

### 3 Kant's Juridical Idea of Human Rights<sup>1</sup>

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What is it for you to have a human right? And what justifies your claim to bear such a right? It is common to suppose that human rights possess such a unique, normative character that they cannot fit into the juridical mold of a right in a strict sense. James Nickel, for instance, claims that forcing human rights into the “narrow conceptual framework” of rights (strictly construed) does not serve well “the human rights movement and its purposes.”<sup>2</sup> Perhaps the most distinctive feature of a Kantian conception of human rights is precisely the opposite. We comprehend the nature and justification of human rights only by fitting them into the strict juridical mold of a right. My aim in this paper, then, is to begin to articulate and defend what I shall call Kant's juridical idea of human rights.

For Kant, a right in a strict juridical sense bears three distinguishing marks. It is a *relational* claim against another, a claim that is logically correlated with the other's duty. A right is *non-instrumentally* justified as a first-order claim to *independence* against others. And a right is attached necessarily to a second-order power to *enforce* the right, a power that need not be exercised by the right holder.<sup>3</sup> The last two features of a Kantian right (and perhaps even the first) set apart the Kantian concept of a right from standard Will theories of rights, which conceive of rights as necessarily requiring a power of enforcing or waiving the other's duty correlative to the right.<sup>4</sup> The first two features of a Kantian right set it apart from standard Interest theories of rights, which conceive of rights instrumentally as protections of an aspect of your welfare.<sup>5</sup> Kant's juridical idea of human rights, then, is the view that human rights are those rights which play a unique logical role: they are constitutive conditions of any claim of right. A human right is noninstrumentally justified as an enforceable, direct requirement of your original right to independence.

In order to articulate and defend Kant's juridical thesis about human rights, I shall focus exclusively on the normative structure of a human rights claim, leaving out crucial questions about which human rights there are and what exact institutional structure is required by human rights at the domestic and international domains.

To do so, my argument proceeds as follows. I begin by articulating a puzzle. It appears to be a conceptual feature of a human right that said right is *inalienable* and *universal*. The puzzle emerges because as I argue, the two predominant theories of rights, the Will and Interest theories, have serious difficulties accounting for these two peculiar normative features of human rights.

My chief argument for Kant's juridical idea of human rights will be modest and will have a comparative and a noncomparative version. It will be modest because I will consider as beyond the purview of this paper the challenge of the radical skeptic who questions the validity of rights in general. It will suffice for my purposes if the Kantian idea can render intelligible the idea of a universal and inalienable right vis-à-vis standard political theories that take for granted the idea of rights but not necessarily the idea of a *human* right.<sup>6</sup> My noncomparative argument is that once we see that human rights function as *constitutive conditions* of any claim of right, we also see that any claim of right entails a commitment to the validity of human rights.

After introducing Kant's generic idea of rights in §2, I develop this noncomparative argument in §3. My comparative argument, developed in §4, is that we should endorse the Kantian idea because it accounts for the inalienability and universality of human rights better than its instrumentalist and more familiar alternatives. If my argument succeeds in typical Kantian fashion it will show that Kant's juridical idea of human rights integrates the main insights of its rivals (standard naturalist and institutional accounts) while avoiding their problematic instrumentalism.

## 1. THE PECULIAR NORMATIVE CHARACTER OF HUMAN RIGHTS

Regardless of how exactly human rights are conceived, they appear to have a peculiar normative character. The first sentence of the Universal Declaration of Human Rights declares them to be the “equal and *inalienable* rights of all members of the human family” (emphasis added).<sup>7</sup> The Vienna Declaration and Programme of Action, the result of the World Conference on Human Rights in 1993, proclaims that “the universal nature of these rights and freedoms is beyond question.”<sup>8</sup> It appears to belong to the concept of a human right that such a right must be *inalienable* (you cannot waive it) and *universal* (every person bears the same human rights regardless of nationality, religion, sex, etc.). The puzzle I now want to make vivid is that neither of the two predominant theories of rights, the Will and Interest theories, can accommodate these normative features. But if so, how is an inalienable and universal right even possible? One of my central arguments for the Kantian idea shall be that it is better positioned than familiar Will and Interest theories to account for inalienable and universal rights, i.e., for most of those rights that international legal instruments now regard as human rights.

The basic thought of the Will theory is that you have a right to X if and only if you have a claim to X against others and you have the power to enforce or waive others' duties with regard to X.<sup>9</sup> For example, the claim that you have a property right to your car means that you have a claim *in rem* against any other person that she not use your car without your authorization or that she not interfere with your use of your car *and* that you have a second-order power to enforce the other's duty (say, by prosecuting if another steals your car) or waive the other's duty. You can waive your right by *alienating* your right (selling your car) or, say, by not suing me when I steal your car.

Perhaps the two standard criticisms of the Will theory are that it cannot account for children's rights or for rights under the criminal law. It is difficult for the Will theory to account for children's rights because children lack the normative power to enforce or waive their rights.<sup>10</sup> And the Will theory has the odd implication that, since you lack control over others' duties when it comes to a criminal offense, you must also lack individual rights under the criminal law.<sup>11</sup>

These two problems are pertinent to our purpose, for the Will theory appears unable to account for the *inalienable* character of human rights. The inalienable character of human rights need not mean that human rights cannot be partially restricted, for such restriction may be (and according to Kant must be) necessary to maintain the consistence of a system of rights.<sup>12</sup> Human rights are *inalienable* in the sense that you lack a second-order power to waive another's duties correlative to your first-order human rights. To say that your right to be free from slavery is inalienable is to say that you lack the power to waive another's duty not to enslave you or, more directly, you have no title to sell yourself into slavery. If the right to political participation counts as a human right, you cannot waive this right, say, by selling it to another. As soon as inalienability is comprehended in this way, we realize that the Will theory cannot account for it, for the simple reason that the concept of an *unwaivable right* will appear incoherent. If human rights are inalienable, you lack the power to waive others' duties correlative to said human right.

A second difficulty for the Will theory concerning inalienability is illustrated by the classic Nuremberg trials, in which twenty-three leading political and military figures of the Third Reich were tried, *inter alia*, for war crimes and crimes against humanity. One would like to think that these figures were tried for having committed the ultimate wrong against the human rights of their victims and that those convicted were punished as a way of *enforcing* the rights of the victims. But if this is correct, the second-order power of enforcement need not be wielded by the rights bearer, for the victim's human right may be enforced by a third party. However, if it is a feature of human rights that they may be enforced by a third party, then the Will theorist will also be unable to account for this feature.

A quick solution to these difficulties is for the Will theorist to simply suggest that human rights should not count as rights, but this would be too quick, for there is an altogether different manner of conceiving of rights.

