for two reasons. They are contingent on circumstances rather than exceptionless. For example, what constitutes an “adequate standard of living” will vary from place to place (UDHR, Art. 25). And their content cannot be fully delineated, since the standards for the right will vary with the circumstances. Therefore, welfare rights cannot count as human rights.

My argument against the perfect duties argument is that it relies on a problematic conception of perfect duties. Once we recast this distinction along Kantian lines, we should have the resources to accept the first premise – human rights correlate exclusively with perfect duties – and deny the second – “welfare” rights too can correlate with perfect duties.

The distinction between perfect and imperfect duties drawn in the first premise is neither helpful nor faithful to Kant.

It is not helpful because perfect duties can be neither exceptionless nor fully delineated. Consider a staple of civil rights, such as the right to freedom of speech. The correlative duty of respect is not exceptionless. Sometimes others (especially a public authority) are entitled to restrict your freedom of speech, when you are inciting hatred or violence. The right to freedom of religion is similarly limited. Sometimes others (especially a public authority) are entitled to restrict your freedom of religion, for instance, when you claim that female genital mutilation is part of your religious practice. The duty of respect correlative to these civil rights is not exceptionless. But if these rights lack perfect correlative duties, they would not count as human rights. Surely we would want to avoid such conclusion.

The content of a human right and its correlative duty is never fully delineated either. The view that the content of a human right must be fully delineated betrays the naturalist assumption that human

¹² Ashford follows Thomas Hill in this characterization.

¹³ Griffin, *On Human Rights*, p. 51.

rights are fully specified in a pre-institutional condition. I have argued that human rights are always partially indeterminate and that they gain further determinacy only by the exercise of public (institutional) judgment. The UDHR, for instance, provides in its Art. 5 that “no one shall be subjected to torture.” But what counts as torture? This right remains particularly indeterminate in the UDHR and requires further determination by other international legal instruments. But if this staple of civil rights retains a degree of indeterminacy, the duties correlative to it would have to be imperfect, and the right against torture could not count as a human right. If I am right in supposing that all human rights are not fully determinate, then my argument for the right against torture could be repeated for any human right. Thus, if by “perfect duties” we mean that the content of the right must be fully delineated, then no right could ever count as a human right, surely a conclusion we ought to avoid.

It seems more promising, then, to draw this distinction in a manner that is more faithful to Kant. It should be noted that Kant himself never offers a full explanation of this distinction. He introduces it provisionally in his *Groundwork* with the promissory note of a fuller treatment in the *Metaphysics of Morals*, but in the latter work Kant aligns perfect with narrow and imperfect with wide duties, without formulating this distinction precisely.¹⁴

In spite of the lack of precision, Kant offers a rough distinction that is immensely illuminating: perfect duties are duties of justice, while imperfect duties are duties of virtue. While duties of justice concern the obligatory performance of a certain action, duties of virtue concern the obligatory adoption of an end.¹⁵ Kant puts this point by saying that duties of justice are legitimate objects of coercion, while duties of virtue are not.¹⁶ Duties of justice are enforceable because they concern actions affecting others regardless of your motives. Duties of virtue are not enforceable because it is incoherent to suppose that you could be forced to adopt a certain end: if you adopted the end because you were forced to do so, then you

¹⁴ Immanuel Kant, *Groundwork for the Metaphysics of Morals*, 4:421; and *Metaphysics of Morals*, 6:390.

¹⁵ I am grateful to Arthur Ripstein for this formulation of the distinction.

¹⁶ See Immanuel Kant, *Doctrine of Right*, 6:219-220; and Arthur Ripstein, *Force and Freedom*, pp. 11-12.

would not be adopting the end after all. For instance, while the law can force you not to steal, it cannot force you not to steal out of respect for the property of others. So long as the motive of your action is to avoid the penalty of the law you will not act out of duty, out of the belief that theft is wrong, but rather out of fear of getting caught.

Kant characterizes this contrast alternatively by saying that perfect duties have fully specifiable bearers, while imperfect duties do not. If the duty to help those in need is a duty of virtue, as Kant argues, it is also an imperfect duty, for every time you fail to be helped when you are in need it is not the case that everyone else has wronged you. By contrast, duties of justice are fully specifiable, not in terms of the *content*, but rather in terms of the bearer of the duty.

Once we distinguish perfect from imperfect duties in this way, we have the resources for accepting the first premise and denying the second. Human rights correlate with exclusively perfect duties in the sense that the duties correlative to human rights are *enforceable* and have *specifiable* bearers. We should deny the second premise because “welfare” rights too can correlate with perfect duties.

Compare your “liberty” right to an effective remedy in the event of an infringement of your constitutionally protected rights (UDHR, Art. 8) and your “welfare” right to a free elementary education (UDHR, Art. 26.1). If we conceive of perfect duties as duties of right and as requiring specifiable duty-bearers, both of these rights correlate with perfect duties. Both represent a duty of justice on the part of the state. The state does not act charitably when you receive a remedy for a wrong to one of your human rights nor does it act charitably when you receive a free elementary education. Instead, it acts in accordance with a duty of justice. The state wrongs you should you not receive the remedy or free elementary education.

The key point here is that it seems possible to construct a parallel argument for “liberty” and “welfare” rights (rights to property and labour rights; freedom of expression and the right to food; the rights to life and to health, and so on), such that both can correlate with perfect duties.

We may now appreciate that the second premise – welfare rights correlate exclusively with imperfect duties – is intelligible only when we are in the grip of an instrumentalist and monadic account.

James Griffin, for example, claims that a welfare right, “being a claim of the needy to be helped, does not indicate who of all those able to help has the duty to do so.”¹⁷ But we should reject both parts of this claim.

First, welfare rights are not claims of the needy to be helped. Instead, “welfare” rights are *rights*, i.e. juridical entitlements to independence, rather than claims to be helped on the ground of need. This locution betrays Griffin’s instrumentalist (the right is grounded in need) and monadic (the value of the need is intelligible independently of any juridical relations to others) assumptions. By contrast, welfare rights are a specific form taken by the original relationship of right. You have the right to food, water and education not because you have particularly pressing needs, but rather because hunger, thirst, and ignorance subject you to domination and wrongdoing. And second, due to their monadic and pre-institutional structure naturalist accounts like Griffin’s tend to focus exclusively on the right-bearer and to neglect the relational structure that connects the right-bearer to the (institutional) duty-bearer. My relational account specifies two types of duty-bearers: every other person (the horizontal dimension of your human right) and the public authority under which you fall (the vertical dimension of your human right).

The perfect duties argument should be rejected, then, because there is no good reason to suppose that economic, social and cultural human rights cannot correlate with perfect duties of justice.

5. THE FORM OF THE HUMAN RIGHTS JUDGMENT II: NEGATIVE AND PUBLIC POSITIVE DUTIES

Let us turn, then, to the second argument for the formal exclusion objection. Call it the “negative duties argument.”

The argument unfolds from two premises. First, it is claimed that human rights correlate exclusively with negative duties. Very roughly put, while negative duties prohibit us from doing something (especially harming others), positive duties require that we take specific actions to help others.

Infringements of negative duties concern *commissions* of harm, while infringements of positive duties

¹⁷ Griffin, *On Human Rights*, p. 51.

concern *omissions* of help.¹⁸ The sub-argument for this first premise might run as follows, building from the perfect duties argument: human rights must correlate with perfect duties; perfect duties are necessarily negative, and imperfect duties are necessarily positive; therefore all human rights correlate only with negative duties. Second, welfare rights, we are told, correlate exclusively with positive duties. Welfare rights are simply claims to assistance from others. Your right to education requires that the state provide you with free elementary schools; your right to work requires that the state provide you with welfare when you are unemployed; your right to health requires that the state provide you with a competent system of free health-care; and so on. Welfare rights, we ought to conclude, cannot count as human rights.¹⁹ The negative duties argument thus articulates the libertarian thoughts that positive duties are never duties of justice and that welfare rights entail exclusively positive duties.

In response, my main argument is that both premises of this argument are false, giving us good reason to reject its conclusion. The libertarian premise is false because human rights do not correlate exclusively with negative duties; they also correlate with positive duties, though these duties are exclusively public. The second premise is false because welfare rights also correlate with negative duties.

First, human rights do not correlate exclusively with negative duties because the public duties of protection and promotion are an essential dimension of any human rights claim. So far, I have put this point by saying that human rights are structured by two key forms of justice, one horizontal and private, the other vertical and public.

My main argument here follows my coherentist strategy. Without public positive duties of protection and promotion, the system of rights remains incoherent. If a system of right were exclusively horizontal and consisted exclusively of negative duties, then certain forms of domination would be systematically permitted. This is because without a public authority to adjudicate disputes about rights,

¹⁸ See, for instance, Thomas Pogge, *World Poverty and Human Rights*, p. 15.

¹⁹ Although not in quite so many words, this is the type of argument we encounter in libertarian thinking such as that of Robert Nozick. See his *Anarchy, State and Utopia*.

each of us remains open to subjection to another, by depending on the other's interpretation of her rights. This form of domination can only be eliminated by the introduction of a public authority to the system of right, which then has the role of determining the content of rights and adjudicating disputes through an authoritative public judgment. In his XVIII century terminology, Kant had put this point by saying that the transition from the (horizontal) state of nature to the (vertical) civil condition is necessarily required by the innate right of independence.²⁰ And once we introduce a public authority to a system of right, we must also assign it the positive duties of protecting the rights of persons within its jurisdiction and of promoting said rights by specifying their content and establishing a civil condition where all such rights can be protected and enforced by public laws. To the extent that human rights correlate with public duties of protection and promotion, then, human rights must correlate with positive public duties.

Let me illustrate this point by showing how two staple civil and political rights require positive public duties. The right to due process is a right to have equal access to a public judicial system that applies public laws in an impartial manner. This right thus concerns rules specifying how court proceedings should be conducted and more general rules for the organization of domestic court systems.²¹ The right thus requires, for example, that domestic courts be fully independent both of the executive power and of the parties to a dispute.²² The right to due process cannot possibly be made sense of in a pre-institutional setting, for it is a right addressed primarily to the state rather than to private individuals. Although it is a paradigmatic civil right, it is unintelligible independently of the public positive duties of protection and promotion. For instance, an independent judiciary is not a fact of nature but an institutional achievement requiring a number of "positive" measures by the state, such as a suitable legal education, adequate funding for judges, public attorneys and other related public officials, the publication

²⁰ See Kant, *Doctrine of Right*, §41.

²¹ See Sangeeta Shah, "Administration of Justice," in D. Moeckli, S. Shah and S. Sivakumaran (eds.), *International Human Rights Law* (Oxford: Oxford University Press, 2010), p. 315.

²² *Ibid.*, p. 320.

and dissemination of public laws, and so on. Without these positive public duties, the human right to due process would be unintelligible.

Similarly, the right to political participation, even in its most austere forms, is also a right claimed against a public authority that requires the establishment of political institutions and procedures to facilitate the right. Suppose that the right to participation involves merely the right to run for office and to vote in regular elections. Neither of these aspects of the right can be claimed before individuals because the very idea of *running for office* and of *regular elections* makes necessary reference to a system of public institutions for the exercise of a public power. In the absence of the institutions embodying a public authority, there would be no such thing as *running for office*. Similarly, the practice of running *regular elections* is not a fact of nature but an institutional achievement requiring “positive” action by the state.

I have just argued that the first premise of the negative duties argument is false because human rights also entail public positive duties of protection and promotion. But even if that premise were true, the negative duties argument would still fail because its second premise is false: “welfare” rights do not entail exclusively positive duties.

To see this, consider a staple “welfare” right such as the right to work. Understood as a welfare right, the right to work is commonly understood to be merely the entitlement to *be employed*, a right claimable against the state. In fact, the right to work is a whole consisting of several rights, none of which is the right to be employed.²³ The right to work consists partly in the rights to a free choice of work, improvement of working conditions, and trade union rights. The state plays a key role here and bears positive duties to regulate, monitor and enforce labour standards. But the state’s duty is not to employ the unemployed; rather it is to ensure the conditions under which employers and employees can relate to each other in a way consistent with equal independence. Thus, one of the key components of the right to work is *freedom from slavery*. For example, as Coomans remarks, caste and ethnic status support the use of slavery

²³ Fons Coomans, “Education and Work,” in D. Moeckli, S. Shah and S. Sivakumaran (eds.), *International Human Rights Law* (Oxford: Oxford University Press, 2010), p. 296. See UDHR, Art. 26.

in Niger, Mauritania, and Mali, where thousands are rendered slaves at birth and then considered the property of their ‘masters’ who force them to work without pay.²⁴ In this sense, the right to work, understood as the right to work for fair remuneration rather than as a slave, correlates with both negative duties of respect (not to enslave you) and positive duties of protection and promotion (the state should establish and promote conditions under which slave labour is effectively prohibited). If this is correct, it shows that the second premise must be false because “welfare” rights too correlate with negative duties.²⁵

I conclude that the negative duties argument is unsound because both of its premises are false. My argument makes explicit a new dimension of the form of a human rights judgment. Human rights correlate necessarily with negative duties of respect and with positive, public duties of protection and promotion. My position thus differs from two common strategies for rejecting the libertarian argument against welfare rights.

The first strategy denies the first premise by arguing that all human rights correlate with both negative and positive duties, without restricting positive duties to a public authority as I have. Thus, Henry Shue and James Griffin follow a tradition that stretches back at least to Aquinas. Aquinas had argued that public duties of assistance are grounded in the more basic private duties of assistance to others. Any holder of property, i.e. of an item out of the common stock, will have distributive duties when others come knocking on the door in circumstances of necessity.²⁶

²⁴ Ibid., p. 297.

