THE MORAL REALITY OF HUMAN RIGHTS

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1. Introduction

The elevation of the discourse of human rights in recent times to the status of an ethical lingua franca has fuelled an unruly proliferation of incompatible or often just incredible rights claims. If human rights are not to fall victim to their own popularity, some principled way of distinguishing the genuine articles from the presumed spate of counterfeits is required. It is no answer to invoke the ‘human rights’ proclaimed as such in international treaties and declarations. To begin with, they lack the requisite universality: the instruments in which they are set out are often not legally binding and even those that are binding are not subscribed to by all states (or are subscribed to by many states subject to eviscerating reservations). More importantly, the international regime of human rights is not self-validating; instead, its legitimacy depends upon compliance with independent moral standards, including genuine human rights. So the intended short-cut through law and political practice rapidly leads back to our original problem.

Although philosophers disagree about whether or how the problem can be solved, many of them agree on the general character of any adequate solution. According to this standard picture, as I shall call it, which human rights exist is a moral question to be distinguished from the predominantly institutional question of the extent to which they are recognized, respected or enforced. An uncompromising formulation of the view is given by Thomas Nagel:

The existence of moral rights does not depend on their political recognition or enforcement but rather on the moral question whether there is a decisive justification for including these forms of inviolability in the status of every member of the moral community. The reality of moral rights is purely normative rather than institutional - though of course institutions may be designed to enforce them (Nagel, 2002: 33).1

Human rights, so conceived, have implications for the creation, modification or abolition of institutions, but their existence is determined by moral reasoning, not by whatever institutional facts happen to obtain. Of course, institutional mechanisms - such as treaties, Bills of Rights, constitutional courts, and so on - can play a vital role in implementing human rights. In particular, they can render their content more determinate by making or reflecting an authoritative choice from among alternative eligible specifications of human rights norms. But, according to the standard picture, the rights must have a tolerably

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1 The standard picture is also elaborated and defended at length in Feinberg (2003).
determinate content independently of any subsequent institutional specification they might receive. If they did not, there would be no warrant for treating them as human rights in the first place.

The distinction between the normative and institutional questions does not simply arise, as Nagel seems to imply in drawing no distinction between 'moral rights' and 'human rights', from the fact that human rights are morally justified. Nor is it the upshot of their moral character combined with universality of scope. These two features distinguish human rights from institutionally-dependent rights that are neither morally justified nor possessed by all, such as the legal rights of slave-owners. But their moral standing does not differentiate them from moral rights that partly depend for their existence on institutional facts, e.g. moral entitlements arising from one's membership of an ongoing institutional scheme, such as a university or a state. Moreover, institutionally-dependent moral rights are also capable of embracing all of humanity. Consider, for example, a global economic regime that assigns to every individual in the world a right of access to a newly discovered natural resource. The rights conferred by such a regime, although morally justified and universal in scope, would not count as human rights on the standard picture. Instead, what also lies behind that picture is the idea that human rights are moral entitlements possessed by all simply in virtue of their humanity. It seems to follow from this definition that no account need be taken of individuals' special relationships to persons, groups and institutions in determining which human rights exist. And this is so even if the human capacity for entering into such relationships is a relevant consideration in identifying human rights.

This last point highlights the fact that there are different versions of the 'standard picture'. One rather austere version interprets human rights as 'natural rights', i.e. rights meaningfully capable of being possessed in a state of nature. This interpretation secures the timelessness of human rights - they can be ascribed to all human beings throughout history - but only at the apparent cost of excluding rights that require or presuppose the existence of non-universal social practices and institutions, e.g. rights to political participation or to a fair trial. By contrast, I have suggested that human rights enjoy a temporally-constrained form of universality, so that the question which human rights exist can only be determined within some specified historical context. For us, today, human rights are those possessed in virtue of being human and inhabiting a social world that is subject to the conditions of modernity (Tasioulas, 2002a: 86-88). This historical constraint permits very general facts about feasible institutional design in the modern world, e.g. forms of legal regulation, political

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2 What 'modernity' amounts to, in this connexion, is a large question. For present purposes, I simply endorse Charles Taylor's characterization of it as 'that historically unprecedented amalgam of new practices and institutional forms (science, technology, industrial production, urbanization), of new ways of living (individualism, secularization, instrumental rationality), and new forms of malaise (alienation, meaninglessness, a sense of impending social dissolution)'. (Taylor, 2004: 1).
participation and economic organization, to play a role in determining which human rights we recognize. But this is different from making the existence of human rights turn on the specific institutional arrangements that obtain at any particular time and place.

The standard picture, if it can be vindicated, endows human rights with great critical power; this is a major source of the picture's appeal. So understood, human rights do not passively mirror the lamentable state of a world in which millions are routinely tortured, persecuted for their religious beliefs or lack the material resources needed for a minimally decent life. Instead, they set standards to which reality must be made to conform. In view of this critical power and the widespread resonance of the language of human rights, it is unsurprising that UNESCO’s strategy for eradicating global poverty is articulated within a ‘human rights framework’. What more unequivocal way of condemning severe poverty than to affirm a human right to be free from it and, guided and inspired by that affirmation, to struggle for the fulfilment of that right in a world in which, as things now stand, 1.2 billion people subsist on less than one dollar per day and one-third of all deaths annually are poverty-related? (Pogge, 2004).

Of course, to assert the existence of a human right to be free from severe poverty (HRP) is one thing; to make good on that assertion, quite another. Let me briefly offer a highly schematic account of how the HRP might be justified within a broadly 'interest-based' theory of rights. On such an account, a right exists if an individual's interest is of sufficient importance, taken by itself, to justify the imposition of duties on others variously to respect and protect that interest. Human rights are rights that all human beings possess simply in virtue of their humanity; on the interest-based account, they are rights grounded in universal interests significant enough to generate duties on the part of others. Although it would be pleasingly symmetrical, there is no implication, in such an account, that the duties must also be universal (i.e. that all persons bear the duties correlative to the human rights enjoyed by all). Some interest theorists further restrict or qualify the nature of the interests that can ground human rights. James Griffin, for example, seeks to derive human rights exclusively from the values of personhood, i.e. autonomy and liberty, thereby conferring a determinate sense on the idea that human rights are protections of a special status, 'human dignity'. Like Martha Nussbaum, I favour a more pluralistic conception of the interests that can ground human rights. Unlike her, however, I am resistant to the notion that these values are best conceived as political in status, in a way that purports to disengage from contentious issues about their philosophical explication.

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3 For a classic exposition of the theory, see Raz (1986), ch.7. Note, however, that owing to an 'atemporal' interpretation of universality of the sort I said should be rejected, Raz is sceptical about the existence of human rights (or, at least, the sort of rights usually thought to be human rights), see Raz (unpublished).

4 For Griffin's view and my criticism, see Griffin (2001b) and Tasioulas (2002a). For Nussbaum's view and my scepticism about the Rawlsian political
Now, even within an interest-based account of the sort outlined so far, there are different potential strategies for justifying the HRP. One strategy is essentially derivative. It begins by justifying certain other rights, e.g. a right to political participation, and then contends that the enjoyment of a HRP is necessary, whether instrumentally or constitutively, for securing the former rights. But the HRP can also be given an independent justification that does not proceed from an interest in exercising any other right, a justification to which the derivative justifications can be thought of as supplementary. This independent justification would go broadly as follows:

(i) For all human beings, poverty consists in a significant level of material deprivation that poses a serious threat to a number of their interests: health, physical security, autonomy, understanding, friendship, etc.

(ii) The threat posed by extreme poverty to the interests enumerated in (i) is, in the case of each human being, pro tanto of sufficient gravity to justify the imposition of duties on others, e.g. to refrain from impoverishing them, to protect them from impoverishment and to assist those already suffering from severe material deprivation.

(iii) The duties generated at (ii) represent practicable claims on others given the constraints created by general and relatively entrenched facts of human nature and social life in the modern world. Therefore:

(iv) Each individual human being has a right to be free from severe poverty.