The main alternative account of rights, the Interest theory, appears perfectly poised to solve these difficulties. The basic idea of the standard Interest theory is that rights are protections of an aspect of your welfare sufficiently weighty so as to furnish a ground, all things being equal, for imposing a duty on another.<sup>13</sup> A crucial feature of any Interest theory of rights is the thought that a right must be justified *instrumentally* as means for the protection of an independently intelligible end. The instrumentalist model of justification necessary to any Interest theory is formal and decouples it from a specific *content* of the grounding interest. In other words, the grounding interest need not be well-being, but may also encompass autonomy, self-realization, or any other end whose value is independent of rights. Thus, for any Interest theory, as Raz puts it, rights play an “intermediate role” rather than an ultimate role in practical thought: interests ground rights, and rights ground duties.<sup>14</sup> In short, by dispensing with the thought that rights are defined by a second-order power of enforcement or waiving, the Interest theory appears better able to handle the inalienability of human rights. Human rights are inalienable, simply put, because they protect especially weighty interests, whatever these interests are.

It is perhaps for this reason (namely, avoiding the difficulties of the Will theory) that the two predominant accounts of human rights, naturalist and institutional, practically take it for granted that human rights must be understood according to the Interest model.

For the first of these accounts of human rights, the *naturalist*, human rights are pre-conventional, pre-institutional, and historically invariant norms 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.<sup>15</sup> Naturalist accounts differ in their characterization of the *grounding interest*, but tend to share the same Interest model of rights. Thus, human rights are the necessary protections of your interest in *normative personhood* (James Griffin),<sup>16</sup> in basic human *capabilities* (Martha Nussbaum),<sup>17</sup> in the natural human good (John Finnis),<sup>18</sup> or, more straightforwardly Razian, in your *well-being* (John Tasioulas).<sup>19</sup>

The second predominant account of human rights, i.e., an institutional or political account, confers upon human rights a *pre-conventional* status such that human rights do not depend on the recognition of a particular legal system. In this respect, advocates of institutional and naturalist accounts agree. But institutional theorists tend to deny the other three features. Human rights are viewed as *institutional* norms, in the sense that their primary function is to regulate the conduct of states internally and externally and thereby limit their sovereignty. Human rights are not *ahistorical*, but particularly

modern norms, since they depend on the modern institution of the state. And for a similar reason, 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 a global 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.<sup>20</sup> Crucially for our purpose, the two leading institutional theorists of human rights, Thomas Pogge and Charles Beitz, appear to rely on an Interest theory of rights as well. Beitz grounds rights in *urgent interests*,<sup>21</sup> while Pogge grounds them in *basic needs*.<sup>22</sup>

The reason why it is important to realize that the standard naturalist and institutional accounts of human rights rely on an Interest theory of rights is that in so doing they acquire an *instrumentalist* model of justification. This is to say that they justify human rights as means for the protection or promotion of an independently intelligible end (well-being, personhood, capabilities, etc.). As we shall now see, their instrumentalism is problematic because it has serious difficulties accounting *either* for the inalienability or for the universality of human rights.

Consider first inalienability. Why are you not entitled to waive your human rights? The answer of any Interest theory must be that human rights are inalienable because they protect especially weighty interests. Even so, as Raz put it, although rights ground duties on others, they do so *all things being equal*. If it turns out that (your/the aggregate) well-being may be better promoted in some other way, the interest protected by your right cannot ground a duty. The important point for our purpose is that by introducing a *justificatory gap* between human rights and their grounding interest, instrumentalist theories render inalienability unintelligible.<sup>23</sup>

As an illustration, take the well-known and ruthless suppression of the right to freedom of religion in the former Soviet Union. On an instrumentalist theory, such suppression need not be wrong. If it turns out that the grounding interest (e.g., aggregate well-being) is better promoted by denying the right to freedom of religion in exchange for peace and bread, then there is no reason to suppose that this staple human right ought not to be denied. And if the state has a reason to deny such a right, then you also have a reason to waive it in exchange for a greater benefit. Similarly, if in a feudal situation you calculate that by waiving your right to be free from slave labor and by handing yourself over to the local lord you can thereby ensure a much-increased standard of well-being, it seems that the interest theory would have to allow you to waive your human right.<sup>24</sup>

These two cases illustrate a further difficulty concerning, now, the *universality* of human rights. On any account, human rights are supposed to be *universally valid*. However, instrumentalist models undermine such universality. For instrumentalist models, your human rights claim, *h*, must be grounded in a distinct goal or value, *G*; and *G* must be *external* to *h*.

However, if the normative structure of *h* is instrumental, this inevitably raises the question whether *h* is the best means for promoting or protecting *G*. In many cases, it may turn out that *G* is better promoted by *non-h*, that is, by *violating* the human right in question. The Soviet Union's suppression of your religious freedom or your waiving your right to be free from slavery illustrate this problem, for the goal of promoting the grounding interest (e.g., aggregate or individual well-being) may sometimes be better secured by violating human rights. Thus, once we allow that means other than *h* are most conducive to *G*, we allow that *h* is not universally valid.

Notice that these two problems, namely, the tension with the *inalienability* and *universality* of human rights are generated by a single feature: the instrumentalist justificatory structure of any Interest theory of human rights. So the crucial point is not whether a particular account fits into the naturalist or institutional formula as I have sketched it. A defender of Griffin, Nussbaum or Pogge might object that my presentation of the key features of a *naturalist* or *institutional* account is not charitable. But for our purpose, the crucial point is whether the account is a version of the Interest theory, for then the account will be committed to justifying human rights instrumentally.

And this brings out the form of the puzzle I want to make explicit. The puzzle is how to account for the presumed *inalienability* and *universality* of human rights when the two standard theories of rights appear to undermine these two peculiar normative features.

Two avenues for resolving the puzzle immediately suggest themselves. We could deny that human rights are inalienable and universal, or we could deny that human rights must have the character of rights "in the strict sense."<sup>25</sup> The first strategy is problematic because inalienability and universality are not simply features attributed to human rights by important international legal instruments; they are *conceptual* features of human rights. If you could waive your human rights or be denied certain human rights due to your nationality (say, as living in the Soviet Union), the concept of a human right would collapse into the concept of an ordinary positive right, that is, a right whose validity is contingent on the enactment of statutory law. The second strategy is problematic because it does not solve but merely *postpones* the problem. Suppose that we follow Nickel in seeing human rights as "rights but not necessarily in a strict sense."<sup>26</sup> This would mean that *some* human rights would be better understood as simply stating "high-priority goals" (e.g., the right to a decent standard of living), but other human rights (e.g., the right not to be tortured) would still have to be understood as rights "in the strict sense." The second strategy thus gets impaled on a dilemma. If *all* human rights represent nothing more than "high-priority goals," we lose from view entirely the concept of a human right, for the concept has now collapsed into that of a high-priority political goal, such as promoting economic growth, general welfare or a sense of cultural belonging. But if at least *some* human rights are represented as rights in the strict sense, then we are once again confronted with our puzzle. How could *these* rights be *inalienable* and *universal*?

I am now going to argue that Kant's juridical idea of human rights resolves this puzzle. Human rights are inalienable and universal because they function as constitutive conditions (conditions of the possibility and meaningfulness) of any claim of right. The first step in advancing such claim is to consider briefly Kant's distinctive independence theory of rights.