²⁵ Here is another brief example. Like the right to work, the right to education, a paradigmatic welfare right, is a cluster of more concrete rights. One of these is the parent’s right to choose freely the form of education for their children. A state that prohibited religious education, for instance, would fail to respect the parents’ and children’s right to education in this regard.

²⁶ See John Finnis, *Natural Law and Natural Rights*, pp. 187-88: “Distributive justice is here, as in most contexts, a relation between citizens, or groups and associations within the community, and is the responsibility of those citizens and groups. The role of the governing authorities and the law in

Perhaps the central problem for such a strategy is that permitting private juridical duties of assistance is inconsistent with the original duty of non-domination. If your hunger, thirst and ignorance generate private, juridical, positive duties of aid, then you can easily become dependent on those by whose charity you receive food, water and education. The rights to food, water and education quickly degenerate from proper claim rights into requests for the grace of the powerful. Put differently, permitting private juridical duties of assistance would amount to making the duties correlative to human rights merely a matter of virtue rather than justice. Your rights to food, water, or education would be contingent on the grace of others, but if that is so, it is not clear why these should count as rights any longer, rather than as matters of charity. Furthermore, this strategy appears to go against our conclusion in the previous section that human rights entail juridical (perfect) duties of justice.

By contrast, the state's positive duties of protection and promotion are consistent with the original duty of non-domination for two reasons. First, these duties are required by the original relation of right, as I have already argued. And second, the state's duties of protection and promotion are not imperfect duties of virtue but rather perfect duties of justice. The state wrongs you when it fails to protect you. My position that positive duties are exclusively public thus avoids the troubles of naturalist strategies for rejecting the libertarian argument without collapsing matters of right into matters of virtue.

My position also differs from the strategy pursued by Thomas Pogge. We might say that Pogge's ingenious strategy is to grant the first premise – human rights correlate exclusively with negative duties – while denying the second – welfare rights too can correlate with negative duties. Pogge seeks to vindicate this libertarian argument for welfare rights by expanding the concept of a negative duty. Although Pogge does not put the point in this way, it seems accurate to characterize Pogge's move as introducing a distinction between two forms of negative duties: *direct* and *indirect*. Direct negative duties reflect the common libertarian thought: you have a duty not to harm others. Indirect negative duties are

determining, for particular political communities, the particular requirements of distributive justice is a decisive but subsidiary (see VL5) role.”

institutionally mediated: you breach your indirect negative duties either when you *contribute* to an institution that harms others or when you *benefit* from participation in such institution.²⁷ Pogge can then assert:

The normative force of others' human rights for me is that I must not help uphold and impose upon them coercive social institutions under which they do not have secure access to the objects of their human rights.²⁸

Welfare rights may count as human rights, then, because they correlate with *indirect* negative duties on others who participate in the same global institutional order. The rights to water, food or education are *under-fulfilled*, then, not because others breach their positive duties to you (i.e., fail to assist you), but rather because others participate in a common institutional order under which you have no secure access to water, food or education.

Pogge's proposal is ingenious and rich. Were it successful, it would vindicate the indivisibility of human rights in an alternative way, and Pogge's "libertarianism" would challenge my claim that human rights must correlate with positive duties. In response, I want to focus on only two problematic issues for such libertarian strategy.

The first is that I think Pogge has given no reasons for rejecting my argument that human rights correlate with public positive duties. Pogge is not necessarily opposed to such view, but endorses libertarianism as a dialectical strategy: if he can vindicate welfare rights while presupposing only libertarianism, his position is that much stronger vis-à-vis the libertarian. However, this dialectical move seems to carry too high a cost, for human rights make essential reference to the positive duties of a public authority. Without such duties, the rights to due process, political participation or to work become unintelligible.

²⁷ Pogge, "Shue on Rights and Duties," p. 129; and Pogge, *World Poverty*, pp. 72-73.

²⁸ *Ibid.*, p. 72.

The second and deeper problem concerns Pogge's concept of an *indirect negative duty*. Pogge rejects Shue's claim that human rights correlate with both negative and positive duties because such a view is over-inclusive with regard to duties. Thus, Pogge claims that Shue's view "holds each of us responsible for all deprivations whatever, regardless of the nature of our causal relation to them."²⁹ The problem, then, is that on Shue's view whenever you go hungry or fall sick, the rest of us (or those of us able to help) are deemed to have wronged you. The problem for Pogge, I think, is that his concept of an indirect duty puts him in exactly the same position as Shue's. The idea of negative duties was meant to capture direct causal connections between persons. Instead, the concept of an indirect duty (or in Pogge's terms, *contributing to or benefiting from a common institutional order that harms others*) abandons the idea of a direct juridical nexus. As a result, whenever you go hungry or fall sick, the rest of us (who participate or benefit from the global institutional order) are deemed to have wronged you. At least a virtue of Shue's account is that it gives us a clear criterion for failing to discharge the duty. Pogge makes the concept of a negative duty so indirect, so far away from the direct juridical nexus, that it is not clear how we could possibly establish a breach of duty.

Consider the relation between someone suffering from poverty in the United States and a rich politician in a developing country. To make the case sharper, suppose the politician is corrupt and becomes rich by embezzling international funds originally destined as "foreign aid." Here we have a case of someone "benefiting" from and someone else being "harmed" by the current global institutional order. But how could we possibly establish that the politician breaches her negative duties to the poor American? We could easily judge that the politician has acted wrongly; we could judge that the politician has breached a relational duty to the donating country and to those the politician is supposed to represent. But how could we establish a "causal relation," between the politician and the poor American? It appears impossible. And if that is so, Pogge ends up in the same problematic position as Shue's.

²⁹ Ibid., p. 72.

In short, instead of doing fancy gymnastics with the concept of a negative duty in order to appease the libertarian, we should simply reject the libertarian assumption that duties of justice are necessarily negative duties. This would save us from the troubles of Pogge's indirect negative duties. But the rejection of the libertarian assumption need not land us in Shue's over-inclusive account of positive duties. We strike the proper balance by endorsing the Kantian position that human rights correlate with negative duties and with public positive duties.

6. THE FORM OF THE HUMAN RIGHTS JUDGMENT: THE GENERALITY OF THE SUBJECT

A third way of pressing the formal exclusion objection against my formal account of indivisibility is to exploit the distinction between general and special rights and duties. Call this the "special rights/duties argument."³⁰

The argument unfolds from two premises. First, it is claimed that human rights are necessarily *general* rights. Unlike *special* rights and duties which arise either from specific transactions between persons (e.g., a specific contract) or from specific standing relationships between persons (e.g., sergeant-troop, parent-child), *general* rights emerge simply from a person's standing *qua* person.³¹ A naturalist sub-argument for this first premise might run as follows: since human rights belong to persons as such, human rights must be general. Second, welfare rights are special rights. Onora O'Neill, for instance, articulates what we might count as a sub-argument for this second premise. O'Neill argues that welfare rights are special rights because they come into existence only once their corresponding positive duties have been institutionally

³⁰ Unlike the previous two versions of the formal exclusion objection, which focused exclusively on the addressee of the human rights judgment, this one may be constructed either for the *subject* or for the *addressee*, for the right- or for the duty-bearer. Since the argument is the same, I only develop it for the right-bearer.

³¹ For a classic formulation of this well-known distinction, see, for instance, H.L.A. Hart, "Are There Any Natural Rights?," *The Philosophical Review* 64: 2 (1955): 188.

specified and distributed. Without the corresponding institutions, there are no welfare rights. But if welfare rights are contingent on specific transactions in this way, they can only be *special, institutional* rights rather than *general, human rights*.³² You only have the right to education once there is a public authority around to bear the correlative duties of protection and promotion; and you are entitled to the right to health only once you live under a public authority, say, to create a system of public healthcare. Welfare rights, we ought to conclude, cannot count as human rights.

A simpler and more powerful way to put the argument is to maintain, as Griffin puts it, that human rights are doubly general. A human right “is a claim of *all* human agents against *all other* human agents.”³³ The problem is that welfare rights are doubly special: they are held by some people, those living in a particular jurisdiction, against a single addressee, the public authority in whose jurisdiction they live.³⁴ Welfare rights cannot be human rights.

In response, we should grant the first premise – human rights are general – and deny the second – “welfare” human rights too are general.

Recall, my formal argument is that human rights are indivisible because they all manifest the same form of thought, play the same constitutive function. A human right is essentially a protection from a specific form of domination, a more specific determination of your claim to independence.

Human rights are necessarily general, then, because they are the constitutive conditions of the relationship of right, that is, of any claim of right or relational juridical duty whatever. By attaching to any

³² Onora O’Neill, “The Dark Side of Human Rights,” p. 432: “A normative view of human rights cannot view rights to food and medicine as pre-institutional while denying that there are any pre-institutional counterpart obligations or obligation holders; it must take a congruent view of the counterpart obligations. But this suggests that such rights must be special, institutional rights rather than universal human rights.” See also Ashford, “The Alleged Dichotomy,” p. 102.

³³ Griffin, *On Human Rights*, p. 177 (emphasis added).

³⁴ *Ibid.*, p. 101.

claim of right whatever, human rights are rights enjoyed in virtue of your original right to independence. But the original right to independence must be a general right, a right you possess in virtue of your status as a person and of your equal authority to any other person. The subject of the human rights judgment, then, must be general. Conversely, if human rights were special, they would be contingent on your performance of special transactions or on your special relations to others. But if that were so, human rights could not play their essential constitutive function. Generality is necessary to human rights.

Nevertheless, granting the first premise – human rights are necessarily general – does not entail commitment to the second – that welfare rights must be special. Indeed, I have argued that human rights structure two basic forms of relations of right: a horizontal-bipolar relation to any other private person and a vertical-omnilateral relation to your public authority. Seen in the current context, that thesis means that human rights are always general, but they necessarily correlate with two kinds of duties: one general (horizontal) and another special (vertical). Human rights are not doubly general but rather, in Joel Feinberg’s phrase, double-barrelled.³⁵ Your human right to life, for instance, addresses simultaneously every other person as a claim that they respect your life and the public authority under whose jurisdiction you fall as a claim for respect, protection and promotion of your right.

The formal view defended here that human rights are double-barrelled simply follows from my previous argument against the negative duties argument. We may now say that human rights correlate with *general* negative duties of respect and with *special* public positive duties of protection and promotion. This view preserves the insight of the first argument as well, that human rights correlate with duties of justice. The fact that the public positive duties are special, owed only to those persons in the state’s jurisdiction, does not mean that these duties are suddenly duties of charity.

A further reason to endorse the relational view that human rights are double-barrelled is that it captures better the normative structure of human rights as they function in practice. The special rights-

³⁵ I take this turn of phrase from Rex Martin, who takes it, in turn, from Joel Feinberg. Rex Martin, *A System of Rights*, p. 88.

duties argument assumes that welfare rights must be special. This assumption is wrong and misleading. It is wrong because “welfare” rights are not special; they are general. Your human rights to food, education and work are not rights to which you are entitled in virtue of some special feature you possess or undertaking you have performed, but rather as a general human right. The assumption is misleading because although it is true that welfare rights correlate with special duties, so does any human right. I have argued that the vertical form of the relationship of right is necessary to a system of right for without it, the system remains incoherent by permitting forms of domination. For this reason, no human right is complete unless it also makes reference to the public duties of protection and promotion. This is not a feature of welfare rights but of any human right. Without active intervention and sound policies by the public authority, there can be no such thing as an independent court or a fair system of elections. But note that these duties are special rather than general. The duties of protection and promotion are owed to you only by *your* public authority. It would be absurd to suppose that the state of Brazil, for example, wronged the citizens of Egypt when Hosni Mubarak rigged the elections. The duty to hold fair elections correlative to the human right to political participation of every Egyptian falls only on the shoulders of the Egyptian public authority.

Furthermore, I should mention that in spite of its plausibility, my formal argument here that human rights are double-barrelled is not available to standard naturalist and institutional accounts. The key commitment of a naturalist account is that human rights must be *pre-institutional*. The naturalist is thus committed to Griffin’s view that human rights are *doubly-general*. Human rights cannot make essential reference to the special duties of the state. Of course, states may have positive duties correlative to human rights for the naturalist, but this would be an instance of the general rule that *anyone* (states included) has positive duties correlative to human rights. It seems that by definition the naturalist rules out the possibility of human rights being essentially correlated with special duties. If the naturalist has difficulties with special duties, the institutional theorist will have difficulties with general rights and duties. The key commitment of an institutional account is that human rights must be *institutional norms*, governing the conduct of states in the current international order. As a result, it becomes difficult for an institutional to accommodate the

thought that human rights (or their correlative duties) could be general. By contrast to these familiar accounts, I can defend the double-barrelled character of human rights because my account is holistic rather than reductive. My argument that human rights are the constitutive conditions of two forms of relations of right, one horizontal and the other vertical, becomes in this context a defense of the thesis that human rights are double-barrelled. The formal argument, then, has the added virtue that it integrates the key insights of naturalist and institutional accounts and preserves the indivisibility of human rights.

7. THE FORM OF HUMAN RIGHTS IV: INDIVIDUAL RIGHTS *AND* A SINGLE GROUP RIGHT

Before closing, let me quickly consider a fourth and final argument in support of the formal exclusion objection. Call this the group rights argument. Unlike the previous three arguments we considered, this one focuses exclusively on the form of the subject of a human rights judgment. The argument unfolds from two premises.