The HRP is meant to secure for all humans access to the means of subsistence - clean air and water, adequate food, clothing and shelter, and a basic minimum of health care - thereby enabling them to have what is needed for 'a decent chance at a reasonably healthy and active life of more or less normal length, barring tragic interventions' (Shue, 1996: 23). Nothing in the preceding argument precludes the existence of a human right to a more expansive set of resources and opportunities than those needed to secure individuals against extreme poverty. It is arguable, for example, that Article 25(1) of the United Nations Declaration of Human Rights – with its reference to a standard of living adequate for individual well-being rather than just subsistence - is a heftier economic entitlement than the HRP, at least if we accept the orthodox empirical measure of extreme poverty as set by the threshold of one dollar per day.5 Equally, the HRP sets a significantly less

5 'Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, housing and medical care and necessary social services and the right to security in the event of
demanding standard than a human right to 'options to live one's life in a productive, interesting, enjoyable way' (Griffin 2001a: 25), which aims to secure not just the conditions of physical subsistence, but of a good or adequate human life.

2. A Mere ‘Manifesto’ Right?

In this paper I shall defend the HRP against a line of sceptical attack that opposes the standard picture's separation of the normative and the institutional with respect to the identification of human rights (or, in the case of the second objection, with respect to so-called 'welfare' rights, like the HRP). Of course, scepticism about human rights generally is heavily over-determined. One source is an outright rejection of at least some of the 'values' human rights embody as flawed or perhaps as not really values at all. This is exemplified by the familiar critique of the traditional schedule of human rights as reflecting a narrowly individualistic or masculine perspective that is sharply at odds with the so-called 'communitarian' or 'feminine' values of social harmony and care. Another variety of scepticism challenges not the values underlying human rights but rather their use as a litmus test of the legitimacy of all political communities without exception, even those whose traditions embody quite different ethical orientations. Whatever their general prospects, both forms of scepticism seem implausible when pressed against the very existence (as opposed to some interpretation or other) of a HRP, since it does not obviously reflect concerns that are either distinctively individualistic or Western.

But a third form of scepticism poses a graver threat. This is the broad claim that, in the current and foreseeable state of the world, the assertion of a HRP is a hopelessly utopian gesture. It therefore has no basis in a normative reality that is, after all, supposed to inform us about what we are entitled to and from whom. Indulging in such gestures is tantamount to the harmless incantations of 'white magic' (Geuss, 2001a: 144) or, worse, to a 'bitter mockery to the poor and needy' (O'Neill, 1996: 133). These gestures are also potentially counter-productive insofar as they foster unrealistic expectations on the part of inevitably frustrated activists and would-be beneficiaries. Alternatively, if proclaiming a HRP has some value, it is the value that rhetorical pronouncements can achieve despite their falsity, such as the expressive value of manifesting a good will or the strategic value of effecting desirable modifications in individual and institutional behaviour. But such pronouncements do not state any normative truth: the 'right' in question is only a political aspiration or 'manifesto right', not a bona fide right of all individuals.

My concern will be with two specific forms this third objection takes when pressed against a HRP. According to the enforceability objection, rights are effectively enforceable claims that individuals can bring to bear against those who shoulder the correlative obligations: to make them carry out their obligations or, at least, to provide a remedy

unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control'. See also Article 11(1) of the International Covenant on Economic, Social and Cultural Rights.
for their failure to do so. A condition of the existence of a right is that it is actually enforceable; it is not enough that it would be enforceable in some improved state of the world. As Raymond Geuss has put it, it is 'essential to the existence of a set of "rights" that there be some specifiable and more or less effective mechanism for enforcing them' (Geuss, 2001a: 143). Human rights would, therefore, be entitlements possessed by all human beings that can be enforced against the relevant duty-bearers, thereby ensuring reliable access to the object of their rights or else appropriate compensation. But, in fact, there are few - if any - such universally enforceable entitlements in the world today. Indeed, Geuss goes so far as to claim that his objection is 'lethal to the whole idea of a natural or human right', showing it to be 'inherently confused' (Geuss, 2001a: 146, 156). For Geuss, to assert a HRP confuses the existence of a right with a mere moral belief as to what would be a valuable state of affairs. Of course, we might eventually institute a system of enforceable claims held by all human beings, e.g. through the creation of an effective international legal regime of human rights. But such rights will exist because we have made them into enforceable claims; they will not have pre-existed their institutional realization as 'grounds for judging actual legal rights'. This is because '[t]he only thing that can serve that purpose seems to be the flickering light of our variable moral beliefs' (Geuss, 2001a: 144), not anything worthy of the description of 'rights'.

According to the second, claimability objection, rights are inherently claimable, if not always effectively enforceable. This means there must be specifiable agents against whom the right may be claimed, agents who bear the counterpart obligations to those rights. Some human rights, it seems, unproblematically satisfy this constraint, i.e. the classic 'negative' liberties, such as the right not to be tortured. This right imposes, as its key normative implication, a duty on all to refrain from torture. But a right against extreme poverty is typically thought to entail positive duties to provide its holders with opportunities and resources. Such duties are not plausibly thought of as incumbent upon all human beings. As Onora O'Neill has put it: 'rights not to be killed or to speak freely are matched by and require universal obligations not to kill or not to obstruct free speech; but a universal right to food cannot simply be matched by a universal obligation to provide an aliquot morsel of food' (O'Neill, 1999: 135). Instead, such rights require some sort of institutional structure to allocate duties and define their content. In the absence of institutionally allocated duties, the assertion of a HRP is, yet again, another piece of rhetoric that has potentially damaging political consequences. In its place, O'Neill would favour the recognition of imperfect obligations - obligations with no correlative moral rights - to aid those with agency-threatening needs and, where appropriate, to assist in constructing institutional systems of welfare rights. But those welfare rights, which depend on institutions allocating the correlative duties, will not be human rights as understood on the standard picture. Instead, they will be institutional rights that
give expression to imperfect obligations that are not, as a matter of pure moral reasoning, the counterparts of individual rights.\(^6\)

Both objections just rehearsed should be distinguished from a deeper criticism of the HRP as ‘utopian’. This is the claim that a world in which that right is secured for all human beings is, quite simply, not a feasible objective given very general and ineradicable facts about human capacities and motivation, limited resources and the constraints of social life. This violation of the ‘ought’ implies ‘can’ maxim disqualifies it from being a genuine right of all human beings. Speculating in this vein, Richard Rorty in his UNESCO lecture entertained the grim prospect that ‘the rich parts of the world may be in the position of somebody proposing to share her one loaf of bread with a hundred starving people. Even if she does share, everybody, including herself, will starve anyway. So she may easily be guilty… either of self-deception or hypocrisy’ (Rorty, 1996; see also Geuss, 2001b: 101-3). Now, a defender of the HRP can respond to this objection in a number of ways: by arguing that it betrays an unjustified pessimism about the available means for securing that right;\(^7\) by relativizing what the HRP demands to those means;\(^8\) or by insisting that the test of feasibility need only be passed by each individual’s right taken singly and not by the aggregate of all rights-based claims taken as a whole.\(^9\) Whichever response is adopted, the key point here is that the defender of the interest-based theory should accept that a feasibility constraint must be satisfied as a prelude to affirming the HRP. Its relevance was marked in step (iii) of the schematic argument outlined in section 1. Recognition of its importance also motivates my suggestion that the existence of human rights is to be determined with respect to a specified historical context, given that any such context will enable suitably determinate judgments of feasibility to be reached. All this differs from the appropriate response to the enforceability and claimability objections – objections that invoke demands that may be unfulfilled even when the feasibility constraint has been met. Neither enforceability nor claimability, I shall argue, are existence-conditions of human rights.

Notice also that, although differing significantly in the extent of their opposition to the standard picture of human rights, both the enforceability and claimability objections challenge the

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\(^6\) The upshot, on O'Neill's analysis, is that the duty to relieve extreme poverty is an imperfect duty of charity, rather than a perfect duty of justice. See O'Neill (1989): 225. This has various consequences within her theory. Most fundamentally, non-compliance with imperfect duties does not directly wrong any other person. Accordingly, such duties lack the stringency of duties of justice (those that have correlative rights), which do prohibit wrongs against specifiable others.