## 2. KANTIAN RIGHTS AS ENFORCEABLE CLAIMS TO INDEPENDENCE

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.<sup>27</sup>

In this crucial but difficult passage, Kant assigns two key features to any right: rights are [1] *relational* and [2,3] *non-instrumentally* justified claims to independence.

Rights are *relational* in that they concern exclusively "the external and indeed practical relation of one person to another." A right is not a special normative property you possess in isolation from your relation to others. Your weight or hair color is arguably non-relational, since they would remain the same even if you had no relations to any other person. By contrast, a right *is* a relation in which you stand to others. The juridical form of this relation is *correlativity*: your right logically entails and is entailed by my duty to respect your right.

In assigning normative primacy to the *correlative* relation of right rather than to one of the *terms* of the relation, Kant departs from any right-based theory that assigns justificatory primacy to an independently intelligible and non-relational right.<sup>28</sup> Similarly, *pace* Onora O'Neill, Kant departs from familiar duty-based theories, such as John Locke's, which tend to assign justificatory primacy to an independently intelligible non-relational duty.<sup>29</sup> O'Neill elides Kant's crucial distinction between non-relational duties (duties merely with regard to others) and relational duties (duties *to* others).<sup>30</sup> A

Kantian right is relational, then, in the *practical* sense that it is the mirror image of a relational duty.

The second and third features of a right bring out its *non-instrumental justificatory structure*. Kant puts the point negatively and positively and in two ways. Negatively stated, rights are not to be justified as means for the protection or promotion of an independently intelligible end such as your *needs* [2]. Similarly put, rights are not to be justified as means for the promotion of a value which figures as the *matter* of your choice [3]. Instead, rights should be justified only as one normative pole in “a relation to the other’s *choice*.” [2] Similarly put, all that matters in the justification of a right is “the *form* in the relation of choice on the part of both, insofar as choice is regarded merely as *free*.” [3] But what could it mean to say that the justification of rights turns on the *form* of the relation of free choice?

One common but implausible answer is to turn Kant into a restricted Interest theorist, “restricted” in the sense that rights are justified by a single interest in *free choice*. In developing her Kantian or “freedom-based” theory of human rights, Laura Valentini offers a recent and representative example of such an instrumentalist reading. She admits that much of the structure of her account could be retained “while grounding human rights in values other than freedom but which, like freedom, are in need of political articulation and can be seen as placing constraints on the actions of state-like political authorities.”<sup>31</sup> Valentini’s statement may be taken to reveal the *instrumentalist* structure of her account, according to which the *ground* of human rights is an independently intelligible end.

By contrast, we ought to take Kant’s claim that right concerns the *form* of a relation of freedom as defending a *non-instrumentalist* justification of rights. Instrumentalist positions such as Valentini’s turn *free choice* into the *matter* of choice, i.e., a normative property of one of the terms of the relation. Kant emphasizes that right concerns not the *matter*, but the *form* of such relationship. As anywhere in Kant’s philosophy, we ought to read Kant’s formulation of the third term of the concept as the synthesis of the previous two. To say that rights are justified *formally* is to say that the relationship between rights and freedom is *internal* (the non-instrumentalism of [2]) *and* to say that freedom itself must be construed as a relationship, i.e., “the external and indeed practical relation of one person to another.” Rights cannot be grounded in any value external to the relationship of right.

The freedom protected by rights, or more precisely, the freedom of which rights are an aspect, is what Kant calls “external” freedom, as opposed to “internal” freedom.<sup>32</sup> 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).<sup>33</sup> By contrast, your actions are *externally* free when your choice is *independent* from the choice of others, regardless of what your motives are.<sup>34</sup> Even in this negative articulation, external freedom is already a relational and interpersonal normative property, namely, your title to independence compatible with the same title for everyone in accordance with a universal law. It represents your entitlement to set your own ends in the relational sense that others lack the authority to set your ends for you, and it ascribes this very same title to everyone else. Kant calls this the juridical quality of being your own master, *sui iuris*. This entitlement 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 her power of choice. Enslaving you, turning you 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 of extra slices of cake), your external freedom can only be compromised by the deeds of others.<sup>35</sup>

We may put together the first two conceptual features of a right by saying that, for Kant, a right is a first-order claim to independence against others. Rights are relational because my right is logically connected to your correlative duty. And rights are non-instrumentally justified because the value of independence is *itself* construed as a juridical entitlement, rather than as an *extra-legal value*.

In addition to their relational and non-instrumental character, Kant adds a third dimension to the concept of right: enforceability. Kant says: "there is connected with right by the principle of contradiction an authorization to coerce someone who infringes upon it."<sup>36</sup> Kant's argument is that once we understand rights as first-order claims to independence, we must see such first-order claims as *necessarily* attached to a second-order normative power to *enforce* such rights. On this picture, a wrong is a *hindrance* to my independence. As a result, coercion that has the jural effect of cancelling the hindrance and restoring the original right must be seen as internally connected to the right in question. Such coercion is thereby internally connected to rights. A non-enforceable right cannot count as a right, but crucially the power of enforcement need not be confined to the bearer of the first-order right.<sup>37</sup>

We are now in a position to see how the Kantian concept of a right differs from the standard theories. Unlike Will theories, a Kantian right does not require that the second-order power of enforcement either (i) be necessarily attached to a power of *waiving* or (ii) that the power of enforcement be held by the bearer of the first-order claim to independence. This difference makes it possible for a Kantian right to be *inalienable*.<sup>38</sup> Unlike Interest theories, a Kantian right is *relationally* and *non-instrumentally justified*. This difference makes it possible for a Kantian right to be *inalienable* and *universal*. Indeed, a Kantian right that bears these two features will function as a human right.

### 3. HUMAN RIGHTS AS A *PRIORI* RIGHTS

The highest division of a theory of rights, Kant tells us, is that between “*natural right*, which rests only on a priori principles, and *positive* (statutory) right, which proceeds from the will of a legislator.”<sup>39</sup> Human rights according to Kant, I will now suggest, are those rights which rest “only on a priori principles.”

To get into view the contrast Kant has in mind here, it is important to distinguish it from a common manner of understanding the status of an *a priori* principle. Rationalist and empiricist philosophers following René Descartes or John Locke tend to understand the *a priori* as a form of *intuitionism* in (moral) epistemology. In moral epistemology, this is the view that certain values have a justificatory fundamental status, i.e., the value is *self-justified* rather than justified by a further value, and that the self-justified character of the value is comprehended only by a form of quasi-perceptual *intuition*. An *a priori* right is then one apprehended by the “natural light of reason.”

Kant’s concept of the *a priori* is fundamentally different.<sup>40</sup> Let me put the contrast first in terms of theoretical knowledge. According to the standard picture of the *a priori*, empirical propositions depend on *a priori* propositions whose self-justified character is apprehended non-empirically, say, by a “special” form of intuition. The Kantian conception departs in two interrelated ways from such picture: the *a priori* is not apprehended by a special form of intuition, but rather by the *logical role* played by the *a priori*, and such role is precisely that the theoretical *a priori* constitutes experience. The *a priori*, in a now familiar phrase, “makes experience possible.” Kant understands experience normatively—as a form of cognition—rather than phenomenally—as merely a subjective seeming. As a result, the claim that the *a priori* is constitutive of experience is also the claim that 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.<sup>41</sup> 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.