First, it is claimed that human rights are necessarily *individual* rights. The distinction is said to mark the difference between individual and group rights. It is difficult to state this distinction precisely, since theorists have indulged in deploying the concept of a group right without proper care. Nonetheless, following the structure of the judgment of right, we may distinguish three main senses of ‘group rights.’ The first two concern the *subject* of the judgment. While group rights proper make the subject or bearer of the right some group or other, group specific rights make the subject or bearer of the right certain individuals belonging to a specific group.³⁶ The right to tax property, for example, is a group right proper, since it is a right held by the group organized as a municipal public authority. No individual has the right to tax the property of others. The right to choose the leader of a teacher’s union, for example, is a group specific right, since it is held by individuals who are members of the union. No individual who is not a

³⁶ For this distinction, see Thomas Pogge, “Group Rights and Ethnicity,” in I. Shapiro and W. Kymlicka (eds.), *Ethnicity and Group Rights* (New York: New York University Press, 1997), p. 191.

member of the teacher's union has the right to vote in such election. A third and more elusive sense of a 'group right' concerns the *object* of the right. A group proper or group specific right is said to emerge because the object of the right is only intelligible as a collective or shared rather than an individual good.³⁷ If the survival of a particular culture or ethnicity counts as a (sufficiently weighty) good, then it attracts the protection of a group right, say, to the survival of said culture.

The variety of conceptions of group rights also makes it difficult to articulate the sub-argument(s) for this first premise. One such argument could build from the results of the special rights-duties argument and run as follows. Every human right is general, but group rights are special rights. Therefore, every human right must be an individual right.

The second premise of the argument would not focus on such wide a category as "welfare" rights but could focus instead on "cultural" rights or so-called "third-generation," solidarity rights like the rights of peoples, nations, races, ethnic, cultural or linguistic groups. These cultural rights, we ought to conclude, cannot count as human rights.

James Griffin articulates an important version of the group rights argument. Griffin points out that there are two main strategies for defending group rights. On the one hand, good-based arguments justify group rights on an analogy with a straightforward instrumentalist defense of any human right. Just as we justify human rights by virtue of goods sufficiently weighty to attract the protection of rights, so too we justify group rights by virtue of collective goods sufficiently weighty to attract the protection of human rights.³⁸ On the other hand, justice-based arguments justify group rights as necessary means for the prevention or correction of past injustice done to a group.³⁹ Thus, both strategies may be used to defend the right of oppressed minorities to the survival of their culture. Griffin argues that both these strategies fail

³⁷ For this concept, see James Nickel, "Group Agency and Group Rights," in I. Shapiro and W. Kymlicka (eds.), *Ethnicity and Group Rights* (New York: New York University Press, 1997), pp. 236-7.

³⁸ Griffin, *On Human Rights*, p. 258.

³⁹ *Ibid.*, p. 266.

because they fail to identify an interest weighty enough to warrant the protection of a right. Griffin makes it clear that collective goods and group domination are matters of great importance, but he questions whether these matters are important in the way required to justify the protection of a right. Griffin concludes that group rights should not count as human rights.⁴⁰

Should we step back from our philosophical reflection for a moment and focus on the UN human rights system, we would find a curious situation. UN human rights treaties protect only *individual* rights with a sole exception: the right to self-determination (Art. 1 ICCPR, and Art. 1 ICESCR). How could this be? An easy explanation would be to say that the right to self-determination is not a genuine right but rather a subterfuge by individual states to shield themselves from foreign criticism. Following the group rights argument, we should simply deny that any group right can count as a human right. Conversely, if the right to self-determination is to count as a human right, then the group rights argument must be unsound, for self-determination is a right held by *peoples* and never by individuals. The right to self-determination is not an object but a group proper right.

But once we allow at least one group right, then why not allow others? Language rights, cultural preservation rights, religious rights, women's rights, Dalit rights, Roma rights and so on may count as proper human rights. But this line of thought is problematic for two reasons. It risks inflating the concept of a human right so much as to make it over-inclusive. And, more importantly, it conflicts with our earlier view that human rights are general. If Dalit rights are group human rights, then some human rights are special.

We thus face a dilemma. If we accept the group rights argument, we must exclude the right to self-determination, which figures as the cornerstone of key UN human rights treaties. If we reject the group rights argument, we purchase the legitimacy of a single group right at too high a cost. We have a kitchen sink problem: everything but the kitchen sink may count as a human right.

⁴⁰ Ibid., p. 269.

Nevertheless, the relational account puts us in a position to dodge this dilemma by rejecting the second horn. The relational account can illuminate the normative structure that justifies the odd asymmetry in the UN system, where a single group right is permitted. What is the normative structure of the right to self-determination?

Notice first the type of group right the right to self-determination would have to be for the relational account. It cannot be an object group right, i.e., a right grounded in a collective interest. Object group rights are a specific version of interest-based theories of right, and the relational account rejects such non-juridical theories. Self-determination cannot be a group specific right, i.e., a right held by individuals by virtue of their belonging in a specific group. Self-determination is best understood as a relational group proper right: the right to independence and non-domination of one people by any other. Since the right to self-determination correlates with duties also held by other peoples rather than by individuals, we make best sense of it by regarding it as a group proper right.

With the right to self-determination the relational account has shifted to a new, higher and international register. Until now, we have been thinking of rights in a primarily domestic context. The right to self-determination marks the transition in a system of right from domestic to international right. In the domestic context, we focused on two main forms of relations: horizontal (between private parties) and vertical (between private parties and their public authority). We now encounter a new version of the horizontal relation, one that emerges from the combination of the first two forms. The right to self-determination unifies the two forms in this way: it represents the horizontal entitlements of public parties. This is the international relationship of right I mentioned in my progressive argument in chapter 4.

Just as the fundamental horizontal form expresses the ideal of relational justice, your entitlement to independence from others and your original duty to not dominate others, the international form expresses the ideal of relational justice in the international domain: a public authority's entitlement to independence from other public authorities. We may add that just as the paradigmatic form of wrongful dependence on others is *slavery*, the paradigmatic form of wrongful international dependence is *imperialism* or *colonialism*, where one public authority gets to set the purposes another public authority will pursue. The

right to self-determination is the right of a group of persons understood collectively, rather than distributively. This is the right of a people, as Kant put it, “considered as a state (*universi*).”⁴¹

From the standpoint of the relational account, then, the right to self-determination is not an anomalous feature of a system of right. Instead, it is the duty constitutive of a public authority seen from the standpoint of an international system. From the domestic standpoint, a public authority is constituted by two forms of duties (the duties to protect and promote the human rights of persons in its jurisdiction) and special rights attaching to such duties, such as the right to tax, punish, legislate, etc. From the international standpoint, these duties and rights constitutive of a public authority are unified under the right to self-determination. This right is simply the formal representation in the international arena of the rights and duties constitutive of a public authority.

Notice that contrary to common practice, the right to self-determination as understood here gives no title to make the human rights of individuals matters of “state discretion.” Since the right to self-determination is identical to the rights and duties constitutive of a public authority, and a public authority acts *publicly* only when it acts in a manner consistent with the human rights of its members, the right to self-determination cannot give license to a particular state to violate human rights. Instead, the right to self-determination represents the title of each state to fulfill its duties to protect and promote the human rights of its members free from external domination.

In order to resist the second horn of the dilemma, I now need to show that this picture of self-determination is compatible with the general character of human rights and that it avoids the kitchen sink problem. Dealing with the first is easier than the second. The right to self-determination is not a special

⁴¹ For Kant, the idea of a state is the idea of a whole rather than of the aggregate of parts. The state is the group of persons considered *collectively*, as a whole, rather than *distributively*, as an aggregate of independently intelligible parts. The right of self-determination, I am suggesting, is only intelligible in this Kantian sense of the state. It is a group right proper, belonging to a certain people considered *collectively*. See Immanuel Kant, *Doctrine of Right*, 6:315-6.

right because it is a group proper right rather than a group specific right. If it were a group specific right, say, the right of individual South Africans, it would be a special right. But since it is a group proper right, its form is perfectly general. *Every* public authority is entitled to self-determination.

The second concern is that by allowing group rights into a system of human rights, I have opened the door to all manner of bogus rights. Let me offer three responses to address this concern.

The first is that by permitting the right to self-determination, I am only committed to allowing group proper rights, rather than group specific or object group rights. I have given a principled defense of the claim that there is only one group proper human right: this right is the representation in the international domain of the duties and rights constitutive of a public authority. This allows me to exclude in a principled manner any other group proper right, group specific or object group rights.

The second concerns the general character of so-called “cultural” rights. In this regard, I can follow a “reductive” strategy. Rights that initially appear as group proper rights, like language rights or religious rights, are in fact individual rights. This is in line with current international human rights law. Art. 27 ICCPR provides:

In those States in which ethnic, religious or linguistic minorities exist, *persons belonging to such minorities* shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language.
(emphasis added)

This article makes it clear that the rights to enjoy your culture, profess and practice your religion or use your language are rights you bear as an individual. They are not rights born by the cultural group. And they are not group specific rights. You do not bear said rights merely in virtue of “belonging to such minorities,” for presumably individuals belonging to the majorities bear the very same rights. The emphasis here does not denote a group specific right, i.e., a special right that some persons bear in virtue of their membership in a particular group. Instead, they denote general rights, rights born by all persons. The special emphasis here on minorities simply highlights that members of minorities are particularly vulnerable to forms of domination specified by these “cultural” rights.

Finally, my account may now be accused of being unduly restrictive. Do I mean to claim that indigenous rights, women's rights, children's rights, immigrant rights, disabled rights are not and cannot be human rights? My response by now should be clear: these are either general human rights or not human rights but special protective policies. Let me begin with the latter.

It is often claimed that formal equality is not sufficient to guarantee justice. Justice, we are told, must be complemented by substantive equality and particularly strict equality of results. One way to pursue substantive equality is by developing policies that pursue "affirmative action."⁴² Such policies do grant special, group rights in fact of two different types. They grant *exemptions*, i.e., special liberties granted to individuals belonging to particular groups, and *assistance* rights, i.e., special provisions to repair past patterns of domination.⁴³ At bottom, the normative structure of these rights is the same: they are special, corrective provisions meant to *remedy* a past wrong. These are not general but special rights granted as a remedy for past injustice. Due to their special structure, these rights cannot count as general human rights.

But notice that indigenous and women's rights, for example, fall partly within this category, and partly within the category of genuine human rights. One way to understand some women's rights, for instance, is precisely as *remedies* for past wrongs. But another way to understand women's rights is as *inclusive* human rights. Women's rights, as commonly understood in international human rights law, are not new human rights. Instead, they are more inclusive expressions of the very same human rights. Van Boven argues, for instance, that we should think of these not as "new" human rights, but as "inclusive human rights." Instruments protecting indigenous or women's or children's rights "do not define new rights but re-define and re-conceptualize existing human rights in order to make them more explicit and

⁴² For this line of argument, please see Daniel Moeckli, "Equality and Non-Discrimination."

⁴³ For these two different forms taken by group rights, see Jacob Levy, "Classifying Cultural Rights," in I. Shapiro and W. Kymlicka (eds.), *Ethnicity and Group Rights* (New York: New York University Press, 1997), pp. 28-29.

more inclusive.”⁴⁴ In our terms, instead of thinking of such rights as group rights, we should think of them as further determinations of the subject of the human rights judgment. The human rights judgment remains perfectly general. Indigenous and women’s rights simply specify what these general rights mean in specific circumstances.

Let me put this point differently. In practice it is all too easy to exclude others from human rights protection by acting as if the other is not a full person. The function of indigenous, women’s or children’s is to ensure practically and juridically the very generality of the subject of human rights. We ensure such generality not metaphysically, say, by elaborating a metaphysical account of the necessary properties of personhood and then trying to show how the excluded other bears the relevant properties of personhood. We ensure such generality juridically, by making the subject of human rights perfectly general and by making sure through legal provisions that *every person* counts for a full person. Thus, contrary to initial appearances, indigenous and women’s rights (when these do not qualify as corrective remedies) are not special, new rights, but rather the juridical attempt to realize the generality of the subject of human rights.

I conclude, then, that the final argument in support of the formal exclusion objection also fails. The group rights argument is unsound because it is based on the false premise that all human rights are individual rights. I have tried to defend the initially odd fact that international human rights law recognizes a single group proper right, the right to self-determination, by accounting for this right as a representation in the international domain of the rights and duties constitutive of a public authority. With the exception of this right, all human rights are individual.

Before closing, let me remark that this position is not easily available to the competitors of the relational account. Naturalists like Griffin find it very difficult to account for any group rights. Human rights are those of individuals. They thus fail to account for the unique institutional normativity of the right to self-determination. Institutional theorists like Beitz must find it very difficult to account for the existence of a single group proper right. Since institutional accounts find it difficult to account for general rights as a

⁴⁴ Theo Van Boven, “Categories of Rights,”

general matter, special rights, we might say, are their specialty. But if this is correct, institutional accounts would not be able to explain easily the general yet group proper form of the right to self-determination. And they would not be able to easily block the second horn of the dilemma, namely, the kitchen sink problem. Institutional accounts have no principled basis from which to rule out all manner of group proper and group specific special cultural rights. In particular, nothing prevents the institutional account from counting remedial group rights as human rights proper.