\(^7\) E.g. both Thomas Pogge and Peter Singer have suggested that the cost of eradicating the severest manifestations of poverty world-wide would amount to around 1 per cent of the annual disposable income of the wealthiest tenth of mankind. See Pogge (2002b): 152 and Singer (2002): 194.

\(^8\) E.g. Pogge (2002a): 68, who suggests that one cannot be entitled to resources others need to survive.

normative/institutional divide implicit in it. Of course, there is no necessary connection between enforceability and claimability, on the one hand, and institutional mechanisms that secure them, on the other. But in the absence of divine intervention or the workings of a re-enchanted nature, enforceability is most obviously to be secured through effective institutional mechanisms (as well as various other broader cultural factors and personal qualities that ensure the good functioning of such mechanisms\(^\text{10}\)). Similarly, claimability does not necessarily require the existence of institutions allocating the relevant duties - that was supposed to be illustrated by the example of universal negative obligations, such as the duty to refrain from torture, generated by the right not to be tortured. But in the case of rights that ground duties requiring the active provision of opportunities, resources etc., some institutional specification of duty-bearers seems necessary if the claimability condition is to be met.

3. Responding to the Enforceability Objection

Geuss' enforceability argument depends upon the contrast between an enforceable claim (a genuine right) and a moral belief, including a moral belief as to what 'enforceable claims' should exist. The standard picture of human rights, he says, offers only the latter, foibbling us off with 'a kind of puffery' (Geuss, 2001a: 144). But why should the fact that claims about the existence of rights express beliefs about entitlements all humans have, irrespective of whether they are currently enforceable, render them rhetorical gestures in the absence of a reliable enforcement mechanism to give them teeth?

Geuss' answer is twofold: that there is radical disagreement about moral matters and that, even if it abated, this would not 'guarantee effective action' (Geuss, 2001a: 146). But the second point merely reiterates his thesis, whereas the first generalizes well beyond rights discourse since there is no less controversy about the duties people have, what their 'true' interests are, which ideals are worthy of adoption and so on. Does it follow that, in the absence of consensus, such notions are also illusory? If so, Geuss' argument is unmasked as an all-out attack on moral thought. In any case, why should the very fact of deep and interminable moral disagreement have such drastic consequences? The answer, of course, is that Geuss thinks it is a basis for rejecting any form of ethical objectivity: the realm of moral belief is a realm of mere belief and hence of rationally intractable disagreement. As an adherent of a broadly Nietzschean perspective, he not only repudiates ethical objectivity but would likely interpret any aspiration to it as evincing the resentment of the right-claimant towards the supposed duty-bearer. On this debunking account, claims of objectivity are attempts by the weak to invoke some imaginary coercive 'force' that will back up their demands for protection.\(^\text{11}\) But the friend of human


\(^{11}\) Richard Rorty makes precisely this point in connection with human rights in his Oxford Amnesty lecture: 'We resent the idea that we shall have to wait for the strong to turn their piggy little eyes to the suffering of the weak. We desperately hope that there is something stronger and more powerful that will
rights who believes that they have an objective basis will have no truck with these Nietzschean moves. He will instead insist that we have good reason to disentangle the aspiration to objectivity from any claim about power, or what Rorty calls 'a noncontingent and powerful ally' who will enforce one's beliefs against transgressors. And with the possibility of objective justification in play, why should we not understand the notion of rights as genuine entitlements that provide a critical purchase on social reality, even if they are unenforceable at any given time for the vast majority of people?

Still, we might interpret Geuss' view as expressing something less than a blanket denial of ethical objectivity. The reason why assertions of human rights constitute 'mere beliefs', in the absence of an enforcement mechanism, is that attempts objectively to justify human rights in particular are doomed. Geuss simply presupposes this to be so in *History and Illusion in Politics*, but more recently he has offered the following hint of an argument:

> [W]hat are sometimes called the 'normative foundations' of this theory ['natural human rights'] are anything but clear (and convincing). The suspicion immediately suggests itself that the reason for this is that the project of finding a completely secular, immanent 'grounding' for such a theory is incoherent: there simply is not any direct argumentative path from facts of nature and human psychology, as these are know to us through experience and the usual forms of scientific enquiry, the economic and commercial requirements of the kind of society in which we live, and some minimal principles of rationality, to the desired doctrine of natural human rights (Geuss, 2003: 47).

There are two problems here. The first is that the sort of justification Geuss finds questionable is not one which the believer in objectively-grounded human rights is bound to deliver. The notion of 'the human' or 'human interest' that is the basis of a compelling theory of human rights should not be construed value-neutrally or as reliant on a 'thin' account of rational self-interest. This ambitious characterization of what it would take to justify human rights might fit some theories, especially those of a contractarian stamp, but it does not tally with the self-understanding of leading contemporary proponents of the interest-based approach to human rights. Geuss needs to do far more to substantiate his 'suspicion' about the human rights project if it is to trouble them. The second problem is that Geuss slides too quickly from the claim that human rights have no foothold in an 'objective' moral reality to the idea that the only reality they can achieve is that of being enforceable claims. But the point about meta-ethical status does not automatically yield that quite specific normative pay-off. Anti-objectivist adherents of the standard picture will plausibly insist that,
although not susceptible to an objective moral justification, the existence of human rights need not be brutally institutional in that way. It may consist, instead, in their being the deliverances of a suitably refined ethical subjectivity or the presuppositions of certain social practices to which we are ineluctably committed.

Does this mean that we can discount the idea that enforceability stands in any interesting relationship to the existence conditions of human rights? Well, one conclusion we might draw is that it does, but in a quite different way from that stipulated by Geuss. The point can be seen as emerging, contrary to her own intentions, from Susan James' recent attempt to build on Geuss' central thesis by elaborating on the conditions that render rights enforceable claims. According to James, it is among these conditions that duty-bearers know both what they are obligated to do and how to discharge their obligations. A further condition is a general social climate in which the right is regarded as valuable and there is support for its fulfilment through appropriate social arrangements (James, 2003: 140, 143). Now, a defender of the standard picture can respond that one important technique for getting people to satisfy both conditions is by enabling them to grasp and act in the light of the moral justification for the imposition of certain duties on them. In other words, an appreciation of the case for the existence of a right as an interest that merits the imposition of duties on others helps to create the broader context of understanding and support that is essential to the genuine enforceability of rights.

But we have not yet scotched the idea of a conceptual link between rights and enforceability. Even if we give up on Geuss' uncompromising identification of rights with the power to enforce entitlements, might we not salvage from his discussion the idea that rights claims express the moral belief that certain entitlements ought to be secured through some reliable enforcement mechanism? Here, the institutional element in the existence conditions of rights would be normative, rather than reflective of actual social reality. In other words, rights will exist only if they are entitlements that ought to be enforced, regardless of whether they actually are enforceable. An immediate problem with this sort of proposal is the indeterminacy of the phrase 'reliable enforcement mechanism'. One popular way of making it more determinate is represented by Jürgen Habermas' thesis that 'human rights have an inherently juridical nature and are conceptually oriented toward positive enactment by legislative bodies’ (Habermas, 2001: 122). Those who follow this venerable line of thought defend what Joel Feinberg has aptly dubbed the ‘there ought to be a law’ theory of moral rights. According to this theory, ‘A has a moral right to do (have or be) X’ is to be understood as ‘A ought to have a legal right to X’ (Feinberg, 2003: 45).\footnote{It is worth bearing in mind here O'Neill's warning against adopting any 'supposedly exhaustive contrast between that which is enforced by law and that which is simply voluntary', see O'Neill (1989): 232. There may be other versions of the enforceability thesis that are not tied to specifically legal enforcement.}
Even this weaker thesis should, I think, be discarded. First, it fails in its own terms, since it is a notorious fact that the legal enactment of human rights is not enough to confer legal authority to enforce them, let alone the actual power to do so. To begin with, this is because a legal right can exist without any associated remedy – the right can be declaratory, for example, or enforceable only by a person or body other than the right-holder, e.g. some arm of government. Whether a right exists in law is a question distinct from whether it is justiciable or (legally) enforceable. This is certainly true of vast tracts of the international law of human rights. Moreover, even if the enforcement of the putative right is legally authorized, the fact of such authorization may issue in no de facto power to enforce the right. Instead, the right might be effectively unenforceable due to deficiencies in the motivations and capabilities of the right-holders and duty-bearers. For instance, the former might lack knowledge of their rights or the means to avail themselves of them, while the latter might be unable or unwilling to identify or discharge their obligations. Finally, of course, many supposed human rights are enacted by cynical governments for cosmetic or strategic purposes and without any genuine intention to uphold them.