My suggestion is that we may fruitfully transpose to the practical this concept of the *a priori* in order to comprehend Kant’s concept of a human right. A human right is an *a priori* right not in the sense that it is apprehended by a special intuition, but rather in the sense that human rights play a unique *logical role*. Human rights are the constitutive conditions of any claim of right, just as causality is the constitutive condition of any claim to empirical cognition. The concept of a human right is universally and necessarily valid because such right is a condition of the *meaningfulness* of any claim of right. Kant develops the idea of human rights as constitutive conditions of any claim of right in three stages.

As I have suggested, Kant conceives of generic rights as enforceable first-order claims to independence. For you to claim any right whatever is, at bottom, for you to claim a title to independence that correlates with a duty of non-domination on any others. Kant calls this basic title to independence the sole *innate right*, that is, “the only original right belonging to every man by virtue of his humanity.”<sup>42</sup> The original right to independence immediately involves the following authorizations: innate *equality* and thus “a human being’s quality of being *his own master (sui iuris)*.”<sup>43</sup> Your title to be your own master is precisely the same as your title to independence from the domination of others. And since this title attaches to your mere standing as a juridical person,<sup>44</sup> it may be construed as your innate juridical equality, a title shared equally by every person.

The original right to independence is, in a sense, the most basic human right. Negatively put, its justification is *a priori* because its validity is not contingent on “the will of a legislator.” Positively put, its justification is *a priori* because it is the constitutive condition of any claim of right. If rights are claims to independence, any ordinary claim of right presupposes your equal right to independence.

Furthermore, the view that human rights are valid *a priori* because they are the constitutive conditions presupposed by any claim of right also assigns human rights the two marks of the *a priori*: universality and necessity. The original right to independence is *necessary* because it is presupposed by *any* claim of right, regardless of its content. And such right is universally valid for the same reason: it attaches to your bare status as a *claimant of rights*, i.e., as a juridical person. You bear human rights due to your *generic* juridical status as *sui iuris*, rather than due to a *specific* juridical status attaching to your “race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”<sup>45</sup> When human rights are understood as *constitutive conditions of any claim of right*, their validity must be thought of as *necessary* and *universal* rather than as contingent on the will of a particular legislator or on a specific juridical status.

To see what it might mean to think of human rights as *a priori* in this way, consider the negation of the original right to independence, namely, the claim that some persons are entitled to be the masters of others. And consider, further, an ordinary property right, such as your right to your laptop. Regardless of your specific conception of property, in general when you claim ownership of your laptop you claim a right to its exclusive use and you thereby place on any others a duty of respect. Your right entails that others lack the authority to decide how and whether to use your laptop. But notice that in so doing you also thereby *presuppose* your independence. If you did not presuppose your original right to independence, you would deny your independent status and potentially ascribe to yourself the status of slave to another. But the moment you become a slave to another, you cease to have property rights, for these must now be transferred to your master, who owns you. In claiming any ordinary property right, you thereby *presuppose* your

original title to equal independence. And without such title, your right to property becomes meaningless.

In the first instance, then, human rights govern a *horizontal relationship of equal authority among private parties*. My human right correlates necessarily with your duty of *respect* and *non-domination*. Our equal authority means that neither of us has authority *over* the other. Therefore, my human rights must be the same as yours. You and I are one in human rights and the human duty of non-domination and respect. Kant expressed this unity of rights in a generalized version as the first principle of a system of right: “Any action is *right* if it can coexist with everyone’s freedom in accordance with a universal law.”<sup>46</sup> Human rights, then, govern a *horizontal* relationship of equal authority among private parties. Or stated differently, human rights govern a system where my rights are consistent with everyone’s rights in accordance with a universal law.

Thus, unlike institutional and like standard naturalist accounts of human rights, Kant sees human rights as governing *interpersonal* relations of right. But unlike naturalist accounts and like institutional accounts, Kant also argues that public institutions are *necessary* to a system of rights. The necessity of public institutions is not *instrumental*. Public institutions are not necessary simply in order to enforce fully determinate rights. Public institutions are also necessary in a non-instrumental sense: they are necessary to articulating the *content* of human rights.

Within a system of purely *horizontal* relationships, i.e., a system of rights composed entirely of private persons, the adjudication and enforcement of rights could easily degenerate 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.<sup>47</sup> A key role of a public authority in a system of rights is thus to resolve disputes about rights in a manner consistent with the original right to independence. Lest the adjudication and enforcement of rights be a form of domination, a public authority must be able to make, apply and enforce rules on behalf of everyone. This status of acting on behalf of everyone, rather than imposing a stronger but still private interest, vests the state with *public authority*. Living under public laws is itself a form of freedom because the law establishes a condition of non-domination among its members. As Rousseau had put it, we become independent by depending instead on public laws.<sup>48</sup>

Here is how Kant puts the point:

One cannot say: the human being in a state has sacrificed a *part* of his innate outer freedom for the sake of an end, but rather, he has relinquished entirely his wild, lawless freedom in order to find his freedom as such undiminished, in a *dependence upon laws* [emphasis added], that is, in a rightful condition.<sup>49</sup>

The key point for our purpose is that *dependence upon public laws* is both a *new normative form* and a form that is essential to a system of rights.

Human rights, then, govern a second form of relation among independent persons: a *vertical relationship of unequal authority between private persons and their public authority*. This relationship takes an asymmetrical form, for a public authority enjoys second-order normative powers (of legislation, adjudication and enforcement) that no private person enjoys. Similarly, this means that a public authority bears second-order duties of protection and promotion that no private person bears. Kant's view, which I cannot defend here, is that my human rights correlate with first-order negative duties on the part of any private person, i.e., duties of non-domination, but also with exclusively public *second-order positive* duties of protection and promotion. These duties are second-order because they are not concerned with the state not wronging you, but rather with the state's duty to *prevent* (protect) or *remedy* (assist and promote) wrongs from thirdparties.<sup>50</sup> Kant's basic argument for the exclusively public character of these second order duties is that if these duties were private they would perpetuate the problems of adjudication and enforcement characteristic of the state of nature.

Human rights, finally, govern a third form of relation among independent persons: *the international relationship of equal authority among public authorities*. What I have in mind here is what Kant calls a *right of nations* (*ius gentium*). Kant says:

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 cosmopolitanicum*). 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.<sup>51</sup>

Human rights regulate not only your relationship of right to other private persons and your state, but also the international relations among states. This constitutes a new form of relation because the equal authority of states is not reducible to the equal authority of persons, since states are public entities limited to the pursuit of exclusively public purposes (i.e., establishing and maintaining a rightful condition) while persons are private persons of unlimited purposiveness. Kant's basic normative point, for our current purpose, is that there is an internal relationship between *domestic* (*vertical*) and *international* juridical relationships: your rights cannot be fully determinate or secure *domestically* unless you live in an international juridical order that governs itself by human rights norms and that shuns war as a means for the resolution of disputes.