CONCLUSION

Where in the previous chapter I sought to vindicate the idea of a human right, here I have attempted to vindicate the *indivisibility* of human rights, the thesis that there are civil, political, social, economic and cultural human rights. I offered a distinctive and formal conception of indivisibility. Contrary to what is frequently supposed, “liberty” and “welfare” rights manifest the same form of thought, perform the same constitutive function in a system of rights. Accordingly, my formal argument for indivisibility is just that rights from all five categories are equally necessary to a system of right, for eliminating one of these categories would permit a form of domination. My distinctive argument for indivisibility is coherentist (*a priori holistic*): indivisibility is necessary because otherwise the system of rights becomes normatively incoherent by contradicting the original duty of non-domination.

The formal argument for indivisibility supplants the need to survey an entire list of candidate human rights in order to determine whether each one should count as human rights. Instead, my defense of indivisibility makes it possible for rights from all five categories to count as human rights by showing that it would be incoherent to rule them out. If successful, my defense of indivisibility provides the form of argument needed to vindicate specific candidate rights. The rights to work and to health, for instance, would have to be established by showing them to play the same function as any other human right: without them a form of domination is systematically permitted.

My response to the four versions of the formal exclusion argument revealed a more determinate picture of the form of the human rights judgment, a form shared by “liberty” and “welfare” rights. Human

rights are *general, double-barrelled rights* that correlate with two forms of perfect duties of justice: *general, negative duties of respect* and *special, positive, public duties of protection and promotion*. This form also gives us a way to establish specific candidate rights. If the candidate right can only correlate with imperfect duties, is a special right or a group specific right, then it cannot count as a human right.

In the final section, the formal exclusion objection led us to a new form of relationship of right, the international form. Since the transition from domestic to international human rights opens up a new dimension of the system of rights, developing this unique form of relation of right, the synthesis of the previous two, shall be my task in the next and final chapter of my dissertation.

Chapter 6

Matters of International Concern

Hence, under the general concept of public right we are led to think not only of the right of a state but also of a *right of nations* (*ius gentium*). Since the earth's surface is not unlimited but closed, the concepts of the right of a state and of a right of nations lead inevitably to the idea of a *right for a state of nations* (*ius gentium*) or *cosmopolitan right* (*ius cosmopoliticum*). So if the principle of outer freedom limited by law is lacking in any one of these three possible forms of rightful condition, the framework of all the others is unavoidably undermined and must finally collapse.¹

The introduction of the collective right to self-determination into the system of human rights may be regarded as a Trojan horse: once we allow states the right to self-determination, have we not made human rights matters of exclusively domestic concern? A state's right to self-determination in the international arena is commonly associated with the state's right to others' non-intervention in its internal affairs. But if human rights are an exclusively domestic concern and restricted to the discretion of the state, the very idea of human rights is potentially incoherent. If the state has discretion in the way it treats persons under its jurisdiction, then the right to self-determination may warrant state treatment contrary to human rights, permitting the state to torture, exploit, kill or arbitrarily detain you. If so, human rights would no longer be valid universally. The system of human rights thus appears to face an "irresolvable contradiction" between the "affirmation of universal human rights and the reaffirmation of state sovereignty over domestic social issues."²

¹ Immanuel Kant, *Doctrine of Right*, 6:311.

² The claim that this tension represents an "irresolvable contradiction" is Benhabib's. See Seyla Benhabib, *The Rights of Others: Aliens, Residents, and Citizens* (Cambridge: Cambridge University Press, 2004), p. 19. The longer quote is from David Forsythe, *Human Rights in International Relations*, 2nd edition (Cambridge: Cambridge University Press, 2006), p. 38. Somewhat hyperbolically, Gareth Evans calls the principle of state sovereignty and the accompanying right to self-determination, a "license to kill." Gareth Evans, "The Responsibility to Protect: from an Idea to an International Norm," in R. Cooper and J. Kohler (eds),

Arguably this contradiction structures much philosophical reflection on international relations, for the two principal positions resolve the contradiction by denying one of its conjuncts. Somewhat crudely, the opposition can be stated thus. On the one hand, “realists” do away with human rights: moral judgments (including human rights judgments) have no place in the evaluation of a state’s action either domestic or international, for the sole norm governing international relations is the pursuit of the state’s interests. On the other hand, “cosmopolitans” do away with the state: although the state is usually a helpful instrument for realizing human rights, state boundaries are arbitrary, for the sole norm governing international relations is the human rights of individuals.

My aim in this chapter is to complete the progressive argument promised in chapter 4 by defending what I then called the *international* form of the relationship of right. In the current context, the claim that human rights are the constitutive conditions of the international form means that human rights are *matters of international concern*. I shall defend, then, the position that your human rights are matters of international concern (contra the realist) precisely by correlating with second-order duties of states other than your own (contra the cosmopolitan). The realist is right to observe that states play a key normative role in our international system, but she misunderstands what it is for a state to be sovereign. The sovereignty of the state, I argue, is best understood as the state’s public duty to respect, protect and promote the human rights of persons under its jurisdiction. The cosmopolitan is right to insist that human rights are a matter of international concern, but she misunderstands the role of states in a system of rights. Contra the cosmopolitan, I argue that the sovereignty of the state is best understood *non-instrumentally*. States play two essential, non-instrumental roles in a system of human rights: they make human rights determinate through their public judgments, and they are the exclusive bearers of the duties to protect and promote human rights.

Responsibility to Protect: the Global Moral Compact for the 21st Century (New York: Palgrave MacMillan, 2009), p.

More precisely, I shall argue that the public duties of the state are double-barreled, manifesting first-order, special obligations to persons within their jurisdiction and second-order, general obligations to persons outside their jurisdiction. The latter are second-order obligations in the sense that they are not obligations owed directly to individual others, but rather obligations owed to other public authorities. Although the tension between human rights and the authority of the state may be ineliminable from practical life, I shall argue that this tension does not amount to a contradiction. Indeed, if my position is correct, universal human rights *require* that a public authority bear the right to self-determination against other states. The relation between self-determination and human rights is internal: self-determination is the international face of a public authority's first-order duties to protect and promote the human rights of persons under its jurisdiction.

In order to advance this argument, I proceed in three main steps. First, I articulate more carefully the alleged contradiction between human rights and state sovereignty and show it leads to a dilemma. If the realist is correct, human rights cannot be valid; but if the cosmopolitan is correct, the idea of a public authority is arbitrary, making it difficult to allocate the duties of protection and promotion. Second, I argue that Kantian internationalism avoids the dilemma altogether, for it provides formidable arguments against the realist premise that the international state of nature is *amoral* without, however, collapsing into cosmopolitanism. In the third and final stage I strengthen the internationalist argument by showing that the international order is best understood through a new relational form, which I call the "public horizontal" form, the *horizontal relations among public authorities*. More specifically, I shall argue that, contrary to realist and cosmopolitan conceptions, the normative structure of a human rights treaty is best understood through the public horizontal form.

My relational, internationalist account thus promises to vindicate the Kantian thought that domestic and global peace are internally related. A system of right concerned exclusively with the municipal is imperfect, for international war threatens the ability of a public authority to fulfill its regulative duty to establish a condition where the human rights of all under its jurisdiction can be equally protected by law. The establishment of such a condition requires, as it turns out, the pursuit of global

peace: the establishment of a condition where the human rights of everyone in the globe can be fully enjoyed. Peace, as Kant put it, is the final end of a system of right. We may put this point differently: human rights are the conditions of the possibility of peace.

1. BETWEEN REALISM AND COSMOPOLITANISM

State sovereignty is thought to express the fundamental principle organizing the “Westphalian” international order that reigned in the three hundred years between the Peace of Westphalia and the end of World War II.³ On this understanding, a state is sovereign in the sense that it is subject to no higher authority. The state has the right to self-determination in the sense that no body external to the state has the authority to determine its policies, which are deemed accordingly matters of exclusively domestic concern. The right to self-determination correlates with a duty of non-intervention in the internal affairs of the state.⁴ This understanding of self-determination and state sovereignty is often thought to find its clearest expression in the UN Charter Art. 2(4). But what are the grounds for this understanding of self-determination and state sovereignty?

The idea that the state has the right to self-determination because it is subject to no higher authority draws much of its support from the realist tradition stretching from Machiavelli and Hobbes through Hegel and Croce to more recent figures like Hans Morgenthau, Henry Kissinger, Kenneth Waltz and John Mearsheimer. It is difficult to state the key claims of the “realist” school, especially because realist thinkers tend to conflate two types of concerns, one descriptive and the other normative. The descriptive concern is with the best explanatory model for international relations. In this sense, a key realist claim is that in order to understand international relations we should formulate law-like generalizations based on the assumptions that (i) states are the fundamental units of explanation, (ii) states are self-

³ For this common view, see for example David Held, “Democracy: from city-states to a cosmopolitan order?” *Political Studies* 40 (1992); and David Forsythe, *Human Rights in International Relations*, pp. 20-22.

⁴ See Jack Donnelly, *International Human Rights*, pp. 28-29.

sufficient, and (iii) states act to maximize their own interest. The normative concern is with the type of policies statesmen should pursue. Crudely put, any statesman that pursues policies meant to promote morality rather than her own state's interest is a fool. Since my purpose in this chapter is to defend the thought that human rights are matters of international concern, I shall set aside the descriptive component of realism and focus on its normative one.

As commentators have pointed out, although Thomas Hobbes wrote in the mid-seventeenth century, he formulated one of the clearest and strongest arguments for normative realism.⁵ So let me reconstruct Hobbes's argument. I shall put it in the form of a syllogism.

Hobbes begins by drawing an analogy between states and individual persons. States in their relations to each other are just like pre-institutional persons: they both inhabit a state of nature. Indeed, the analogy runs the other way. Hobbes explains the hypothetical state of nature among pre-institutional individuals through the actual state of nature among states:

But though there had never been any time wherein particular men were in a condition of war one against another, yet in all times kings and persons of sovereign authority, because of their independency, are in continual jealousies and in the state and posture of gladiators, having their weapons pointing and their eyes fixed on one another, that is, their forts, garrisons, and guns upon the frontiers of their kingdoms, and continual spies upon their neighbours, which is a posture of war.⁶

The central point of the analogy, I take it, is that pre-institutional individuals and states alike enjoy an unrestricted "right of nature:" since neither is bound by the conventional obligations of a higher authority, each is free to "use his own power, as he will himself, for the preservation of his own nature ... and

⁵ See Charles Beitz, *Political Theory and International Relations* (Princeton, NJ: Princeton University Press, 1979) (with an afterword from 1999), p. 27; and Marshall Cohen, "Moral Skepticism and International Relations," *Philosophy and Public Affairs* (1984) 13:4, pp. 318-320.

⁶ Thomas Hobbes, *Leviathan*, ch. 13.12.

consequently of doing anything which, in his own judgment and reason, he shall conceive the aptest means thereunto.”⁷ In short, both states in relation to one another and pre-institutional individuals have an unlimited natural right to do what seems to each most conducive to their own benefit, a right that leads directly to a condition of war.

The second step of Hobbes’s argument is the claim that in the state of nature there is no justice or injustice.⁸ The state of nature is *amoral*. Hobbes supports this notorious claim with his view that justice is not natural but conventional: “The definition of INJUSTICE,” he claims, “is no other than *the not performance of covenant*.”⁹ Since there are no binding covenants in the state of nature, there can be no justice either. But this may seem arbitrary. Why must justice depend on the crafting of covenants?

Hobbes’s sub-argument for this claim turns on his deeper views on the nature of normativity, specially his concept of rights and obligations. For Hobbes, rights and obligations are opposed to one another. If you are obliged to do *A*, you cannot be free either to do *A* or *not-A*. Your obligation is thus incompatible with your natural right to either do *A* or *not-A*.¹⁰ If obligations are opposed to rights, and if we start in the state of nature with an unlimited right of nature, Hobbes can easily infer that the state of nature is a state devoid of obligations.

Obligations must arise from the conventional activity of limiting your natural right with respect to others either by *renouncing* or by *transferring* your right to another. However, in order to limit your right and create an obligation to another, it is not sufficient that you merely *say* you will do so. If you say to me that you will have a vanilla ice-cream, but in the end decide to have chocolate ice-cream instead, you have not

⁷ Ibid., ch. 14.

⁸ Ibid., ch. 13.13.

⁹ Ibid., ch. 15.2.

¹⁰ I owe this formulation to Terence Irwin, *The Development of Ethics: a Historical and Critical Study, Volume II: from Suarez to Rousseau* (Oxford: Oxford University Press, 2008), p. 128. Indeed, my discussion of Hobbes’s view of normativity is informed by Irwin’s discussion in §§484-485.

breached any obligation to me. You can only limit your right when you and I enter what Hobbes calls a “covenant of mutual trust.”¹¹ You and I acquire obligations to one another, then, only when we are mutually assured that the other will do her part of the agreement. Hobbes’s well-known argument is that only the awesome power of the sovereign can provide such assurance. Thus, Hobbes concludes that “the nature of justice consisteth in keeping of valid covenants; but the validity of covenants begins not but with the constitution of a civil power sufficient to compel men to keep them.”¹²

In short, the Hobbesian state of nature is a state devoid of justice because it is a state devoid of obligations. Justice is parasitic on the voluntary crafting of covenants of mutual trust. Once the requisite assurance of performance is secured by a sovereign power, justice enters into the scene: it is just for you to keep your covenant and unjust for you to break it. Without a sovereign power, you lack assurance that I will limit my natural right, and therefore we do not yet have a covenant of mutual trust. Thus, without a civil power “sufficient to compel men to keep” their covenants, there can be no justice.