Still, these observations might simply force a slight modification to the original thesis, viz., that to claim a human right exists is to say that it ought to be an effectively enforceable legal entitlement. Yet even thus modified, serious problems remain. As a conceptual matter, the revised thesis doesn't fit the ordinary discourse of moral rights. We often speak of such rights in indicative terms as being exercised or violated even before they have become law. And we typically feel justified in asserting their existence irrespective of how things stand with respect to legal enactment. Consider the situation of slaves in America's pre-abolitionist era. They are naturally thought of as having possessed rights that were in fact violated. The claim that they had these rights is not equivalent to a claim about what rights to liberty the law ought to have conferred on them, although it may figure as a premise in an argument for the latter. In response, the juridical thesis might be presented as a revisionary interpretation intended to instil some much-needed rigour into ordinary human rights discourse. But even admitting the serious imperfections of such discourse, the juridical thesis does not provide the necessary remedy. Instead, it is defeated by a number of substantive objections.

One is that the proposal to enshrine a human right in law sometimes conflicts with, and may be defeated by, other considerations (including considerations grounded in a concern for human rights). For instance, a government may have good reason not to enact a right to abortion in a staunchly Catholic country if the result of doing so would enforce enforcement. But questions will arise as to whether they are plausible or, if plausible, sufficiently determinate to be of interest.

14 It is not clear from Geuss' discussion whether rights must be enforceable at the discretion of the right-holder, or whether it is sufficient if some third part is able to enforce them on the right-holder's behalf. I leave this issue aside in what follows.
be grave social unrest and a steep decline in people’s confidence in the legal system. This leads to a further point: even if legal enforcement of a specified right is not too costly in this way, it often seems far-fetched to claim that it is required if a community is to secure that right. The HRP might be effectively secured in a given society through the combined influence of democratic politics, a well-functioning economy, strong familial ties and a deeply entrenched societal ethos of respect for that right, without its figuring in the law. Moreover, as this last example shows, even where legal rights of some sort are needed to ensure the fulfilment of a human right, those rights need not have the same content as the human right (Pogge, 2002a: 46).

Perhaps, however, some proponents of the juridical thesis have in mind the weaker claim that there is always a pro tanto reason for making a human right an effectively enforceable legal right. But even this weaker thesis is dubious, especially if it is interpreted as a conceptual constraint on the very idea of a human right. This is because the very nature of some human rights appears to be such as to render it inappropriate or pointless to acknowledge any reason – and, certainly not any reason tantamount to a pro tanto obligation – in favour of their legal enactment. For example, there are good reasons relating to respect for privacy against admitting any reason to enact a right to have a say in important family decisions or a right to marital fidelity, assuming both of these rights are (implications of) human rights. It is not that the positive reasons for enactment are outweighed by countervailing considerations, but that the nature of the rights themselves speak against a reason for enactment from the very start. Still, that need not cast doubt on their status as human rights. Again, with respect to some human rights legal enactment to ensure their enforceability is pretty much pointless, because the rights concern situations where the legal system has itself become the chief threat to human rights. An example here would be the right to rebel against a tyrannical government.

In the light of the complicated issues that bear on the legal enactment of human rights, we can subject the juridical thesis to the following thought-experiment. If all we knew about an otherwise unspecified right was that it is a genuine human right, would that entail the existence of a pro tanto reason (let alone a pro tanto obligation) to enact that right in law irrespective of its content and of the particular circumstances of the relevant community? I think the preceding discussion gives us firm grounds to answer ‘No’.

The juridical view is just one contemporary interpretation of human rights that builds a concern with enforcement into their very nature. Another enforcement-centred interpretation is advanced by John Rawls, and it is precisely this feature that explains why his list of human rights is so disconcertingly minimalist (Rawls, 1999: 65).15 It omits freedom of expression and assembly, rights to political participation, education and health care as well as equal religious liberty. Moreover, it endorses only a right to subsistence (as an

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15 For a similar view, see Beitz (2004): ‘Human rights are standards for law and public policy whose breach on a sufficient scale constitutes a pro tanto justification of remedial action’.
implication of the right to life), but not a more demanding right that would guarantee what is necessary for a decent or adequate standard of living. As Rawls conceives of human rights, they essentially belong to the segment of political morality that governs relations between political communities. Most importantly, they are conceived as norms whose violation, if sufficiently extensive and persistent, generates an in-principle justification for intervention by liberal and decent peoples. Presumably, the chief benefit of Rawls' account is that it renders the notion of human rights more determinate, thereby addressing the persistent tendency to invoke it in a virtually criterionless way.

As I have argued elsewhere, Rawls' revisionary view of human rights fails. It marginalizes the traditional insight that human rights are primarily protections of quite central human interests. As such, they provide one kind of input into the formation of principles of inter-state relations, including intervention. But they are not conceptually linked to any particular form of remedy for their violation. Inevitably, Rawls' view issues in a drastically truncated schedule of human rights, but only because it conflates the existence conditions of human rights with the separate question of the conditions under which intervention by one society into another is ever justified (Tasioulas, 2002b: 384-390). Rawls' approach has various other unattractive consequences, such as preventing us from meaningfully raising the question whether the creation of a world government can be justified on the basis of human rights considerations. Given that the interest-based account renders the concept of human rights tolerably determinate, why should we take the further step of subordinating that concept to contingent features of the existing global political order, thereby short-circuiting human rights arguments that bear on the desirability of precisely those features?

We should, I think, reject the juridical and the interventionist analyses of human rights. There is no a priori inference from the recognition of a human right to the even pro tanto conclusion that it ought to be legally enacted or that it provides a basis for intervention when egregiously violated. For each right, an argument needs to be made to justify its enactment or a policy of intervention in response to its violation whether in general or in any particular instance; conceptual fiat cannot take the place of such argument or generate a presumption as to its outcome. This conclusion confirms the idea that rights occupy an intermediate position in our ethical thinking, standing between the ultimate values that ground them and the normative implications they generate, including the institutions and policies that best embody and give effect to those implications. On the one hand, we shouldn't accord rights a foundational role in ethical thought: rights are derived from (certain of) our interests that can be specified independently of the concept of a right. Denying this derivative status is the error of human rights 'fundamentalists', like Nagel, who thereby end up shrouding in mystery the procedure for identifying human rights. Now, my objection

16 I argue that Rawls' intervention-based account of human rights leads to a right to subsistence rather than to the conditions of an adequate life, and that this in turn results in an excessively weak duty of assistance to 'burdened societies', in Tasioulas (unpublished).
to the juridical and the interventionist views is that they commit the converse error: understanding rights in an unduly superficial way, as essentially embodying some prescription for legal enactment or remedial measures. Human rights are now being too tightly bound up, not with fundamental ethical categories, but with specific institutions and policies. Rather than being, as they should be, potential objects of an assessment that is sensitive to the demands of human rights, these institutions and policies are imported into the very meaning of such rights.

An incidental benefit of this conceptual distancing of the existence conditions of human rights from questions of legal enactment and intervention is that it offers a further line of response to the 'Asian values' critique of human rights. Much that goes under that heading reflects the anxiety that recognizing human rights inevitably leads to the creation of an American-style culture with, among other features, a supreme court exercising judicial review, a highly litigious population and the fraying of communal bonds. By leaving it as a separate question of implementation which forms of institutional design best realize human rights in any given social context, one can partially allay such fears while still insisting on universal respect for human rights.