Let me illustrate the structure laid out in this section by articulating a Kantian conception of the human right to life.<sup>52</sup> Article 3, UDHR, provides: "Everyone has the right to life, liberty, and security of the person." The human right to life and security is, first of all, a human *right*. This means that by adopting the structure of a right (in the strict, juridical sense), the right must be *enforceable*. This distinguishes the juridical duties of justice

correlative to such right from wider duties of virtue, duties which are never *enforceable*. To count the right to life, liberty and security of the person as a *human* right is then to presuppose a determinate schema of argument. One thereby supposes that said right is a *constitutive condition* of any claim of right by governing the three forms of juridical relations.

With regards to the *horizontal form*, the right to life, liberty and security of the person furnishes a more determinate aspect of the generic original right to independence. To claim a right to life is to claim, minimally, a right against the arbitrary termination of one's life, and this can be fruitfully interpreted as a claim to independence and non-domination. Murder, the paradigmatic infringement of the right to life, amounts to the ultimate form of domination: the *biological* slavery of one party getting to decide that and how the other's life will end.

With regards to the *vertical form*, the right to life and security of the person represents a more determinate version of your title to independence held against the state. The right correlates with a first-order duty of respect, most flagrantly violated by *extrajudicial killings*, when the state itself perpetrates murder, or by *enforced disappearances*, when the state secretly deprives a person from her liberty without informing anyone of the arrest. These are guises of domination because agents of the state subject you to their private choice, without the mediation of public laws. The rights correlate as well with second-order duties of protection and promotion. Thus, the Human Rights Committee has found that the right to security of the person can be violated by a state that fails to investigate credible death threats.<sup>53</sup>

And finally, with regards to the *international form*, the right to life, liberty and security of the person represents the claim that said right is a *matter of international concern*. In the event of flagrant and systematic violation of these rights, as is characteristic of *genocide*, a Kantian can argue that states have a duty to protect victims of genocide outside their jurisdiction.<sup>54</sup> The general form of the argument here is that your human rights do not correlate exclusively with duties of protection by the state in which you live, but also with duties owed by the international community of states. The central idea here is Kant's argument that the state of nature in which states find themselves in relation to one another is "in itself still wrong in the highest degree, and states neighboring upon one another are under obligation to leave it."<sup>55</sup> My suggestion, which I develop in detail elsewhere, is that a state's duties correlative to the human rights of persons outside the state's jurisdiction are a necessary element of the state's generic duty to leave the international state of nature and establish an international rightful condition.<sup>56</sup> Put conversely, if human rights were not a matter of international concern, states would lack any obligation to leave the international state of nature and would be permitted to perpetuate indefinitely a condition of lawlessness and war as the method of enforcing their rights.

In sum, Kant's juridical idea of human rights is that a human right is an *a priori right*. To say that human rights are *rights* is to say that they are

enforceable claims to independence held against others. Since the duties correlative to claim-rights are enforceable, human rights duties are duties of justice and contrast with wider duties of virtue, which include non-enforceable duties, such as duties of benevolence or friendship. To say that human rights are *a priori* is to say that the justification of these rights takes a peculiar non-instrumental form: a right counts as a human right when it functions as a constitutive (universal and necessary) condition of *any claim of right*. Human rights may also be understood as direct requirements or aspects of the original right to independence, which Kant calls "innate right." Furthermore, Kant argues that *qua a priori* human rights govern three distinct forms of relations: the *horizontal*, *vertical* and *international forms*.

#### 4. INALIENABILITY AND UNIVERSALITY

It is now time to return to our puzzle: how can a right be inalienable and universal? How are human rights possible? Kant's juridical idea of human rights easily resolves this puzzle. Human rights are inalienable and universal due to their *a priori status*.

Let us turn first to *inalienability*. Will theories of rights have difficulties accounting for inalienable human rights because it is supposed to belong to the character of a right that the right-bearer wields the power to waive the right. Interest theories of rights have difficulties accounting for inalienable rights because in certain contexts you would be justified in waiving the right in order to better secure the grounding value (e.g., your welfare). Kant's independence theory rejects the Will theory thesis that rights must be waivable without adopting the instrumentalist character of Interest theories. In a word, human rights are inalienable because they are the constitutive conditions of any claim of right. As such, to waive a human right would be tantamount to waiving your original right to independence.

One way to put this point is to distinguish your *generic* right to own property from your right to own a *specific* something as property. When you own your laptop, you have the right to alienate your specific ownership right to the laptop by selling it to me. But a condition of the possibility of your sale (your alienation of your *specific* right) is your *generic* right to own property. If you were a slave, you would not be entitled to own any *specific* thing because you would lack the *generic* right to own property. Thus, the generic right to property is a condition of the possibility and normativity of your specific right to property. Your power to alienate *specific* property rights is conditioned and made possible by your *inalienable generic* right to own property.<sup>57</sup> In *claiming* any specific and alienable property right you thereby *presuppose* your generic and inalienable right to own property.

We can extend this line of thought to the inalienable status of any human right. Your power to alienate *specific* rights is conditioned and made possible by your inalienable and generic human rights. You only have the power

to alienate specific rights due to your original title to independence. Thus, in claiming any ordinary and alienable right you thereby *presuppose* your generic and inalienable human rights. To waive a human right is therefore tantamount to a contradiction: in waiving human rights you surrender your status as *sui iuris*, a status that is presupposed by your title to waive any rights whatever.

It may be objected that this argument for inalienability is implausible. If waiving your human rights is more conducive to your (or aggregate) well-being, then you ought to be justified in alienating your human rights.

My response to this objection is that a Kantian must distinguish two levels at which the objection operates. At a first level, the objection challenges the alleged constitutive link between rights and human rights. Since the point of rights is to protect an aspect of your well-being or any other grounding interest (according to the Interest theorist), it makes perfect sense to allow for the possibility of alienating rights if well-being is better promoted in this way. To simply assert that the point of rights is to express your original right to independence appears to beg the question against the Interest theorist.

At this level, the objection reveals itself as a counsel of despair. If upholding your rights means that *any* right whatever may be sacrificed at the altar of welfare promotion (either maximization of well-being or minimization of suffering), then this simply reveals that the Interest theorist has no resources to account for the *inalienable* character of human rights. Indeed, if this line of thought is pushed far enough, the Interest theorist will be unable to account for *any rights whatever*.<sup>58</sup> What appears as an objection to the Kantian account is revealed as a deficit in any Interest theory of human rights. The Kantian thesis that human rights are *a priori rights* supports the argument, then, that there is an internal connection between rights and human rights. To say that human rights are *constitutive conditions* of any claim of right is to say that any claim of ordinary right *presupposes* the validity of a human right. Thus, if you assert the validity of an ordinary claim of right but deny the validity of human rights, you contradict yourself, because in denying the validity of inalienable rights you deny the conditions of the meaningfulness of any ordinary right. This is analogous to your assertion of a *specific* property right coupled with your denial that you possess a *generic* property right.