The conclusion of the Hobbesian syllogism now easily follows from these two premises. If states inhabit a state of nature, and if a state of nature is devoid of justice, international relations are a condition devoid of justice. In the international domain, there is no civil power “sufficient to compel” states to keep their covenants. As a result, the lack of assurance means that states cannot be bound by covenants and therefore inhabit a condition devoid of obligations.

If the realist argument is convincing, it mounts a formidable challenge to the idea of human rights. Human rights are supposed to be valid *universally*. However, if the realist argument persuades, states would not be bound by human rights norms in their international relations. Indeed, states would not be bound by human rights norms even in their own *internal* conduct. For the realist, what appear as human rights norms in liberal societies is nothing other than a particular internal convention, say, the norms enshrined in the state’s constitution. This is precisely the position manifested, for example, by ultra-nationalist American

¹¹ *Leviathan*, ch. 15.3. See also Irwin, *The Development of Ethics*, p. 131.

¹² *Ibid.*, ch. 15.3.

isolationists.¹³ Constitutionally protected rights are not necessarily human rights: the validity of the former is supposed to be limited to a domestic jurisdiction, while human rights are supposed to be universally valid. For this reason, if the Hobbesian syllogism is sound, we must reject the idea of human rights.

The right to self-determination thus appears to work like a Trojan Horse: once we allow it entry, it wreaks havoc on the entire system of human rights. If the normative realist is correct, no norm of justice, including human rights norms, can govern the international domain. The skeptical charge that human rights are culturally relative and tools for imperialism finds here new expression. The human rights discourse is no more than sheep's clothing on a realist wolf.¹⁴

If the collective right to self-determination is a Trojan Horse, then an easy way to avoid the problems of normative realism is to keep the horse out of the gates by rejecting the right to self-determination in the first place. We should assert the primacy of universal human rights and deny the fundamental importance of self-determination as a collective human right. This is the position commonly endorsed by proponents of *cosmopolitanism*.¹⁵

¹³ David Forsythe, *Human Rights in International Relations*, p. 11: "They easily accept the notion that because the US constitution is revered, and because the United States manifests an independent and powerful judicial system, American society has no need of international standards or international review of human rights practices." See also p. 109: "Stripped of misleading rhetoric, Washington's position toward the ICC [International Criminal Court] was that international relations was still a dangerous game meriting realist rather than liberal policies. To protect the security of the USA, Washington might have to authorize torture, degrading treatment, and other policies that violated international human rights and humanitarian law."

¹⁴ Consider again the problem of American isolationism and the American refusal to be bound by the International Criminal Court.

¹⁵ This claim requires some qualification. "Cosmopolitanism" is a label so frequently and variously deployed that it defies attempts to formulate the central tenets of the doctrine. Many cosmopolitans

If we keep in view the Hobbesian syllogism for normative realism, it appears that cosmopolitans attempt to rebut the argument by rejecting the first premise. The central though variously articulated claim is that upon careful reflection the analogy between states and pre-institutional individuals breaks down. We may organize these arguments as falling under three headings: the right of nature, the equality of states and the self-sufficiency of states.

In his seminal *Political Theory and International Relations*, Charles Beitz is one of the first to articulate this objection in the contemporary debate.¹⁶ Beitz's central objection is that even if we grant that pre-institutional individuals have an untrammelled natural right, it is not clear in what sense states would enjoy a similar right. What is the content and justification of such right? Realists tend to give content to the state's "natural right" by referring to the "national interest." But the concept of the "national interest" is either empty or problematic. On the one hand, as Forsythe argues, "the central weakness of realism has always been its inability to specify what comprises the objective national interest..."¹⁷ On the other hand, if we define the national interest as the promotion of its members' human rights or their physical integrity,

formulate their views largely independently from human rights as, for example, a question of our fundamental allegiances and identities. Cosmopolitanism can also figure as a meta-ethical debate between particularism and universalism. See, for example, David Miller, "The Ethical Significance of nationality" *Ethics* (1998) 98:4. As a result, these views would figure orthogonally on the debate as I am setting up. My concern here is with those self-described cosmopolitans like Thomas Pogge, Charles Beitz and Martha Nussbaum that do challenge the ultimate significance of values like patriotism, nationalism and state sovereignty by appealing to the ultimate significance of human rights.

¹⁶ Beitz, *Political Theory and International Relations*, p. 52 and ff.: "The argument that states should pursue their own interests in the absence of reliable expectations of reciprocal compliance with common rules depends on the analogy drawn between persons in the interpersonal state of nature and states in international relations. But the analogy is imperfect."

¹⁷ Forsythe, *Human Rights*, p. 266.

then normative realism loses its force, for it is not clear why the best way to promote human rights is to grant states an unlimited sovereign power.

Others argue that the analogy between pre-institutional individuals and states breaks down on two other accounts: the equality of states and their self-sufficiency. Cohen argues that while pre-institutional individuals may be equal in their ability to kill one another, states are unequal in power.¹⁸ States with nuclear capacities have the ability to destroy states without such capacities, but not vice-versa. Where Hegel, following Hobbes, defends the independence and self-sufficiency of states, Martha Nussbaum argues that modern states are interdependent.¹⁹ At least in the twenty-first century, the Hegelian view that a state's needs are met "within its own borders" is ludicrous.

The general cosmopolitan strategy is straightforward: it denies the first premise of the Hobbesian realist syllogism. Since the analogy between states and pre-institutional individuals breaks down, there is no reason to think that states inhabit a state of nature. And since states do not inhabit the state of nature,

¹⁸ Cohen, "Moral Skepticism."

¹⁹ Martha Nussbaum, "Beyond the social contract: capabilities and global justice," in Gillian Brock and Harry Brighouse (eds.), *The political philosophy of Cosmopolitanism* (Cambridge: Cambridge University Press, 2005), p. 200: "The gravest problem with the analogy is its assumption of the self-sufficiency of states." In his *Philosophy of Right*, Hegel claims that "autonomous states are principally wholes whose needs are met within their own borders." (§332) Hegel goes on to claim that "since the sovereignty of a state is the principle of its relations to each other, states are to that extent in a state of nature in relation to each other." (§333). See Georg W. Hegel, *Hegel's Philosophy of Right*, T. Knox (trans.) (Oxford: Oxford University Press, 1973). For the view that Hegel is developing here a type of Hobbesian realism, see Thom Brooks, *Hegel's Political Philosophy: A Systematic Reading of Hegel's Philosophy of Right* (Edinburgh: Edinburgh University Press, 2007), pp. 113-116.

there is no point in asking whether this state is amoral. International relations are already imbued by considerations of justice.

Although cosmopolitans do not put the point this way, it is helpful to distinguish two ways in which they think about global justice. On the one hand, what we may call “corrective cosmopolitans” suppose that global justice should be understood in a fundamentally corrective model. Thomas Pogge, an exemplary corrective cosmopolitan, understands human rights as claims primarily “on the global institutional order, which are claims against their fellow human beings.”²⁰ The primary bearers of the duty to protect and promote the rights of the global poor are those who have *wronged* the poor either by indirectly benefiting from or by directly contributing to the coercive institutional order. Pogge thus reconceives the duties of protection and promotion as purely *remedial* duties. On the other hand, what we may call “distributive cosmopolitans” suppose that global justice should be understood in a fundamentally distributive model. In his *Political Theory and International Relations*, Charles Beitz, an exemplary distributive cosmopolitan, argued that we should transpose the Rawlsian contractualist model of distributive justice to the global stage.²¹

Once we reconceive of international relations in this way, we would realize the arbitrariness of state boundaries. Such a device would justify global institutional reforms aimed at the application, for example, of the difference principle to the relations of persons across the world.

The key point here is that both corrective and distributive cosmopolitans share the same strategy against the Hobbesian realist: they deny that states inhabit a state of nature and then construct a global conception of justice.

I would now like to argue that the cosmopolitan response is unconvincing for two main kinds of reasons. The first is dialectical and concerns whether the cosmopolitan has responded adequately to

²⁰ Pogge, “Human Rights and Human Responsibilities,” p. 18.

²¹ Beitz, *Political Theory*, p. 181.

Hobbesian realism. The second concerns the problematic view of public authorities presupposed by cosmopolitans. Let me begin with the first.

The cosmopolitan rebuttal of the Hobbesian syllogism is unconvincing because it misses the normative core of the Hobbesian position. Hobbes's central thought, I take it, is not that states inhabit a state of nature because they are self-sufficient (they need not be) or because they are all equally strong (Hobbes is the first to admit they are not). Instead, Hobbes's main point is that states inhabit a state of nature because they are all equal in one key respect: no state has authority over another, and there is no civil power higher than states to keep them all in awe. But without such higher authority, Hobbes argues, states lack assurance; without assurance, they cannot enter into "covenants of mutual trust;" and without such covenants, there can be no justice (or injustice) among states. The cosmopolitan charge thus leaves untouched Hobbes's central claim that in an international order where states are key players, justice cannot govern their relations because there is no higher authority to solve the problem of assurance.

If this argument is correct, the cosmopolitan key strategy of denying the first premise fails. And if this is so, a cosmopolitan insistence that justice rules the international order anyway because human rights are basic will simply beg the question against the realist.

A second type of reason why the cosmopolitan response to the realist is unconvincing is due to its (implicit) concept of the role of a public authority in a system of rights. When the basic normative relationship is that between individuals across the world and the "global institutional order," public authorities get squeezed out of the picture. To the extent that they preserve a role in global justice, public authorities are justified instrumentally, as means to the production of human rights. But since from the global standpoint the boundaries of public authorities appear arbitrary, the concept of a public authority may even be dispensable. The central problem with this instrumentalist view, then, is that the cosmopolitan lacks a clear criterion for allocating the duties to protect and promote human rights.

The cosmopolitan faces three main options here: deny that human rights correlate with duties of protection and promotion; maintain that such duties are general (owed by all to all); or maintain that such duties are special. The first, libertarian option is morally problematic, and neither Pogge nor Beitz would

endorse it. The second is conceptually problematic, for it has counter-intuitive results. For example, whenever a child is denied the right to education, say, in Mongolia, every other living person would have to be thought as having *wronged* that child. The third, I take it, is the standard view, the one implicit in the UN human rights system. But under this system, the duties to protect and promote are born exclusively by states. Having declared the boundaries and possibly the very existence of states as morally arbitrary, it is difficult for the cosmopolitan to defend this standard view.

To illustrate the difficulty, consider Pogge's approach. Pogge goes for the third option (the duties to protect and promote are special), but implicitly offers a corrective criterion: those in the affluent North who have wronged others by benefiting from or contributing to our current coercive institutional order are the ones who bear the duties to protect and promote the rights of the global poor. But this criterion is conceptually problematic: it is not clear how a private person in the affluent north *wrongs* another private person in the poor south simply by benefiting from participation in a common institutional order. How is this a common institutional order? And who in the affluent North bears such duties of reparation? Is it only the very wealthy, or also the members of the "middle class" who also profit from participation in the global institutional order?

My main point, then, is that when the cosmopolitan makes the state morally arbitrary, she renders unintelligible the standard view that duties of protection and promotion are born exclusively by states without offering a suitable criterion for allocating such special duties.

Let me sum up our reflections thus far by putting them in the form of a dilemma. On the one hand, if we allow the right to self-determination into the system of human rights, we face a Trojan Horse problem: such right has led us to normative realism in international relations which is, in turn, destructive of the very idea of human rights. Furthermore, the cosmopolitan argument against normative realism appears unconvincing, for the cosmopolitan misses the normative core of the Hobbesian position. To make matters worse, even if the cosmopolitan had offered a convincing rebuttal of realism, her own position is problematic. On the other hand, then, if we reject with the cosmopolitan the fundamental importance of a state's right to self-determination, we lose from view the essential role played by states in a

system of human rights. Having dispensed with the state, the cosmopolitan does not offer a clear alternative criterion for allocating the special duties of protection and promotion correlative with human rights.

2. THE INTERNATIONAL RELATIONSHIP OF RIGHT: HORIZONTAL RELATIONS AMONG PUBLIC AUTHORITIES.

Having formulated the problem posed by normative realism as a dilemma also gives us the form of the dilemma's dissolution: we ought to reject the Hobbesian syllogism while preserving the non-instrumental normativity of a public authority. In this section, I suggest that we may do so by articulating the internationalist alternative to realism and cosmopolitanism developed by Immanuel Kant.

If cosmopolitanism appears to miss the normative heart of realism, Kantian internationalism targets it directly. We can grant the point that states lack authority over one another while rejecting the Hobbesian assumption that rules of justice are contingent on a *higher, vertical* authority to solve the problem of assurance. Justice is a form immanent already in the *horizontal* relations among states. And by conceiving of justice as immanent in the *horizontal* relations among states, we have also moved beyond cosmopolitan conceptions of global justice. Cosmopolitans conceive of global justice as a magnified version of the domestic and thus reduce it either to a corrective relation (Pogge) or a distributive one (Beitz). Kantian internationalism gives us the resources for articulating the view that international relations are governed by a new and *sui generis* form. I shall call this the "public horizontal" form, i.e., the justice that governs the *horizontal* relations among *public authorities*. I will begin to develop the argument for Kantian internationalism by returning to the Hobbesian realist syllogism.