4. Responding to the Claimability Objection

Onora O'Neill introduces the claimability objection by means of a contrast between universal liberty rights and welfare rights. The former impose 'negative' duties to refrain from harming others in various ways; the latter purport to create 'positive' duties to furnish right-holders with goods and services. Examples of 'welfare rights' are the items in Articles 22-7 of the Universal Declaration of Human Rights, which include rights to social security, work, rest and leisure, an adequate standard of living, education and culture. They contrast with traditional 'liberty' rights, such as the rights to physical security, political participation, freedom of speech and religion. A related contrast used in this connection is between 'first generation' civil and political rights and 'second generation' socio-economic rights. The implied temporal ordering may reflect the history of the legal recognition of human rights, at least in the international context, but it should not obscure the venerable pedigree of rights of subsistence in Western political thought.

Now, in contrast to Geuss, O'Neill readily allows that rights of both sorts may exist despite being, for various contingent reasons,

17 The description 'welfare rights', however, is not free of difficulties. First, it is not intended to imply that there are rights to welfare as such, but only to certain enabling conditions of a good life. Second, it does not necessarily imply a commitment to a 'welfare' state that secures goods and services to its citizens through redistributive policies. There may be other, and better, institutional embodiments of such rights depending on the society in question.

18 E.g. Locke's reference to 'natural reason, which tells us that men, being once born, have a right to their preservation, and consequently to meat and drink and such other things as Nature affords for their subsistence...'. Locke (1984): Bk.II, ch.V, p.129.
unenforceable at any given time or place. Moreover, to ensure their enforceability, both liberty rights and welfare rights will standardly require the creation of institutions that impose duties on certain individuals and groups to enforce the rights. Nevertheless, she insists that there is an important asymmetry between the two sorts of rights, one that has the implication that welfare rights, unlike liberty rights, cannot exist in the absence of some institutional mechanism defining correlative duties and allocating them to specifiable (if not always individuable) duty-bearers. The asymmetry concerns the claimability of the two types of rights: liberty rights are meaningfully claimable in the absence of the institutional shaping of their correlative duties, whereas welfare rights are not. But a right only exists if the duties associated with it are claimable. Therefore, it is an existence-condition of welfare rights that sustaining institutions are in place which, even if they do not ensure the enforceability of such rights, at least define and allocate the duties associated with them:

the correspondence of universal liberty rights to universal obligations is relatively well defined even when institutions are missing or weak. For example, a violation of a right not to be raped or of a right not to be tortured may be clear enough, and the perpetrator may even be identifiable, even when institutions for enforcement are lamentably weak. But the correspondence of universal rights to goods and services to obligations to provide or deliver remains entirely amorphous when institutions are missing or weak. Somebody who receives no maternity care may no doubt assert that her rights have been violated, but unless obligations to deliver that care have been established and distributed, she will not know where to press her claim, and it will be systematically obscure whether there is any perpetrator, or who has neglected or violated her rights (O'Neill, 1999: 105. See also O'Neill, 1996: 131-4).

One immediate worry about this argument is its reliance on the supposed distinction between 'negative' liberty rights and 'positive' welfare rights, a distinction Henry Shue has taught us to treat with suspicion.19 Even if we assume a meaningful distinction between 'negative' and 'positive' duties, all rights will typically have as counterparts duties of both sorts. Thus, some of the most important obligations corresponding to universal liberty rights are 'positive'. The right not to be tortured ordinarily imposes duties on the state, for example, to establish and maintain an adequate police force, judiciary and penal system and to variously empower and constrain officials who operate these institutions to honour that right themselves and to prevent infringements of it by others. Equally, a key entailment of the HRP is a duty not to obstruct others from certain activities that would enable

19 See the classic discussion in Shue (1996): 35-64, 153-66. I leave aside Shue's deeper objection that the very distinction between positive and negative duties correlative to rights is unduly simplistic and will grant, in what follows, that some workable distinction is on hand that covers the great majority of cases.
them to secure the means of subsistence. Among the significant causes of poverty in many less developed countries, for example, are socially-imposed obstacles preventing women from undertaking employment outside the family home. Of course, this 'negative' duty would have to be supplemented by 'positive' duties to prevent such interference and to aid those who have already suffered from its violation. But, in this respect, the HRP is no different from the right not to be tortured.

O’Neill’s argument is supposed to be compatible with the deontic pluralism of rights. Both liberty and welfare rights generate positive duties. But at least in the case of universal liberty rights, she will insist, we know who bears the primary obligation of non-interference, i.e. everybody. In the case of welfare rights, however, we do not know – in the absence of an appropriate institutional scheme - who has the duty to provide the relevant goods and services or what is the precise content of that duty. This renders such rights ‘radically incomplete’, with the result that the process of institutionalizing them goes not just to the enforcement of such rights but also to their very existence:

> If it is not in principle clear where claims should be lodged, appeals to supposed universal rights to goods or services, including welfare, are mainly rhetoric, which proclaim ‘manifesto’ rights against unspecified others (O'Neill, 1996: 132).

Is this contrast sufficient to vindicate O’Neill’s thesis that the existence of welfare rights is always institutionally-dependent? I do not think so. O’Neill is taking a difference of degree – relating to how much we can typically know about counterpart obligations independently of the establishment of institutional structures – and converting it into a difference of kind, i.e. that welfare rights are institutionally-dependent for their very existence, whereas liberty rights are not. Relatedly, she exaggerates the significance of our pre-institutional knowledge of the duties associated with liberty rights and systematically downplays what we can know about the deontic implications of welfare rights. In other words, when it comes to discussing liberty rights, the glass looks to her half full, but when welfare rights are in question, it looks half empty.

The first point is brought out by considering the importance of the unallocated positive duties associated with liberty rights. It is central to the fulfilment of the right not to be tortured that sustaining institutions allocating positive duties are established; in their absence, the mere fact that the right will be claimable against each and every individual has limited importance. But when it comes to the issue of the existence of human rights, why should we be so impressed by the negative duty which is pre-institutionally allocated, as opposed to the set of no less important positive duties to implement and enforce that right, which are not? Admittedly, violators of liberty rights will be in principle identifiable, and this is no trivial matter. Reflection on it may even lead us to conclude that claimability is ordinarily a pre-condition for speaking in a meaningful way of violations of duties entailed by human rights and, in turn, of addressing questions about the
blameworthiness and punishment of this category of wrong-doers. But why should the conditions for determinate assessments of human rights violations be criterial for the seemingly prior and independent question of whether a human right exists or, for that matter, goes unfulfilled? The interest-based version of the standard picture encourages us to resist the conflation of these questions. According to it, a human right will exist if a universal individual interest is sufficient to generate duties to advance and protect that interest in various ways. And it will be unfulfilled if those modes of advancement and protection have not been secured to the right-holder, obstructing them from access to the object of their rights. These are important matters quite independently of any concern with violations of the human right and the identifiability of their perpetrators.

Consider, now, how O’Neill tends to minimize unduly what we can know about the duties generated by welfare rights in advance of the establishment of an institutional scheme. The first point is that some of the duties associated with welfare rights are themselves allocated universally. The obligations relating to the delivery of the relevant goods and services may be typically unallocated and unspecified until institutionally-embodied. But there is also another set of counterpart duties which, as O’Neill acknowledges, can be universally held obligations (O’Neill, 1996: 103). So, it might be thought, everyone has a duty not to obstruct - and, perhaps, even in some way to facilitate where the cost of doing so is not excessive - the setting up of an institutional scheme that will enable counterpart obligations of delivery to be specified and allocated. There will also be obligations not to deprive people of resources needed to maintain them above the poverty line by, for example, actively co-operating in the maintenance of a global economic order that has the foreseeable and avoidable effect of impoverishing them - a duty whose significance in the present state of world affairs has been powerfully elaborated by Thomas Pogge.