My response brings out a second and deeper level at which the objection may be articulated. Granted that ordinary and human rights are internally related, as Kant argues, but how do we defend the juridical imperatives of claims of right in general against the imperative of well-being (or any other imperative, such as a Nietzschean will to power)? Why should we endorse rights in the first place?

Notice that this question has changed radically the register of our inquiry. We began with a puzzle about how an inalienable right is possible, a puzzle that nonetheless takes for granted the validity of rights (however conceived). In raising this question, i.e., a question about the very idea of rights, the skeptic has radically raised the stakes and placed herself in a unique and vulnerable position, for very few theorists are willing to assert that individual rights are

a fiction. The skeptic must thus justify how her own denial of rights is not arbitrary. In any case, for the present purpose addressing this *radical* skeptic is not our concern.<sup>59</sup>

Instead, what matters for our purpose is the dialectically superior position of the Kantian account not in relation to the radical skeptic, but vis-à-vis standard Will and Interest theories. While these theories have serious difficulties accounting for the inalienable character of human rights, the Kantian account of human rights as *a priori rights* meets the challenge without difficulty. Human rights are inalienable due to their character as *constitutive conditions* of any claim of right.

The same argument may be constructed in defense of the *universality* of human rights. Since Will theories have difficulties accounting for *inalienable rights*, they also have difficulties accounting for *universally valid* rights. If certain human rights are alienable, say, in the former Soviet Union, then such rights could not possibly be universally valid. Interest theories fare worse because of their instrumentalist character, as illustrated by the case of the Soviet Union abolishing freedom of religion for the sake of bread and peace. The problem is general for any instrumentalist account: so long as there is a justificatory gap between human rights and their ground, it will be possible to imagine cases where the ground is better promoted by violating human rights. Thus, to the extent that standard naturalist and institutional accounts presuppose an Interest theory of rights, they too will face this problem.

A second version of my comparative argument for Kant's juridical idea of human rights is that it accounts for the universality of human rights with less difficulty than its alternatives. We ought to comprehend the universality of human rights not as a by-product of the alleged universality of the underlying interests, but rather as a feature of the *constitutive* function of human rights. Since human rights are the constitutive conditions of *any* ordinary claim of right, regardless of its content, human rights must be valid universally. Kant argued for the universality and necessity of the concept of causality by making the case that the concept of causality is a constitutive condition of any empirical cognition: any claim to know the empirical world presupposes that we represent the world in causal relations. Kant's argument for the universality of human rights is structurally identical: whenever you *claim* an ordinary right you thereby presuppose your original right to independence and the other human rights as more determinate aspects of the original right.

As before, it may be objected here that some cultures do not possess the concept of a human right, perhaps due to their more community-oriented traditions. The charge is the familiar one that human rights are a culturally specific (i.e., a "Western" or modern) practice that therefore cannot enjoy *universal validity*.

The Kantian answer to this charge is distinctive. Unlike Instrumentalist theories, which tend to depend on problematic empirical assumptions about "universal human interests," the Kantian idea defends universality in

a noninstrumental way. Human rights are universal due to their normative function as constitutive conditions of any claim of right. This means that regardless of their cultural traditions, so long as members of that tradition are committed to making a single claim of right (a property claim, a contract with another, a claim against the state, etc.), they are already committed to the idea of human rights. This is because, as I have argued, your claim of rights already presupposes your status as an independent rights bearer and your original right to independence. And since human rights are aspects, direct requirements, of the original right to independence, human rights are presupposed by ordinary claims of rights. Put differently, human rights are a condition of the possibility and meaningfulness of ordinary claims of right. In a word, the response to the objection is that regardless of your cultural background, you cannot consistently deny the validity of human rights if you affirm the validity of ordinary claims of right.

As before, this response still leaves space for the radical skeptic who denies the validity of any claim of right whatever. But notice that in raising the objection to the register of the radical skeptic, the charge of cultural relativism loses much of its force. Those who articulate such charges tend to presuppose the validity of a practice of rights and even frame the charge in terms of rights (say, the right to the preservation of one's culture). Thus, the Kantian argument is two-pronged. The argument (here) against the radical skeptic is that by shifting the topic and questioning the very idea of rights, the radical skeptic makes her objection implausible (though not necessarily incoherent), for the cost of rejecting rights altogether is so high as to appear prohibitive to most participants of the debate. The argument against the objection of cultural relativism is that such objection is most forceful when articulated not in terms of radical skepticism about rights, but as skepticism about *human rights* in particular. But this weaker skeptic will likely assume the validity of at least some rights, and in so doing already provides enough for the Kantian to get a foothold, for you cannot consistently deny human rights but affirm rights, once you see that human rights are the constitutive conditions of ordinary rights.

Let me emphasize the contrast here with instrumentalist strategies for defending the universal validity of human rights. An instrumentalist account justifies human rights as means for the promotion of an independently intelligible end, such as your well-being. As we have seen, any version of the Interest theory, whether naturalist or institutional, takes this instrumentalist form. Thus, an instrumentalist account must defend the universality of human rights on two grounds. 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), of normative agency (Griffin) or, more straightforwardly, of human well-being (Tasioulas). Institutional accounts offer essentially the same candidates: universal interests in well-being, conceived as needs (Pogge) or as urgent interests (Beitz). And second, to be universal human rights must be the most effective response *anywhere* to threats to the grounding value. Borrowing

Jack Donnelly's terminology, we may say that for instrumentalist accounts the universality of human rights is *functional*, that is, a function of being *universal* remedies for threats to *universal* interests.<sup>60</sup>

Laying bare the instrumentalist structure of familiar naturalist and institutional accounts is important because it reveals how such accounts make the universality of human rights open to two types of objections. The relativism objection, then, will target one ground of functional universality or another. First, instrumentalist accounts open themselves up to the objection that the grounding value is not indeed universal because it relies on a culturally specific concept of said ground, that is, a culturally specific concept of well-being, the human good, or our perfectible capabilities. Second, as I argued above (§1), instrumentalist accounts open themselves up to the objection that *even* if the grounding value is universal, human rights need not be the most effective remedies *everywhere* for threats to the grounding value. Sometimes violating a certain human right may provide a more effective protection. That Donnelly admits that the functional universality of human rights is decoupled from their necessity is a symptom of this problem.<sup>61</sup>

Now what matters for our purpose is not whether these two objections are fatal to instrumentalist accounts, but rather that the Kantian idea is not vulnerable to them. This is because on the Kantian account the universality of human rights is not *functional* (as means to a further end) but *constitutive*. Human rights are universally valid because they are the constitutive conditions of *any* claim of right *anywhere*. Human rights, as Kant would put it, are authorizations that “follow immediately” from your original right to independence so that their validity is not contingent on a particular status (nationality, sex, gender, creed, etc.). The dialectical advantage of the Kantian account, then, is that unlike its familiar instrumentalist counterparts its defense of the universality of human rights hinges neither on controversial ontological-empirical claims about what is of value *for any human being* nor on controversial theoretical-political claims about what functions anywhere as a remedy for threats to said value. Instead, it relies simply on the universal conditions of the meaningfulness of making a single claim of right against another.