The first premise of the realist syllogism is that, like pre-institutional individuals, states inhabit a state of nature. Hobbes begins from the thought that states inhabit a state of nature because they inhabit a *horizontal* domain of relationships. No state has authority *over* another state. Unlike cosmopolitans, we should grant this point. Kant had put this point by saying that under the title of the right of nations, the relation of one independent state to another, "a state, as a moral person, is considered as living in relation

to another state in the condition of natural freedom and therefore in a condition of constant war.”²² So far, so Hobbesian. However, on the Kantian understanding, the *horizontal* relationship between independent states carries two crucial implications.

The first concerns the concept of *sovereignty*. The contrast here may be put in terms of the difference between sovereignty as authority and sovereignty as responsibility.²³ Hobbes appears to favor the former: in the international domain, a state has an unlimited natural right and therefore unlimited authority. The state would have an authority unlimited in two ways: it is limited neither by a higher authority (other states) nor by the rights of its members. By contrast, the idea of sovereignty as responsibility finds expression in the thought that a public authority is constituted and regulated by the public duty to protect and promote the human rights of persons under its jurisdiction. Thus, although states are in the state of nature, their authority is limited by the human rights of persons inside and outside their own jurisdiction.

The second implication concerns the normative restrictions on public *war*. Although the horizontal inter-state relationship is formal, Kant infers from it three substantive normative restrictions. The horizontal structure of inter-state relations means, first, that no state is entitled to wage a *punitive war*, “for punishment occurs only in the relation of a superior (*imperantis*) to those subject to him (*subditum*), and states do not stand in that relation to each other.”²⁴ Unlike Locke’s view of the executive right of punishment, which finds paradigmatic expression in horizontal relationships, Kant’s view is that punishment is an exclusively vertical, or public, normative power.²⁵ As a horizontal interaction, punishment is indistinguishable from an additional wrong. For this reason, punishment must be the enforcement of

²² Immanuel Kant, *Doctrine of Right*, §53, 6:343.

²³ For helpful discussion of this contrast, see James Pattison, *Humanitarian Intervention and the Responsibility to Protect: Who Should Intervene?* (Oxford: Oxford University Press, 2010), pp. 2-4.

²⁴ *Ibid.*, §57 6:347.

²⁵ For excellent discussion of Kant’s treatment of punishment, see Arthur Ripstein, *Force and Freedom*, ch. 10.

public laws by a public authority. But since states are horizontally related to one another, they lack the normative power to punish each other. Thus, no state is entitled to make war on another state in order to *punish* it for a perceived wrong. Second, states must respect the human rights of non-combatants in war. And third, states must act *after* war in a manner that is consistent with a future peace. This gives states the right to “constrain each other to leave this condition of war and so form a constitution that will establish lasting peace.”²⁶

These three implications make it clear that Kant’s internationalism offers us a way to grant the Hobbesian first premise (states inhabit a state of nature) while denying the second (the international state of nature is amoral). Indeed, Kant claims that the state of nature “is itself a condition of injustice.”²⁷ The central Kantian reason for this claim is that in spite of the fact that there are no *vertical* relations among states, their horizontal relations are already imbued by the norms of justice. And that is why a condition where might makes right is a condition of *injustice*. While the cosmopolitan appears to beg the question against the realist, the Kantian disarms the realist syllogism by showing how the second premise rests on an implausible view about the nature of obligations.

I developed Hobbes’s sub-argument for the second premise in some detail in order to bring out the normative structure required to support the claim that the international state of nature is an *amoral* state, lacking in normative rights and duties. Hobbes’s argument depends on the claim that without a world sovereign to solve the problem of assurance, states cannot form “covenants of mutual trust” and therefore lack any obligations, specially any obligations of justice. But this claim, in turn, depends on two more basic ones: that rights and obligations are opposed to one another, and that obligations emerge exclusively from voluntary “covenants of mutual trust.” We are now in a position to see that neither of these claims is plausible.

²⁶ Ibid., 6:343.

²⁷ Ibid., 6:350.

The view that rights are opposed to obligations is conceptually problematic. The very idea of a claim right, as Hohfeld, Hart, and Feinberg have argued, is the idea of a claim *against* another. Thus your claim against me is from my perspective my duty to you. Rights and duties are not opposed in Hobbesian fashion, but rather rights and obligations are interdependent. The view that rights are independent from and opposed to obligations is like claiming that the concave is independent from and opposed to the convex. Just like the concave and the convex are two aspects of a single physical whole, rights and obligations are two aspects of a single juridical whole.²⁸

The other leg on which the second premise stands is equally implausible. Hobbes claims that normative obligations arise exclusively from voluntary covenants with one another backed up by sufficient assurance that the parties will be made to stick to the agreement.

To see how this view is problematic consider the status of Hobbes's first law of nature: *seek peace*. Hobbes calls this a "precept, or general rule, of reason."²⁹ But it is questionable whether pre-institutional individuals bear a normative duty to seek peace. The problem can be stated as a dilemma.

On the one hand, if the normative realist sticks to the Hobbesian view that normative obligations emerge exclusively from voluntary covenants sufficiently backed by a civil power to provide assurance, then pre-institutional individuals have no obligation to seek peace. But if they lack an obligation to seek peace, it is difficult to see how or why they would enter into covenants in the first place. Hobbes's voluntarism faces the well-known boot-strapping problem.³⁰ But meta-ethical issues aside, the voluntarist view is problematic also on a normative level. According to the Kantian view I have been developing, pre-

²⁸ I have developed this argument in detail elsewhere.

²⁹ Hobbes, *Leviathan*, ch. 14.4.

³⁰ As Korsgaard points out, Samuel Clarke already clearly identified this problem. See Christine Korsgaard, *Sources of Normativity* (Cambridge: Cambridge University Press, 1996), p. 28. For further discussion of the meta-ethical issues raised by Hobbes's view of obligation, see Irwin, *The Development of Ethics*, §§482-496.

institutional individuals and states alike do not inhabit moral limbo, but rather face substantive moral constraints. Individuals are bound to respect what Kant calls the “innate right” of others. Similarly, states are permitted to wage war, but only in such a way that is compatible with the possibility of a future peace. This rules out the permissibility of any aggressive war (punitive wars, wars of extermination, wars for conquest) and sets limits to a state’s conduct during war. By contrast, if we suppose with the normative realist that there is no justice or injustice in the international domain, then there can be no moral restraints on a state’s international conduct. Wars of extermination would be just as permissible as a state’s discretion in the allotment of its foreign aid. The category of war crimes would disappear from our moral discourse. This upshot is deeply problematic.

On the other hand, the normative realist can hold that Hobbes’s first law of nature, *seek peace*, embodies a normative obligation. This position would enable restrictions on the pursuit and conduct in war and thus avoid the problematic moral upshots of voluntarism. But if the normative realist holds this non-voluntarist view of obligations, then the problem is theoretical, for this position now undermines the second premise of the Hobbesian syllogism. If pre-institutional individuals and states alike have at least the normative obligation to seek peace, then justice gains a foothold in the state of nature. Any action contrary to the possibility of a future peace would be prohibited. Arguably, pre-institutional individuals would have the obligation, for example, not to rape, and states would have the obligation, for example, to not wage aggressive wars. But once we allow such obligations to govern relations in the state of nature, the second premise of the normative realist argument is rendered false. We have no reason to regard the state of nature as an *amoral* state. Instead, with Kant we ought to regard it as a state of injustice from which states are bound to exit.

I have just argued that the Hobbesian claim that the state of nature is *amoral* is false because it rests on an implausible view about rights and obligations. If my argument is correct, it supports the view that a state’s sovereignty should be construed in terms of the state’s *responsibility* rather than the state’s *unlimited authority*. Once we hold that there are norms of justice governing the conduct of any state, and that part of these norms are human rights, then it no longer makes sense to suppose that a state has unlimited

authority. The authority of the state is limited at the very least by the responsibility to respect the human rights of any person. Moreover, once we understand a state's sovereignty as its responsibility to protect and promote the human rights of persons under its jurisdiction, we no longer need to suppose that the state's right to self-determination must require the state's unlimited authority. Instead, we ought to understand such right as the international face of the public duty to protect and promote the human rights of persons within the state's jurisdiction. Self-determination and sovereignty *as responsibility* are the same concept.

And while challenging the central claim of the realist, the Kantian position I am defending differs from the cosmopolitanism envisaged by Pogge and Beitz. Human rights are indeed universal norms. But they are double-barreled: they correlate both with general private negative duties and with special public positive duties. Public authorities are the exclusive bearers of the second type of duty. By conceiving of global justice as a relation between individuals and the global institutional order, cosmopolitans squeeze out public authorities and make it difficult to allocate positive duties. By contrast, by reconceiving of the right to self-determination in an internationalist rather than a realist way, the relational account can continue to hold that public authorities play an essential, non-instrumental role in a system of human rights: they are the sole bearers of the duties to protect and promote human rights.

Normative realists and cosmopolitans alike follow a reductive strategy by conceiving of international relations on the model of private horizontal relations (realist) or on the model of public vertical relations (cosmopolitan). The internationalist extension of the relational model of human rights preserves the partial truth of each by conceiving of international relations as *sui generis*. International relations are governed by a new form: the "public horizontal" form.

Before going on to articulate and defend the unique normative status of this form, let me quickly preempt two possible cosmopolitan objections. The first objection is that by defending the principle of sovereignty and state independence, I have made it impossible to justify humanitarian interventions. The

second objection is that there is no plausible justification for the principle of state independence. As Beitz argues, such principle “lacks a coherent moral foundation.”³¹

An adequate response to the first objection would require delving into the theory of just war, something I cannot pursue here. Instead, I want to offer two main reasons why the Kantian internationalist is not committed to the prohibition of humanitarian intervention.

First, a categorical prohibition on humanitarian intervention would be committed to the view of sovereignty as *unlimited authority*. If a state is entitled to absolute authority over domestic issues, then no state could ever be entitled to “intervene” in another’s internal affairs. But as I have argued, on the internationalist view, a state’s authority is necessarily connected to the state’s public duty to protect and promote the human rights of those in its jurisdiction. When a state egregiously flouts that duty, say, by committing genocide or war crimes on its population, there is no reason to deny that other states have the right and perhaps even the duty to intervene. In short, since Kantian internationalism is not committed to the view that state sovereignty is *unlimited authority*, it is not committed either to a categorical prohibition of humanitarian intervention.

Second, the prohibition of aggressive and punitive wars, the objection goes, would entail a prohibition of humanitarian interventions. But this inference is dubious. There is no reason to suppose that a humanitarian intervention would be either aggressive or punitive. Indeed, as theorists of just war argue, for a humanitarian intervention to be justified, its purpose (not the state’s motive) must be protection of the attacked and the interruption of the attack.³² The purpose of an aggressive or punitive war is necessarily different, for it is an activity whose immanent purpose is the acquisition of new territory, resources, etc. or the punishment of another state for a perceived wrong. Thus, the prohibition of aggressive and punitive wars does not commit the internationalist to a categorical prohibition of humanitarian interventions.

³¹ Beitz, *Political Theory*, p. 121.

³² See, for example, James Pattison, *Humanitarian Intervention*, p. 28.

The second cosmopolitan objection is that the principle of state independence and equal sovereignty is arbitrary. Charles Beitz articulates a battery of arguments against the internationalist view and concludes that since none of the arguments for state independence work we should endorse cosmopolitanism. Thus Beitz considers and rejects the following arguments for the principle of state independence. States ought to be treated as independent because (1) they protect (or are themselves a) free association;³³ (2) because this principle is impartial “between competing conceptions of the good in international relations;”³⁴ and (3) because this principle is anti-paternalistic, since “a state is more likely to know its own best interests than any other state.”³⁵ Beitz finds each of these arguments unconvincing and concludes that the principle of state independence “lacks a coherent moral foundation.”³⁶

Although Beitz is very careful and fair in his examination of the possible grounds for the principle of political independence, his arguments are innocuous against the Kantian internationalist view for a simple reason: the Kantian arguments I have been developing are different from the ones Beitz considers and therefore untouched by his criticisms. Beitz strikes at a straw man. Only the third, anti-paternalist, argument bears some resemblance to the Kantian argument against despotism and domination, but even here the arguments are fundamentally different. The anti-paternalist argument is instrumentalist: it hinges on the state promoting its interests (either of the state or its members) better than external actors. The anti-domination argument is formalist: it hinges on the public duty of a state to protect and promote the human rights of its members.

Since neither of these cosmopolitan objections is forceful, we should move on to examine in more detail the public horizontal form.

³³ Beitz, *Political Theory*, p. 72.

³⁴ *Ibid.*, p. 87.

³⁵ *Ibid.*, p. 84.

³⁶ *Ibid.*, p. 121.

3. THE PUBLIC HORIZONTAL FORM OF THE INTERNATIONAL RELATIONSHIP OF RIGHT: THE DOUBLE-BARRELED STRUCTURE OF PUBLIC DUTIES

My aim in this final section is to buttress further the internationalist account by showing how the public horizontal form gives us a more plausible conception of the normativity of international human rights norms than the conception of realists and cosmopolitans. On the one hand, as the second premise of the Hobbesian syllogism illustrates, realists are committed to the view that the international state of nature is *amoral*. As a result, if a state is bound by human rights norms at all, it must be due to the state's *own consent*. This leads directly to the positivist view that states *create* human rights obligations by ratifying the human rights treaty. On the other hand, the cosmopolitan must see the human rights treaty as recognizing *pre-existing* obligations. I will now argue that realists and cosmopolitans alike offer an implausible picture of the normative structure of the human rights treaty. On the internationalist model, the human rights treaty neither *creates* human rights obligations *ab nihilo*, nor does it merely *recognize* fully determinate pre-existing obligations. Instead, such treaty articulates publicly in a more determinate form the precise content and scope of the state's duties to protect and promote human rights. The human rights treaty manifests the normative structure I have been calling the "public horizontal form": the state's double-barrelled first-order duties to persons within its jurisdiction and second-order duties to other states.