The retort on behalf of O’Neill might now be as follows. In the case of welfare rights, the key duties are those to provide the relevant goods and services, not the negative duties to avoid the infliction of severe impoverishment or the derivative duties to assist in setting up of appropriate institutional structures. For these duties of provision are the primary duties associated with welfare rights, just as the relevant forms of non-interference are mandated by the primary duties associated with liberty rights. Thus, the duty to refrain from impoverishing others is a negative duty, and so cannot be the primary duty correlative to the HRP as that right is commonly understood. The other duty mentioned is secondary, being parasitic on the primary duty. It belongs to the class of duties that are modes of promoting and monitoring compliance with the primary duties or default duties that address the failure of the primary duty-bearers to perform their duties.

Contrary to this line of argument, we should, I think, be reluctant to concede that we can identify, in abstraction from specific circumstances, the primary duty associated with any particular right. It is not far-fetched to suppose, for instance, that the HRP might be adequately secured for the vast majority of citizens in a wealthy and
economically productive society with a strong human rights ethos through the widespread recognition and effective enforcement of negative duties not to deprive others of work opportunities. But perhaps we should understand the appeal to 'primary' duties in a different way. Liberty rights, it might be said, can be entirely fulfilled in a world where everyone complies with the negative duty of non-interference. But this is not true of welfare rights. The prospect of collective action problems and 'natural' disasters, for example, means that positive duties of provision will also need to be complied with in order to ensure the enjoyment of such rights. Even this characterization of primacy, however, is problematic. For instance, the right to free speech plausibly imposes on the state a duty to provide its citizens with the opportunity to acquire basic literacy. Mere compliance with the 'negative' duty not to obstruct free speech will not be enough to fulfil that right. Still, let us grant, arguendo, that positive duties of provision have a particular salience in the case of welfare rights.

But now, it seems to me, the response should be that in the case of welfare rights we often have enough information to know that there are correlative duties without the performance of those duties being claimable against specifiable others. So we preserve the core intuition that rights are correlative with duties, while abandoning the requirement that it is an existence condition of rights that they be claimable. How can this line of thought be substantiated? Again, the interest-based account of rights sheds valuable light on our topic. This theory can allow for knowledge of the existence of rights (hence of the justification of duties corresponding to those rights) without the duties being precisely specified or allocated to particular agents.20 Instead, the question of allocation and specification is a further question, not one that needs to be answered in order to establish the existence of the right. So, to take the HRP as an illustration: I can know – by fleshing out the argument sketched in section 1 – that everyone has a right not to live in extreme poverty and that, therefore, the imposition of duties on others to secure that condition is justified. This is because the interest is important enough to generate the counterpart duties given the constraints set by human capacities, available resources and general features of social life. But who should best be assigned those duties will be a separate question requiring further deliberation. In that deliberation, we will have to draw upon considerations that bear on the allocation and specification of duties arising from the right, including the allocation and specification of 'default' duties to cover cases where some duty-bearers fail to discharge their duties.21

Notice that the bracketing of these further questions in the context of asserting the existence of rights does not originate in uncertainty about whether securing those rights through the imposition of duties is feasible. If that were the case, then the very existence of the relevant rights would be doubtful, since rights ground duties and duties must satisfy the maxim 'ought' implies 'can' (this was the third objection.

21 Obligations correlative to subsistence rights are discussed in Shue (1996): 35-64, 153-66.
set aside in section 2). Moreover, once we have separated out claimability as a further question, we can admit that a right may exist even though the allocation and specification of its correlative duties remains indeterminate. The indeterminacy arises from the fact that there will be multiple candidate schemes for allocating and rendering more precise the counterpart duties. In the case of the HRP the primary obligation might be placed on the state, or in some other circumstances on family groups, or an international poverty relief agency, or some combination of such agents. Any one of these schemes may be acceptable a priori and which, if any, is ‘best’ will depend upon factors that are subject to considerable local and temporal variation. Often, there will be no one optimal arrangement but rather irreducibly many schemes for allocating and defining the HRP that are no worse than each other. Indeed, O’Neill admits as much when she observes that a right to food, or to work, can be ‘satisfied in countless different ways’, e.g. earning enough money, having access to the use of land, or through membership of familial or social groups that acknowledge obligations to provide the requisite support. But then she contends that ‘without one or other determinate institutional structure, these supposed economic rights amount to rhetoric rather than entitlement’ (O’Neill, 1999: 125). Yet there are two reasons to balk at this austere conclusion.

The first is the ad hominem point that even positive duties of assistance can be allocated independently of any institutional structure, since principles of responsibility may sometimes adequately specify the primary duty-bearers in particular circumstances through institutionally unaided ethical reasoning. One example is an emergency-type situation where there is some agent in the position of a solitary by-stander who has all the capacities to take the necessary action and can do so far more effectively than anyone else and at a negligible cost to themselves. Another example is the case of the largely prosperous societies of the West, where considerations of efficiency, accountability and of the value of political self-determination, among others, combine to create a pro tanto obligation on states to ensure that their citizens do not fall below the poverty line. In societies that suffer from the ‘weak state’ phenomenon, the primary duty would lie elsewhere. Granted, the cases just mentioned scarcely cover all of the situations in which people suffer from or are threatened by extreme poverty. So, for the most part, institutional assignments of duties become necessary for meaningful claimability. The unpalatable alternative is to declare a generalized and ongoing state of ‘emergency’ with perhaps all the denizens of affluent Western societies cast in the role of duty-bound by-standers.

But now the second reply comes into play. Why should this indeterminacy – which, in any case, reflects a healthy plurality of ways of securing the right rather than uncertainty as to whether there is any realistically available means of doing so - undermine the very existence

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22 Cf. Martha Nussbaum who conceives of her capability theory as yielding constitutional standards with which states must comply if they are to meet a threshold of legitimacy. For criticism of this focus on an individual’s state as the (primary) duty-bearer, see Okin (2003): 295.
of such rights prior to their institutional embodiment? Why isn’t the interest and the fact that taken by itself it is sufficient to generates duties, enough to warrant the existence of the right? In view of the strength of the case for recognizing and imposing duties based on that interest, there is a strong case for regarding the issue of claimability as separate from that of the right’s existence. It is an important issue, one to be addressed through further moral and empirical investigation and possibly even negotiation or formal determination within the context of democratic politics or judicial reasoning. But in addressing that issue, the existence of the right to be rendered claimable is taken as having been established by prior and independent arguments of the sort sketched in section 1.

The preceding line of argument is strengthened by an additional consideration, viz., that the indeterminacy of a right’s deontic implications is not just a tolerable drawback of the idea that welfare rights exist pre-institutionally. Rather, it is related to another valuable feature of rights, viz., the ‘dynamic’ character of their normative implications. The duties which a right generates are not comprehensively specifiable once and for all; instead, they can vary with changes in the nature of the agents, institutions and social contexts in question. In order to arrive at an adequate assignment and specification of duties, one will need to engage in what Shue calls ‘strategic reasoning’ with respect to particular contexts (Shue, 1996: 161). Second, even within any particular context, there may be a variety of equally admissible ways of allocating the correlative duties and specifying their content. Context-sensitivity will rarely issue in a uniquely correct answer to the problem of allocation and specification. Indeed, a key function of democratic politics and legal reasoning is to provide legitimate mechanisms for arriving at decisions that take up some of the slack left here once natural reason has done all that it can.

The consequent indeterminacy of a right’s normative implications at the point at which one is entitled to affirm the existence of the right should be readily countenanced. This is because what drives the interest-based theory of rights are the interests a right protects rather than any specific set of normative implications they generate. The latter can undergo tremendous variation depending upon changes in social conditions, and can also admit of rival specifications in the same conditions, while the right nevertheless persists throughout. But if rights are conceived in this protean way, the thesis that their very existence at any given time depends on a specific assignment of duties loses much of its attraction. What is crucial to the existence of rights is the duty-grounding character of the underlying interests they protect, not whether a particular distribution or specification of duties has been fixed.