## CONCLUSION

How is it possible for a right to be inalienable and universal? I have argued that the two predominant theories of rights, Will and Interest theories, have serious difficulties accommodating rights with these features. Alternatively, pursuing the non-juridical route (human rights are not rights “in the strict sense”) is also problematic because it risks collapsing the concept of a human right into the concept of a high-priority goal, such as maximizing happiness, GDP growth, or finding the cure for cancer. This scenario might support the conclusion that such a right is just *impossible*. But I have been arguing that this

conclusion would be premature. This conclusion would be premature because Kant's independence theory of rights possesses the conceptual resources for accommodating the inalienability and universality of human rights.

I have offered two main arguments in support of Kant's juridical idea of human rights. The first is non-comparative: anyone who advances a claim of right is thereby committed to the validity of human rights and can only deny human rights on pain of contradiction. The second is comparative: Kant's juridical idea accounts better than its alternatives for the inalienability and universality of human rights while remaining less vulnerable to challenges to human rights. Moreover, a further virtue of the Kantian account is that by conceiving of human rights as governing three forms of relations (the *horizontal*, *vertical* and *international*), it integrates the key insights of naturalist (human rights govern interpersonal relations) and institutional accounts (human rights govern the domestic and international conduct of states) while avoiding the problems of any instrumentalist account in defending the inalienability and universality of human rights.

## NOTES

1. For very helpful feedback on earlier drafts of this paper I am grateful to Charles Beitz, Paul Franks, Rainer Forst, Sarah Goff, Brian Keenan, Reidar Maliks, Claire Reid, Jacob Weinrib, and Jennifer Whiting. I am *immensely* grateful to Arthur Ripstein for having patiently read every draft of this paper and acutely commented on every version.
2. See James Nickel, "Human Rights," *The Stanford Encyclopedia of Philosophy*, ed. Edward N. Zalta (Spring 2013), forthcoming, <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, no. 3 (2010): 333–364.
3. By a 'first-order' right and a 'second-order' power I mean to refer to Hohfeld's famous distinction between rights as first-order *claim rights* and rights as second-order *powers* to exercise claim rights. See Wesley Hohfeld, "Some Fundamental Legal Conceptions as Applied in Legal Reasoning," 23 *Yale Law Journal* 16 (1913).
4. For a classic statement of the Will theory, see H. L. A. Hart, "Are There Any Natural Rights?" *The Philosophical Review* 64, no. 2 (1955).
5. The now classic statement of this view is perhaps Joseph Raz, *The Morality of Freedom* (Oxford: Oxford University Press, 1988), chap. 7.
6. I tackle the radical skeptic's charge elsewhere, because a proper response to it brings out a distinctive kind of argument which I cannot develop here.
7. Universal Declaration of Human Rights, Preamble.
8. 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.
9. For a classic statement of the Will theory, see H. L. A. Hart, "Are There Any Natural Rights?" N. Simmonds and H. Steiner defend more recent versions of

- the theory in their contributions to *A Debate Over Rights* (Oxford: Oxford University Press, 2002).
10. The *locus classicus* of this criticism is Neil MacCormick, "Children's Rights: A Test-Case for Theories of Rights," *Archiv für Rechts- und Sozialphilosophie* 32 (1976): 305–317.
  11. Matthew Kramer formulates a recent and powerful version of this critique. See his "Rights without Trimmings," in *A Debate over Rights*, 71–72. Simmonds responds, unconvincingly in my view, in 230–232.
  12. In his entry to the *Stanford Encyclopedia*, Nickel denies that human rights can be inalienable precisely because human rights can be restricted, such as when your right to freedom of movement is restricted as punishment for your crimes. But the concept of inalienability seems misconstrued if it is understood as the *absolute* character of a first-order entitlement. Instead, inalienability is better comprehended as a second-order power, or, more precisely, the lack of such power, a version of what W. Hohfeld called a *disability*.
  13. Joseph Raz offers 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*, chap. 7, 166.
  14. Joseph Raz, *The Morality of Freedom*, 181: "The interests are part of the justification of the rights which are part of the justification of the duties. Assertions of rights are typically intermediate conclusions in arguments from ultimate values to duties." Raz is not precise about the logical and justificatory relationship between rights and duties, for at times he appears to suggest that rights and duties are correlates of one another, but his formulation also leaves open the possibility of rights that do not entail correlative duties. Matthew Kramer points out this ambiguity as a potential source of confusion between *interests* and *morally or legally protected interests* (i.e., rights). Kramer, "Rights without Trimmings," 44.
  15. 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), chap. 3; and David Boucher, *The Limits of Ethics in International Relations* (Oxford: Oxford University Press, 2009), 150–151.
  16. James Griffin, *On Human Rights* (Oxford: Oxford University Press, 2009).
  17. Martha Nussbaum, "Human Rights Theory: Capabilities and Human Rights," *Fordham Law Review* 66 (1997): 273–300.
  18. 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), chap. 1.
  19. John Tasioulas, "The Moral Reality of Human Rights," in *Freedom from Poverty as a Human Right: Who Owes What to the Very Poor?* ed. Thomas Pogge (Oxford: Oxford University Press, 2007), 75–101.
  20. This formulation mirrors Charles Beitz's in his *The Idea of Human Rights*, 197.
  21. *Ibid.*
  22. Thomas Pogge, *World Poverty and Human Rights* (Malden: Polity Press, 2008), 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 other institutional theories, see John Rawls, *The Law of Peoples* (Cambridge, MA: Harvard University Press, 2001); and Rex Martin, *A System of Rights* (Oxford: Oxford University Press, 1997), chap. 4.
  23. It is worth emphasizing that what generates the problem is the *instrumentalist* character of the account and hence the gap between human rights and their