A straightforward way to bring the issue into focus is to consider a puzzle for international lawyers raised by the normative structure of human rights treaties.³⁷ In general, the international treaty is understood on the model of a contract: two parties voluntarily limit their rights and incur a bilateral obligation for the sake of obtaining a future benefit. The 1969 Vienna Convention on the Law of Treaties

³⁷ For a lucid discussion of this puzzle, see Matthew Craven, "Legal Differentiation and the Concept of the Human Rights Treaty in International Law," *EJIL* (2000), Vol. 11 No. 3, 489–519; and Frédéric Mégret, "Nature of Obligations," in D. Moeckli, S. Shah, and S. Sivakumaran, *International Human Rights Law* (Oxford: Oxford University Press, 2010).

lays out the specific contractual normative structure of treaties in considerable detail. The puzzle emerges because state obligations characteristic of human rights treaties appear to lack the two defining features of a standard contract: such obligations appear to be neither voluntary nor to be exchanged for the sake of a future benefit. This deviation from the general structure of treaties has led international lawyers to speak of the “special character” of obligations enshrined in human rights treaties. The puzzle is exactly how to understand the “special character” of these obligations.

The puzzle is significant for international lawyers because it raises central questions about the general structure of international law. But the puzzle is also significant for philosophers because it gets to the heart of the normative structure of international relations: if the human rights obligations of the state have a “special character,” the realist claim that the state’s human rights obligations are merely *voluntary* and *consensual* is false.

Curiously, in spite of the puzzle’s prominence in discussion among international lawyers, philosophers have not paid attention to it. But if I am right, answering the question whether human rights treaties have a “special character” has direct and important implications for the plausibility of realism and cosmopolitanism. I shall now argue that human rights treaties indeed have a “special character” and that this special character is best understood through the public horizontal form.

Normative realism is most plausible when we suppose that human rights function as international juridical standards only because they derive their validity from voluntary agreements. We may construct such an argument in three steps.

First we observe, as Chinkin does for instance, that “international human rights law today *primarily* derives from international and regional treaties.”³⁸ Since the system of international law lacks a unified

³⁸ Chinkin, “Sources,” p. 105 (*emphasis added*). But note that this claim would be insufficient. What the realist needs is the stronger claim that international human rights law derives *exclusively* from treaties. No international lawyer would ever endorse such a claim because the ICJ Statute envisages three other formal sources of international human rights law, (2)-(4). I let this slide because I want to formulate the strongest

legislative body (e.g., a world Congress) and an executive (e.g., a world government), Article 38 (1) Statute of the International Court of Justice identifies four formal sources of international law: (1) international conventions,³⁹ (2) international custom, (3) the general principles of law recognized by civilized nations, and (4) judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of the rules of law.⁴⁰ While (4) is irrelevant, (2) and (3) are the most problematic for normative realism. If human rights are norms recognized by (2) international custom or (3) can be identified with “the general principles of law,” then the second premise of the Hobbesian syllogism will have been rendered false, for states would be bound by human rights obligations regardless of their voluntary pacts. Normative realism thus requires that international conventions be the sole source of a state’s human rights obligations.

From this it follows that the “foundations of contemporary human rights law lie in positivist law, based on state consent.”⁴¹ The second step, then, is to understand the normativity of international conventions on the model of the contract.

When so understood, human rights law does not challenge normative realism because international human rights law is ultimately contingent on the self-limiting consent of states. Should this consent be withdrawn, the edifice of human rights law would allegedly crumble.

This traditional picture of international law thus betrays two crucial realist presuppositions. The first is voluntarism: states are not juridically bound to bear any obligations to which they have not provided full consent. The second is sovereignty as authority: since the only obligations states bear are

possible argument for normative realism about human rights in order to show that even that argument fails.

³⁹ Following common usage, I will treat the terms ‘convention,’ ‘treaty,’ ‘pact,’ and ‘agreement’ as perfectly synonymous in this context.

⁴⁰ See Christine Chinkin, “Sources,” in *International Human Rights Law*, p. 104.

⁴¹ *Ibid.*, p. 105.

those to which they have fully consented, in principle states enjoy an unlimited sovereignty. If states do not agree to limit their rights in any way, then states bear no obligations whatever. Thus, for the realist challenge to hold its ground it needs to maintain that human rights treaties function like contracts. The problem is that they do not.

There are two main formal reasons why human rights treaties do not take the form of contracts. The first, as I mentioned earlier, is that states have human rights obligations prior to their ratification of the respective human rights treaty. Consider the infamous Armenian Genocide. During and after World War I, the Ottoman Empire carried out policies designed to exterminate Armenians from their historic homeland in Asia Minor. As a result, upwards of 1 million Armenians are estimated to have perished. It would be absurd to maintain that the Ottoman Empire had no obligation to not exterminate Armenians because the Genocide Convention only entered into effect in 1951. Or consider the Holocaust perpetrated by Nazi Germany during World War II. It would be absurd to maintain that Nazi Germany had no obligation not to exterminate Jews, homosexuals, Roma and dissidents because the Genocide Convention had yet to enter into effect. And yet this is the view to which the realist appears to be committed: since states acquire specific obligations only by voluntarily entering into treaties, the state could have no such obligations prior to treaty ratification.

In the case concerning the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (between Bosnia-Herzegovina and the Serbia-Montenegro), Judge Weeramantry had to establish whether to consider Bosnia-Herzegovina and Yugoslavia as parties to the Convention in spite of the fact that Serbia-Montenegro had not formally ratified it. Weeramantry ruled that since the Convention, like any “humanitarian” treaty, did not represent an exchange of interests but rather embodied “a commitment of the participating States to certain norms and values recognized by the international community,” the Convention “transcended” the concept of state sovereignty and enabled regarding Bosnia-Herzegovina and Serbia-Montenegro as parties to the convention regardless of whether they

desired to be so regarded and regardless of the steps they may have taken to be so regarded.⁴² Judge Weeramantry's decision further supports the position that states like Serbia-Montenegro had the obligation to neither commit nor permit, for example, the Srebrenica massacre in 1995 in spite of Serbia-Montenegro's claim to not be bound by the Convention.⁴³

At this juncture, I need to formulate my claim more carefully. Although I am claiming that states have human rights obligations *prior* to their ratification of human rights treaties, I am *not* claiming that human rights treaties are normatively inert. Whereas institutional and normative realists claim that human rights treaties *create* state obligations, naturalists and cosmopolitans understand those obligations as *pre-existing* the treaties in fully determinate form. For the naturalist and cosmopolitan, a human rights treaty would merely *recognize* perfectly determinate pre-existing obligations. The treaty would thus not change the normative situation of the state. This mirrors the naturalist view that human rights are fully determinate independently of institutions and that institutions do not *create* but simply recognize human rights.

The relational account offers an alternative to these views. We ought to regard states as already bound to respect, protect and promote the human rights of persons under their jurisdiction because this duty is constitutive of the very idea of the state. But this does not mean that international treaties are normatively inert, as the naturalist seems to think. We ought to understand treaties differently. Just as I have argued that a key function of municipal public laws is to solve the problem of *indeterminacy*, I am now claiming that a key function of international public law is to solve the problem of *indeterminacy* as well.

The claim that states have human rights obligations prior to their ratification of treaties is perfectly compatible with the claim that treaties institutionalize in a public way the more determinate content of such obligations. The claim, for instance, that states have the duty not to commit or permit genocide is

⁴² ICJ Reports (1996) 595, 645-649, quoted in Craven, pp. 491-492.

⁴³ In a highly controversial decision, the Court ruled that genocide did take place in Bosnia-Herzegovina and that Serbia-Montenegro was not responsible for *committing* the Srebrenica genocide, although it was responsible for failing to *prevent* it.

perfectly compatible with the claim that this duty became far more determinate through, for example, the classic definition of genocide provided by Art. II of the 1948 Convention on the Prevention and Punishment of the Crime of Genocide (Genocide Convention). This definition would then be repeated in the Statutes of the International Criminal Tribunal for the former Yugoslavia (ICTY) and crucially in Art. 6 of the Statute of the International Criminal Court. But this process of institutionalization is a dynamic and open process, as we continuously fine-tune the precise scope and content of states' obligations. For example, during the drafting of the Genocide Convention, many argued that "cultural genocide" should be included in Art. II of the Convention: genocide should be expanded to include acts aimed at forcibly assimilating a group so that it ceases to exist as a cultural rather than a physical entity. This claim was rejected, but it has been revived. Perhaps in the future, genocide will come to encompass cultural genocide as well.⁴⁴

The central point for our purpose is that realists and cosmopolitans alike, echoing the debate between institutional and naturalist models, miss this crucial function of international law. The realist and institutional theorist is right to maintain that treaties are normatively important, but she overstates their importance. Treaties do not create a state's human rights obligations *ab nihilo*. The cosmopolitan and naturalist theorist is right to maintain that a state's obligations *pre-exist* the treaty, but she underestimates the normative importance of a treaty. Although the public duty to respect, protect and promote the human rights of persons under its jurisdiction is constitutive of a public authority, treaties specify and further determine the content and scope of such duty. The treaty is neither creation *ab nihilo* nor mere *recognition* of perfectly determinate duties.

⁴⁴ See Robert Cryer, "International Criminal Law," in *International Human Rights Law*, p. 543. Naturally, not counting cultural genocide as genocide does not entail that states are now permitted to forcibly assimilate cultural minorities. It only means that their doing so does not count as genocide. It would be a wrong to members of those minorities, say, under the provisions of Art. 27, ICCP, which protects cultural human rights.

I made a parallel point at the end of Chapter 5 with regard to the relationship between human *rights* and treaties. I suggested that international human rights law protecting the rights of children, women and indigenous peoples do not *create new* human rights but rather guarantee the generality of the subject in the human rights judgment. These are more *inclusive* formulations of the same rights. The treaties manifest the self-correcting feature of a system of human rights. When we see that a particular group of persons is being systematically discriminated against and not counted as full persons, treaties are one institutional form of recognizing members of that group as full persons. By overestimating the importance of treaties, institutional models tend to suppose that these treaties must *create* new rights. This is problematic because the list of human rights would then balloon out of control and we would lose from view the internal conceptual connections between “new” and “old” human rights. By underestimating the importance of treaties, naturalist models tend to suppose that these treaties simply *recognize* pre-existing rights, rendering new treaties normatively irrelevant. The relational model helps us to see that both views are blinded to the special function of human rights treaties: they further determine the scope and content of human rights. This is neither creation *ab nihilo* nor mere *recognition* of perfectly determinate human rights.

The first reason, then, for rejecting the realist understanding of the normativity of human rights treaties is that the realist claim that states lack human rights obligations prior to treaty ratification is plainly false.

The second reason for rejecting the realist, voluntarist understanding of human rights treaties is formal: human rights treaties are simply unintelligible when we conceive them as a *reciprocal* contract. As Craven notes, we may understand the *reciprocity* regulative of a contract in three ways: a contract is *reciprocal* (1) through the material exchange of benefits (“considerations” or “causes”), (2) through the psychological attitudes of mutually *agreeing*, or (3) through the legal form of a bilateral normativity, the mutual and conditional exchange of obligations.⁴⁵ Human rights treaties cannot be understood as voluntary contracts

⁴⁵ Craven, “Legal Differentiation,” p. 503.

because they are not reciprocal either in the material (1) or the logical-legal sense (3), and not necessarily reciprocal in the psychological sense (2).

A contract must be reciprocal by signifying (1) the material exchange of benefits. In return for your two loaves of bread, I will give you 2 pounds of oranges; as compensation for your renovation of my kitchen, I will pay you \$3,000. Contracts are reciprocal, then, because two parties voluntarily agree to a future exchange of goods. A bilateral free trade agreement appears to take this form: state *A* agrees to lower its tariffs towards state *B* in exchange for easier access to *B* markets. But human rights treaties do not take this form, for three reasons.

First, in a human rights treaty, there is no conditional *exchange* of benefits between two states. The Inter-American Court of Human Rights (ICHR) made this point poignantly in the *Effect of Reservations Case*: modern human rights treaties in general, and the American Convention in particular, are not multilateral treaties of the traditional type concluded to accomplish the reciprocal exchange of rights for the mutual benefit of the contracting States. Their object and purpose is the protection of the basic rights of individual human beings irrespective of their nationality, both against the State of their nationality and all other contracting States.⁴⁶

The ICHR emphasizes the point that it would be deeply misleading to understand a human rights treaty as the exchange of rights for the benefit of the contracting parties. Instead, we must understand such treaties as laying out the obligations of parties to the treaties to protect the human rights of persons within their jurisdiction.