5. Consequences of the Dynamism of Rights
Two consequences of this dynamism are worth stressing. The first is that it offers a response to Geuss’ complaint that rights as standardly

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23 The description derives from Raz (1986): 186.
conceived are not only a fiction (because unenforceable), but also an ‘inconvenient fiction’. And this because they supposedly foster a sclerotic political culture, one obsessed with the stability of entitlements at the expense of flexibility in adapting to changing circumstances (Geuss 2001a: 147, 152, 154). In a strikingly Benthamite metaphor, Geuss contends that rights ensure that 'the ghostly hand of the present is able to throttle the future' (Geuss 2001a: 154). Now, it is rather peculiar that Geuss begins by stipulating that rights only exist if they are backed up by a settled assignment of duties and established enforcement mechanisms, and then proceeds to denounce the political ossification that is encouraged by this stipulation. Recognition of the 'dynamic' aspect of rights enables us to deflect the accusation of conservatism precisely by exposing Geuss' linkage between rights and existing enforcement mechanisms as gratuitous. The selfsame right can have greatly varying normative implications in different circumstances and may be properly enforced in a variety of ways. In a sparsely populated rural society, for example, institutional structures ensuring access to the use of land may play a fundamental role in securing the HRP. With the onset of industrialization and rapid population growth, however, the emphasis may instead fall on the provision of adequate employment opportunities for all. A due respect for rights, therefore, demands a preparedness to support quite radical changes in existing social practices and institutions. Geuss’ strictures are properly directed only at a certain abuse to which the language of rights lends itself, one that is given comfort by his own identification of rights with effective mechanisms for enforcing entitlements. But they do not (as he supposes) call into question the value of rights themselves.

The second, and more substantial, consequence of dynamism is that it enables us to decline as false the choice between interactional and institutional conceptions of human rights. Thomas Pogge, the author of this distinction, has written:

We should conceive human rights primarily as claims on coercive social institutions and secondarily as claims against those who uphold such institutions. Such an institutional understanding contrasts with an interactional one, which presents human rights as placing the treatment of human beings under certain constraints that do not presuppose the existence of social institutions… On the interactional understanding of human rights, governments and individuals have a responsibility not to violate human rights. On my institutional understanding, by contrast, their responsibility is to work for an institutional order and public culture that ensure that all members of society have secure access to the objects of their human rights (Pogge, 2002a: 46, 65).

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24 This ties in with the Nietzschean hypothesis that rights discourse reflects the interests of the weak in a stable and predictable social order, see Geuss (1997): 4.
Both accounts impose *ex ante* conceptual constraints on the normative implications of rights, pre-empting matters best left to 'strategic reasoning' that is sensitive to the vagaries of time and place. In so doing, they contravene the dynamic character of rights and, more generally, illustrate the perils of over-estimating the contribution that philosophical analysis can make to political deliberation.

Thus, the interactional account is rightly faulted for its naive assumption that each right straightforwardly entails counterpart duties on the part of particular individuals or groups. In a minimalist version of interactionism (such as libertarianism), all individuals bear the negative duty of not directly impeding the secure access of others to the object of their right. In a more maximalist version (such as utilitarianism), duties are imposed on others regardless of their causal responsibility for any deprivations. But, as Pogge has argued, the duties entailed by a right cannot simply be read off in this way from the object of the right. The chief normative implication in a particular society of the right not to be subjected to degrading treatment, for example, may be a duty to support programs to improve literacy and unemployment benefits, thereby securing that right for a large class of domestic servants (Pogge, 2002b: 182). The assignment and specification of the duties is thus mediated by reflection upon institutions, the deprivations they cause and the reforms that might prevent, ameliorate and compensate for, those deprivations.

But rejecting the interactional account does not force us into the arms of its institutional rival. The former account was scuppered by the potential complexity (including institutional mediation) that is exhibited by the process of generating normative implications from human rights. But this does not dictate the presence of a *specific* kind of complexity in every case. In particular, it does not necessitate conceiving of human rights as, primarily, claims on coercively-imposed institutional orders and, secondarily, on those who co-operate in upholding them. To demand otherwise is to impose an unnecessary restriction on our strategic thinking about the deontic implications of rights. In order for human rights concerns to be activated in any given case, is it really necessary to identify a shared institutional order that is causally responsible for the relevant deprivations? And need those deprivations have been disregarded by 'officials' within that order, as Pogge also insists?

Inevitably, a lot here turns on our considered judgments as to what should count as paradigm cases of human rights and their violation. One such case, I think, would be that of a religious community that has sought refuge from secular society in a remote corner of the Australian outback. Self-sufficient for decades, it maintains only very limited contact with the outside world. If the community’s crops should fail one year, threatening its members with severe impoverishment and perhaps starvation, is it not plausible to think that the Australian government would be violating its duty to respect their human rights if it did not supply them with the aid needed to subsist, assuming it could do this at little cost? In other words, a positive duty seems to follow directly from the HRP and various facts
about capacity to offer aid and the cost of doing so. Nor are the counter-intuitive implications of the institutional theory confined to cases of ‘positive’ duties correlative to putative human rights. Another case, whose paradigmatic status Pogge would strongly contest, is that of the man who habitually inflicts serious violence on his wife and children. Why deny that he is directly infringing their human rights to physical security? Is it plausible to think that a human rights dimension enters into such a case only if his pattern of abusive behaviour can be interpreted as the object of official disregard within a coercively-imposed institutional scheme? Even if such institutional reasoning can be successfully carried through in intuitively compelling cases such as these - and nothing guarantees that this will be so - its precarious and circuitous nature diminishes, rather than enhances, the critical power of human rights discourse.

This assessment is, if anything, only reinforced by Pogge’s concession that there may be universal moral rights in cases like the domestic violence scenario just described that are not human rights (Pogge, 2002b: 160). Presumably, both the universal moral right against physical abuse and the human right against physical abuse are grounded in the self-same universal human interests. If so, what is gained by introducing a bifurcated system of universal moral rights, and why reserve the title ‘human right’ for those universal moral rights that fit the specifications of the institutional account?

It might now be objected that the institutional account is not an unnecessary encumbrance, but a powerful dialectical ploy against those - such as libertarians or adherents to O'Neill's claimability thesis - who believe that human rights (at least in the absence of institutionalization) generate only negative duties. This is a premise that Pogge shares with these opponents. On his account, all humans have a negative duty not to uphold coercive social institutions that avoidably deny others secure access to the objects of their rights. If they are implicated in any such institution, they must either desist from participating in it or else make reparation for it by working for the reform of the institution or for the protection of its victims (Pogge, 2002a: 66). Yet it is doubtful that any dialectical advantage secured here offsets the costs incurred.

One worry is that Pogge's ploy starts by conceding too much, insofar as we have already found cause to resist as dogmatic the idea that human rights have exclusively 'negative' counterpart duties. Second, as the domestic abuse example shows, in its insistence on an

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25 Thomas Pogge has suggested (personal communication) that the outback case is covered by the institutional account, because the Australian government claims authority over Australian territory, including that piece of the outback inhabited by the imaginary community. Let us grant this claim. But what if we now alter the example, and place the community on an unclaimed island just beyond Australian territorial waters, all other salient facts held constant? Should this slight change potentially make all the difference in determining whether the Australian government bears a human rights-based obligation to render assistance? Reluctance to accept that it does ought to engender scepticism about Pogge’s explanation of the existence of a human rights dimension more generally, including in the outback case.
institutional dimension, Pogge's account arguably fails to cover paradigmatic cases of the violation of 'negative' duties to refrain from harm. Finally, it is far from obvious that making this concession secures the advertised *ad hominem* victory. O'Neill, for example, may plausibly respond that when it comes to claimability the institutional account of welfare rights simply moves the wrinkle to a different place in the carpet. For, as Pogge acknowledges, that account entails the collective responsibility of all those who participate in an institutional order that causes the relevant deprivations (Pogge, 2002a: 64, 66). But it is unlikely that O'Neill would accept that the meaningful claimability of human rights is secured by identifying a collectively responsible group with a potential membership in the many millions. Instead, real claimability will require principles apportioning responsibility within the group, specifying exactly who has to do precisely what by way of compensation, institutional reform and so on. Such principles will reflect a diversity of considerations: the means individuals have at their disposal, the extent to which they have contributed to, and benefited from, the maintenance of the harm-causing institutions and so on. Presumably, there is no canonical way (or, at least, no one obvious way) of reflecting all these considerations in principles of responsibility. The irresistible upshot seems to be that the principles apportioning responsibility will themselves stand in need of institutional shaping. O'Neill's claimability objection, then, persists even on an institutional reading of the HRP: until an appropriate institutional order is in place, the right will not be genuinely claimable. What's more, her objection now generalizes to encompass all putative human rights, not just welfare rights, since liberty rights will also require a parcelling out of collective responsibility through institutional mechanisms.