- ground. The same problem would obtain regardless of how the grounding interest is characterized (e.g., well-being, autonomy, capacity-fulfillment, etc.).
24. This feudal situation need not be confined to medieval times, for in fact it is perpetuated today wherever “indentured” labor persists. If well-being is increased by such labor, the interest theorist seems committed to saying either that you lack the relevant human right or, similarly, that you ought to waive said right.
  25. A third option, of course, is to maintain that *if* there are human rights, they must be inalienable and universal, but since no right can bear these features, the proper response is *skepticism* about human rights. As mentioned in the introduction, I do not tackle this possibility here. Notice, however, that since a Kantian account will show why some rights must be inalienable and universal, this argument for skepticism is blocked: it cannot be a reason for skepticism that two standard theories of rights cannot account for human rights if another theory of rights can.
  26. James Nickel, “Human Rights,” §1.
  27. Immanuel Kant, *Metaphysics of Morals*, (henceforth, abbreviated *MM*) in *Kant’s Practical Philosophy*, trans. and ed. Mary Gregor (Cambridge, UK: Cambridge University Press, 2006), 6:230. All references are to the Prussian Academy pagination appearing in the margins.
  28. The relational form of any claim of right means that rights cannot be grounded nonrelationally. If this is the correct reading of Kant’s passage, Kant would have rejected Otfried Höffe’s interpretive claim that for Kant rights are grounded in “self-recognition.” See Otfried Höffe, “Kant’s Innate Right as a Rational Criterion for Human Rights,” in *Kant: Metaphysics of Morals: A Critical Guide*, ed. L. Denis (Cambridge, UK: Cambridge University Press, 2010), 86.
  29. Onora O’Neill, *The Bounds of Justice* (Cambridge, UK: Cambridge University Press, 2004). O’Neill reads Kant as assigning obligations a primary justificatory role and rights a derivative one. This claim may be correct for duties of *virtue*, but cannot be correct for duties of *justice*, where, as O’Neill admits, rights and duties are “mirror images” of each other. For a clear statement of O’Neill’s problematic view, see p. 99: “There are two very general reasons why starting with rights is a lop-sided way of thinking about ethics, and even about justice. The first and the more general, to which I shall return, is that while claim rights are mirror images of obligations, not all obligations have mirror images. If there are obligations without corresponding rights, it will evidently impoverish moral thinking if one starts with the rights and leaves aside those obligations not mirrored by any rights. This thought by itself is reason enough to *begin* with obligations and not with rights.”
  30. Kant, *MM*, 6:442.
  31. Laura Valentini, “Human Rights, Freedom, and Political Authority,” *Political Theory* 20, no. 10 (2012): 1–29, at n.7, 22.
  32. 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, see Arthur Ripstein, *Force and Freedom: Kant’s Legal and Political Philosophy* (Cambridge, MA: Harvard University Press, 2009), 11–12. For a helpful discussion of the distinction between internal and external freedom, see B. Sharon Byrd and Joachim Hruschka, *Kant’s Doctrine of Right: A Commentary* (Cambridge, UK: Cambridge University Press, 2010), chap. 3, §§2–3.
  33. See, for instance, Kant, *MM*, 6:218–220.

34. Kant defines external freedom as “independence from the constraining choice of another (*Unabhängigkeit von eines anderen nötiger Willkür*).” (MM, 6:237).
35. Ipstein, *Force and Freedom*, 15 and 36.
36. Kant, MM, 6:231.
37. For illuminating discussion of the enforceability of Kantian rights, see Ripstein, *Force and Freedom*, chap. 1 and 159–168.
38. That the right-bearer need not bear the power to enforce her rights also means that, unlike traditional Will theories, Kant's independence theory of right has no difficulties attributing rights to children. See MM, §28 and specially 6:280: “so there follows from *procreation* in this community a duty to preserve and care for its *offspring*; that is, children, as persons, have by their procreation an original innate (not acquired) right to the care of their parents until they are able to look after themselves, and they have this right directly by law (*lege*), that is, without any special act being required to establish this right.”
39. Kant, MM, 6:237.
40. For an elaboration of this contrasting conception of the *a priori* in Kant's theoretical philosophy, see Graciela De Pierris, “The Constitutive A Priori,” *Canadian Journal of Philosophy*, Supplementary Volume 18 (December 1992): 179–214.
41. 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.”
42. Kant, MM, 6:237.
43. Kant, MM, 6:238.
44. Somewhat awkwardly I qualify the term ‘person’ by ‘juridical’ in order to connote a specific concept of the person as a bearer of rights. This concept may turn out to be distinct from a metaphysically very thin concept of the person, but this will not matter for our purposes.
45. UDHR, art. 2.
46. Kant, MM, 6:230.
47. Kant, MM, §44, 6:312. “however well-disposed and law-abiding human beings might be, it still lies a priori in the rational idea of such a condition (one that is not rightful) that before a public lawful condition is established individual human beings, peoples and states can never be secure against violence from one another, since each has its own right to do *what seems right and good to it* and not to be dependent upon another's opinion about this.”
48. Jean-Jacques Rousseau, *Social Contract*, ed. and trans. V. Gourevitch (Cambridge, UK: Cambridge University Press, 2009), I.8; and Philip Pettit, *Republicanism* (Oxford: Oxford University Press, 1999), 173–178.
49. Kant, MM, §47, 6:315–6.
50. Needless to say, a systematic failure on the part of the state to discharge these second-order duties is still a *wrong* to its subjects.
51. Kant, MM, §43, 6:311.
52. Although my illustration is confined to the human right to life, any other human right recognized in the UDHR would have fared just as well. I cannot develop the argument here, but for Kant socio-economic rights may count as human rights just as civil and political rights do.
53. *Delgado Páez v Columbia*, CCPR/C/39/D/195/1984 (12 July 1990) para. 5.5, quoted in Sangeeta Shah, “Administration of Justice,” in *International Human Rights Law*, eds. D. Moeckli et al. (Oxford: Oxford University Press, 2010), 315.

54. Fernando Tesón, for instance, develops a version of this argument in *A Philosophy of International Law* (Colorado: Westview Press, 1998), chap. 2.
55. Kant, *Doctrine of Right*, §54, 6:344.
56. I do so in “Matters of International Concern,” *unpublished*.
57. Similarly, if you take a voluntary vow of poverty you are not thereby alienating your generic right to own property. You simply alienate your *specific* property rights to each of the things you own.
58. Simmonds makes this argument against Raz: by making rights only ‘intermediate’ considerations in practical thought, the Interest theorist cannot account for the peremptory character of rights. Simmonds, “Rights at the Cutting Edge,” 150–176.
59. This is why I call my defense of Kant’s juridical idea only a *modest defense*. I tackle head on this radical form of skepticism in “The Very Thought of (Wronging) You,” *forthcoming in Philosophical Topics*. Addressing it requires a distinct form of argument which I cannot develop here. Suffice it to say that the justification of a practice of rights cannot be *external* to the practice, for then the Kantian account would collapse into a standard *instrumentalist* account. The challenge is to provide a form of justification that is non-instrumentalist but non-question-begging. My strategy is to bring out the circular character of the justification of rights. The skeptic does not necessarily contradict herself, but since the cost of giving up the practice of rights is so high the skeptic is likely to be *practically* committed to rights, in which case she would contradict herself. The form of such vindication is *circular* and *second-personal*.
60. Jack Donnelly himself endorses this conception of universality, but does not connect it, as I am doing here, to any instrumentalist account of human rights. See Jack Donnelly, *International Human Rights*, 3rd ed. (Boulder, CO: Westview Press, 2007), 44: “The functional universality of human rights depends on human rights providing attractive and effective remedies for some of the most pressing systemic threats to human dignity faced by individuals and groups. . . . The functional universality of internationally recognized human rights is *historically contingent*. . . . We all face the problems of modern markets and states, and we all need equal and inalienable human rights to protect us.” (emphasis added)
61. *Ibid.*

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