The second reason is that in a human rights treaty there is no *conditional* exchange of benefits. In a contract, the obligations of one party are conditional on the performance of the other party. If you never

⁴⁶ The Effect of Reservations on the Entry into Force of the American Convention on Human Rights (Arts 74 and 75), Advisory Opinion OC-2/82 of 24 September 1982, Inter-American Court of Human Rights (1982), Series A, No. 2, para. 30. Quoted in Craven, “Legal Differentiation,” p. 495.

renovate my kitchen, I do not owe you a cent. By contrast, when Serbia-Montenegro failed to prevent the Srebrenica Genocide, this could not possibly mean that all other parties to the Genocide Convention suddenly were relieved of their obligations to not commit or permit genocide. Similarly, it would be ludicrous to suppose that the United States is no longer obliged to respect, protect and promote civil and political rights because China and North Korea have horrible records of fulfilling their obligations. Unlike contracts, then, the human rights obligations of a state laid out in treaties are not conditional on the performance of the other party.

And third, while contracts require the *voluntary* exchange of benefits (a coerced contract is invalid), human rights treaties lack this condition. If I put a gun to your head and “ask” you to give me your laptop in exchange for my letting you walk freely, this is clearly not a valid contract. Human rights treaties, by contrast, can be binding where “free consent” is absent, for example, by being conditions of peace settlements.⁴⁷ A recent and clear example is the Dayton Peace Accord. This treaty, which formally closed the armed conflict in Bosnia-Herzegovina, stipulated that the European Convention on Human Rights (ECHR) take priority over all municipal law and that Bosnia-Herzegovina become (or remain) member to the UN human rights treaties.⁴⁸ If Bosnia-Herzegovina consented to these terms, the consent in the Dayton Accord was not necessarily “free.”

That human rights are not *voluntary* contracts is also clear from their “stickiness.” In a famous case, North Korea, upset with the criticisms of its record, sought to withdraw entirely from the ICCPR in 1998. If human rights treaties were voluntary contracts, parties should be just as free to enter as to exit the agreement. So the question of North Korea’s title to withdraw from the treaty should have been a moot point if human rights treaties functioned like voluntary contracts. Nevertheless, the UN Secretary-General

⁴⁷ This third reason suggests that the second form of reciprocity (psychological) is not necessary either for the validity of a human rights treaty.

⁴⁸ See Chinkin, “Sources,” p. 107.

ruled that North Korea did not have the title to withdraw because states simply cannot withdraw from the ICCPR.⁴⁹

To put it in now my terms, the intelligibility and normativity of a contract stems from the *bilateral, horizontal* form of justice. Human rights treaties cannot bear this form. They embody a fundamentally *vertical* form: the obligations of the state towards persons in its jurisdiction. The view that human rights treaties are not *horizontal* but *vertical* in this way is now standard in international law. In 1961, the European Commission of Human Rights affirmed that:

The obligations undertaken by the High Contracting Parties in the [European] Convention [on Human Rights] are essentially of an objective character, being designed rather to protect the fundamental rights of individual human beings from infringements by any of the High Contracting Parties than to create subjective and reciprocal rights for the High Contracting Parties themselves.⁵⁰

We may gloss the European Commission's claim that the obligations of states are of an objective character as the claim that these obligations are not horizontal (not the subjective and reciprocal rights for the contracting parties) but vertical (the state's obligations towards persons in its own jurisdiction).

In sum, human rights treaties are simply unintelligible if we conceive of them on the model of a voluntary contract for two main types of reasons. Some state obligations pre-exist the treaty and such treaties take a vertical, rather than bilateral and horizontal form. While contracts must be reciprocal in the three senses specified, human rights treaties do not require any of the three senses of reciprocity.

Moreover, the relational account once again avoids normative realism without collapsing into cosmopolitanism. Since the normative realist requires that the validity of human rights hinge exclusively on human rights treaties and that human rights treaties be understood as contracts, my argument that

⁴⁹ Mégrét, "Nature of Obligations," p. 145.

⁵⁰ *Reservations to the Genocide Convention* (Advisory Opinion) [1951] ICJ Rep 15, para 23. Quoted in Mégrét, "Nature of Obligations," p. 128.

such treaties are unintelligible as contracts deals a further blow to normative realism. As a challenge to international human rights, normative realism is left without a leg on which to stand, for we have good reasons to reject both the claim that the international domain is amoral and the claim that state obligations are exclusively contractual. But I have also argued that the cosmopolitan too is blinded to the key normative significance of the human rights treaty. For the cosmopolitan, such treaties are not fundamentally significant because they merely recognize pre-existing rights and duties. I have argued that it is more plausible to understand such treaties as neither *creating* nor *merely recognizing* rights and duties, but rather as *further determining* the scope and content of human rights and duties. In so doing, I hope to have pushed back from realism without falling into the hands of the cosmopolitan.

Having cast aside the common confusion of human rights treaties with contracts, we are now in a better position to see how such treaties manifest the “public horizontal” form.

One might wonder why, if human rights treaties are indeed *vertical* as I have claimed them to be, a new form is required to comprehend their normativity. After all, why not simply conceive them as an instance of the *vertical* form of justice I introduced in chapter 3? Some commentators make precisely this move. They reject the horizontal, contractual conception of human rights treaties and replace it with an exclusively vertical, unilateral one. Thus, Matthew Craven suggests that the human rights treaty represents a “strictly non-relational one [i.e., a regime] (or at least only relational as between states and individuals).”⁵¹ And Mégrét maintains that if a state’s obligations in a treaty are not bilateral they are unilateral: “states are better understood as making a solemn promise to the international community, and indeed to individuals within their jurisdiction.”⁵²

But this picture of the treaty as exclusively vertical cannot be right either. On such a picture, the treaty would represent the *aggregate* of unilateral obligations incurred by individual states towards persons in their jurisdiction. But if the treaty is no more than the aggregate of unilateral obligations, why is a treaty

⁵¹ Craven, “The Legal Differentiation,” p. 508.

⁵² Mégrét, “The Nature of Obligations,” p. 129.

necessary for conveying such “solemn promise”? The treaty would lack unity, for it would amount to the mere coordination of state obligations that by accident happen to be the same. But if the obligations acknowledged by states are indeed the same, this cannot be by accident. That states acknowledge the very same obligations must be constitutive of the treaty. And this means that just as it is misleading to understand the treaty as an iteration of bilateral contracts, so too it is misleading to understand it as an iteration of unilateral promises.

We comprehend the normativity of the treaty better when we see it as manifesting the “public horizontal” form. The parties to the treaty acknowledge not one, but *two* forms of obligations: a *vertical* obligation to *every* person in their jurisdiction, and a horizontal obligation to *every other state*. The former obligation is simply the further determination of the *domestic* public duty to respect, protect and promote the human rights of persons under the state’s jurisdiction. The latter obligation is the further determination of the same public duty understood in relation to other states. Formally, this is the obligation to establish an international order where the human rights of all can be secured through international law.

As already discussed, the ICHR maintains that the object and purpose of a human rights treaty “is the protection of the basic rights of individual human beings irrespective of their nationality, both against the State of their nationality and all other contracting States.” We can now understand this claim as manifesting the double-barreled structure of public duties. States are constituted and regulated by the public duty to protect and promote domestic human rights and by the international public duty *to other states* to protect and promote international human rights by establishing an international order where the rights of all can be secured.

Note that the two obligations have different structures. The *domestic* public duty is a first-order or primary obligation owed to *persons as individuals*. The *international* public duty is a second-order or secondary obligation owed to states, or to persons as *the collective of a public authority*. If you are denied the right to vote in Nigeria, you have been wronged by the Nigerian state, not by the state of Ghana, Cameroon or any other state. Other states do not owe *you* the duties of protection and promotion. As I argued in the

previous chapter, such duties are *special* rather than *general*: a state owes them exclusively to persons within their jurisdiction, rather than to *all* persons. Thus, while the domestic public duty to protect and promote is first-order and *special*, the international public duty to protect and promote is second-order and *general*, a duty owed to every other state.

What I am calling here the general, second-order international public duty, international lawyers call the *erga omnes* character of human rights obligations. Such obligations carry the *omnilateral, horizontal* structure characteristic of the second-order, international public duties. States bear *erga omnes* public international duties in the sense that these are duties owed “to the international community as a whole” so that “by their very nature, (they) are the concern of all States.”⁵³ Kant had made precisely the same point by suggesting that peace and its conditions

can be assumed to be a matter of concern to all nations whose freedom is threatened by it, [and so] they are called upon to unite against such misconduct in order to deprive the state of its power to do it.⁵⁴

The creation of an international order where everyone can enjoy human rights secured by public laws is a matter of international concern, and every state has the obligation domestically and internationally to establish such an order. War is destructive of such an order. For that reason, human rights and peace are internally related. We might say that human rights are the conditions of the possibility of peace.

Article 28, UDHR provides:

Everyone is entitled to a social and international order in which the rights and freedoms set forth in this Declaration can be fully realized.

For Thomas Pogge, Art. 28 provides evidence of his view that human rights are best understood as cosmopolitan norms: the claims everyone has on a global institutional order.⁵⁵ But as I have been arguing,

⁵³ Mégrét, “Nature of Obligations,” p. 129.

⁵⁴ Kant, *Doctrine of Right*, §60 6:349.

⁵⁵ Thomas Pogge, “Human Rights and Human Responsibilities,” pp. 14-5.

Pogge's cosmopolitanism leaves out the key role states are supposed to play in the system of human rights. For that reason, we should read Art. 28 differently. Art. 28 appears to support the view that your human rights correlate with two forms of state obligations: your state's obligation to protect and promote your human rights, and every state's obligation to establish an order where the human rights of all can be fully realized. That international order is an order of peace. This is the reason why wars of aggression and domestic genocide are matters of international concern. A war of aggression is not a wrong exclusively to the state attacked, but rather to every other state, because a war of aggression contravenes what Kant spoke of as the obligation to leave the international state of nature. Wars of aggression and genocide are inconsistent with an order of peace. They are inconsistent with the international public duty constitutive of the state, namely, the duty to establish such an order.

Human rights treaties, I have been arguing, embody the "public horizontal" form. Although they involve domestic vertical duties to individual persons, they also involve omnilateral horizontal duties to every other state. The public horizontal form makes best sense of the normative structure of human rights treaties, and in so doing explains what it is for human rights to be "matters of international concern." Although Art. 28 focuses on the rights of individuals, we may read it as well on the side of public international duties. Art.28 would then affirm that every state has the duty to act towards the establishment of a global order where the human rights of all can be fully realized. And this is the order of peace.

CONCLUSION

In chapter 4, I offered a "transcendental deduction" of the idea of a human right. The regressive argument revealed human rights to function as constitutive conditions of the relationship of right. This was the first moment in a non-instrumental and relational vindication of human rights. Human rights matter not because they promote an independently intelligible good, but rather because they are the necessary conditions of our claiming rights against one another. They are the conditions without which we cannot relate to each other as persons of equal status. The progressive moment moves in the opposite direction,

from the original relation of right to the three forms of relationship of right constituted by human rights. In chapter 5, I defended the indivisibility thesis that rights from all five categories must count as human rights. Human rights must be indivisible precisely because they *all equally* structure the two forms of relations of right: the form of corrective justice (horizontal and bipolar) and the form of distributive justice (vertical and omnilateral).

However, my defense of the sole group right of self-determination at the end of the previous chapter introduced a puzzle. How is the right to self-determination consistent with the universality of human rights? Should we follow the realist school of thought about international relations, we would understand the right to self-determination as in fact *undermining* human rights. If a state has the right to determine itself with regard to its internal affairs, such right can permit a state to infringe or not recognize the human rights of those within its jurisdiction.

My aim in this final chapter has been to repel this last remnant of skepticism about human rights, now appearing in the domain of international relations. In so doing, we have brought into view a new form of relationship of right, which I called the *public horizontal* relation. The public horizontal relationship of right manifests the *sui generis* character of the relations among states. As far as human rights are concerned, the relation illuminates the double-barrelled character of a state's public duties: its first-order duties of protection and promotion owed to those within its jurisdiction and its second-order duties of protection and promotion owed to every other state. Human rights are a matter of international concern precisely due to the public horizontal form, that is, because when a state infringes in a basic way its most basic duty to respect, protect and promote the human rights of those within its jurisdiction, such act perpetuates an international condition of war. In such condition, might makes right. Human rights are a matter of international concern due to the internal relationship between domestic and international peace highlighted most prominently by Immanuel Kant.

Following Kant, I have offered two main arguments for the view that human rights are constitutive of the international relationship of right. The first rebuts the Hobbesian realist syllogism by granting the first premise and denying the second. The fact that states have no authority *over* one another

does not entail that the international state of nature is *amoral* in the absence of an even higher authority. This is because, as Kant realized, the horizontal relationship between states is *already governed* by the form of justice. My Kantian argument against the realist turned here on the implausibility of Hobbes's voluntarist understanding of obligations. The main point is this: once we reconceive of sovereignty as involving responsibility rather than unlimited authority along the terms developed in earlier chapters, there is no incoherence between the right to self-determination and the international character of human rights.

In the third section, I considered a different argument for normative realism, namely, that international human rights are contingent on human rights treaties, and that treaties are themselves optional and voluntary, just like any contract. I provided numerous arguments to show that this commonly held view is deeply wrong. Human rights treaties are just unintelligible if we think of them as contracts.

As Kant argued, "if the principle of outer freedom limited by law is lacking in any one of these three possible forms of rightful condition, the framework of all the others is unavoidably undermined and must finally collapse." Human rights are matters of international concern because the fulfillment of a state's double-barreled duties is a condition of the possibility of any future peace. But peace is not a good to be promoted. Peace is simply that international condition in which the human rights of all can be fully enjoyed under the institutional protection of a public authority.