Of course, Pogge's institutional account warrants a more extended evaluation than I have been able to give it here. But enough has been said to motivate the suspicion that Pogge unjustifiably elevates the powerful *techniques* he has described for deriving the normative implications of human rights to the status of *conceptual constraints* on the very nature of such rights.

6. Putting Rights First?

Let me take up one further issue raised by O'Neill. This is her recurrent assertion that human rights enthusiasts are inclined to go wrong by putting rights 'first', whereas priority should be accorded to obligations (or, at least, that we should conceive of rights and obligations as standing in the relation of figure and ground (O'Neill, 2002: 79-80); see also O'Neill, 1996: 140-1). Advocates of welfare rights, in particular, are portrayed as beguiled by a grasping recipient’s perspective that complacently skates over hard questions about correlative obligations. In addition, this rights-based view fails to accommodate adequately duties that lack correlative rights, leading to an impoverished understanding of morality as exhausted by principles of justice. Now, to a large extent, this critique can be endorsed by a subscriber to the
view I have defended. But we need to distinguish at least three different meanings 'priority' can bear in this context.

First of all, it is clear that obligations are conceptually prior to rights. One can have an adequate grasp of the concept of an obligation, i.e. a categorical reason with a certain kind of exclusionary force, without having mastered the concept of a right. A right, by contrast, can only be elucidated by reference to the notion of obligation, since rights are defined as grounds for the duties that are correlative to them. Second, and at the more practical end of the spectrum, is an issue about the most effective kind of ethical-political rhetoric in bringing about desirable changes in attitudes and behaviour. Here it seems to me that O'Neill is perfectly justified in rebuking those human rights activists who proclaim all manner of rights without giving any apparent consideration to the justifiability, distribution or coherence of associated duties. This shows that rights discourse is vulnerable to abuse. But a similar vulnerability is exhibited by other forms of moral discourse, including those that prioritize the language of duty.26 Moreover, when we do consider duties correlative to human rights, we might very well discover that (as Pogge suggests) there are significant rhetorical benefits, when addressing a Western audience, to be derived from stressing negative duties not to foreseeably and avoidably inflict harm on others.

However, when it comes to priority in the order of justification, rights are prior to the duties they ground. In other words, some but not all duties owe their existence to the rights that are correlative to them: these 'perfect' duties fall within the domain of justice, which is one ethical category among others. In this way, proponents of the standard picture can accommodate the existence of 'imperfect' duties that lack correlative rights - duties of charity, mercy, gratitude and so on - and thus join with O'Neill in deploving libertarians and others who squeeze such duties out of the picture by treating rights as 'the fundamental ethical category' (O'Neill, 1996: 143).27 Moreover, even though a right is prior to the duty it grounds, it is still not fundamental in the order of justification. That place belongs, instead, to the interest - at least on the interest-based version of the standard picture that I have advocated. So it is one's interest in being free from extreme poverty that is the basis for the HRP and it is in virtue of its existence that duties are imposed on others. The ground floor of justification is our understanding of the human good. Of course, this last claim will not sway a Kantian, like O'Neill, who wishes to accord 'the right' or - more accurately - the realm of the deontic, autonomy from any conception of the good.28 This last point shows that my argument against O'Neill, or Geuss for that matter, is hardly decisive. The underlying issue isn't about enforceability or claimability; instead, it implicates one's deepest

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27 For an account of how duties of mercy might be defended, see Tasioulas (2003).
28 For two powerful expressions of scepticism about the privileging of duty integral to the Kantian project, see Williams (1985): ch.10 and Taylor (1995).
moral-philosophical commitments. Both Geuss and O'Neill have profound doubts about a 'good' or 'interest' based account of human rights. For Geuss, these stem from a generalized ethical scepticism. O'Neill, by contrast, has serious reservations about the notion of a pluralistic human good in this context: Is there a robust conception of the good that we can stably converge on without paying an exorbitant metaphysical price? And, even if there is, how is a schedule of rights to be derived from that conception? These are important questions, to which one must respond by developing a good-based account of human rights and comparing it with O'Neill's own efforts to ground rights in perfect obligations derived by means of a Kantian test of universalizability. Is it a more compelling justification of the human right not to be tortured, for example, that a policy of torture cannot be universalized without contradiction? Or would the strongest case for that right directly invoke the central human interests - in autonomy, freedom from pain and degradation, etc - that are at stake? Particularly important in any such comparison is the idea that the interest-based account of human rights is not necessarily to be subsumed under, hence is not immediately susceptible to the problems that beset, any form of consequentialism. Needless to say, arbitrating between the two theories is not a task to be embarked upon here.

A final, diagnostic, observation. The philosophers whose scepticism about the HRP, and about the standard picture generally, I have been mainly concerned to oppose – Geuss and O'Neill – are a Nietzschean and a Kantian respectively. One might think they make unlikely allies given their otherwise radically divergent commitments. But from the perspective of an interest-based approach to human rights their collusion is unsurprising. For both the Nietzschean and the Kantian positions are sceptical about the idea of human good as understood within a broadly Aristotelian conception of ethics. Instead, they accord priority, respectively, to de facto power (hence the concern with enforceability) and duty (hence, more circuitously, the concern with the claimability of duties correlative to rights). But a presupposition of this paper has been that, in order to 'complete the Enlightenment project' of human rights - as James Griffin has put it (Griffin 2001a: 2) - we need to go back, beyond the Enlightenment to an Aristotelian tradition of thought about the human good and the special protection it merits. In other words, what is standardly thought of as the distinctively 'modernist' doctrine of human rights needs to be nurtured by roots that are, as a matter of intellectual history, pre-modern. When we have gone back to the idea of the human good, and

29 'Just as a shopping list will not in itself contain information that requires some purchases to be given priority over others, so a pluralistic account of human goods does not by itself require some goods to be respected at the expense of others'. O'Neill (2002): 77.
30 And it is in the Kantian category, very broadly construed, that we can place other philosophers whose views on rights are criticized in this paper: Habermas, Rawls and Pogge.
31 It is this understanding of rights that, it seems to me, is regrettably overlooked by Alasdair MacIntyre in MacIntyre (1984): 66-70, a book whose
when we have developed the rights-generating notion that some universal human interests taken singly are of sufficient importance to justify the imposition of duties, then enforceability and claimability - for all their undoubted practical significance - will cease to have a plausible claim to figure among the existence conditions of human rights. They will have been shifted to an important, but non-foundational, place in our thinking about such rights.

7. Conclusion

Our point of departure was the unsatisfactory state of contemporary human rights talk. It is understandable that theorists who aspire to clarity and rigour should instinctively recoil from this situation. Nor is it surprising that they should propose, as a remedy, conceptual constraints that tether the identification of human rights to various institutional considerations. But even real crises can provoke disproportionate responses, 'cures' worse than the disease (or worse, at least, than alternative remedies). It is as over-reactions of this sort that we should understand the theories criticized in this paper. The conceptual innovations they advocate are no substitute for sound ethical and political judgment about the duties human interests impose and the institutional structures that best embody them.32

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diagnosis of the deficiencies of Kantian and Nietzschean approaches to ethics is otherwise highly congenial to the argument developed in this paper.

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