

There are no natural rights*

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(Comments welcome!)

Abstract

It is widely believed that we hold some moral rights just by virtue of our human nature, independently of institutional recognition: natural rights. In this paper, I challenge this widespread belief. I grant that there exist some natural duties, but argue that all moral rights require positive norms—e.g., legal or conventional norms—as necessary existence conditions. This view does justice to the relational nature of rights, by explaining how right-holders acquire the standing to demand certain actions (or omissions) from duty-bearers. At the same time, by making room for natural duties, the view does not deprive human beings of important moral protections.

1. Introduction

A murderer kills an innocent. A husband beats his wife. A powerful tyrant enslaves an entire population. What do these events have in common? Clearly, they involve serious wrongdoing. In fact, many would assert that they involve violations of moral rights. Furthermore, confidence in this assertion would not be dented upon learning that these events occurred in contexts where the rights to life, bodily integrity, and freedom from slavery lack institutional recognition.

Moral judgements like these offer intuitive support for the claim that human beings possess some moral rights just by virtue of their humanity, independently of social or institutional affirmation. These are often referred to as natural rights.¹ In

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¹ I avoid the term human rights since there is controversy about whether human rights should be equated to natural rights. For discussion, see Section 5.5.

order to vindicate natural rights, however, intuitions are not enough. We need to explain how individuals come to possess them: what *grounds* them.² If we can offer a satisfactory answer to the “grounding question,” natural rights are safe. But if we cannot, then we may *either* discount our intuitions and conclude that there are no natural rights *or* simply postulate their existence. Yet postulating natural rights is something we should do only if strictly necessary to account for our moral judgments. As Ockham famously suggested, one should not postulate more features of the world than explanatorily necessary.

So, can the popular view that there are natural rights be satisfactorily vindicated? I defend the unpopular conclusion that it cannot. I argue that purported grounds for natural rights either fall short of accounting for their target phenomenon (i.e., they ground natural duties but not rights) or merely reassert that phenomenon, so that citing those “grounds” amounts to nothing more than postulating natural rights. But this postulation strategy is dubious: our intuitions in support of natural rights, it turns out, are not particularly reliable and can be easily explained away. Postulating such rights is thus explanatorily unnecessary. This leads me to conclude that there are no natural rights.

In response to the inadequacies of natural-rights views, I defend what I call the “positive-norm view” of rights. On this view, positive norms—i.e., norms that exist as a matter of social fact, including legal and conventional norms—are necessary existence conditions of all moral rights.³ Perhaps unappealing at first, this view has

² By “the grounds of A’s moral right to X” I mean what makes it the case that A has a moral right to X. On the notion of grounding, see Gideon Rosen, “Metaphysical Dependence: Grounding and Reduction,” in *Modality: Metaphysics, Logic, and Epistemology*, ed. Bob Hale and Aviv Hoffmann (New York: Oxford University Press, 2010), 109–36.

³ Like me, Derrick Darby and L. W. Sumner see social recognition as a necessary existence condition of moral rights. See Derrick Darby, *Rights, Race, and Recognition* (Cambridge, UK: Cambridge University Press, 2009), and L. W. Sumner, *The Moral Foundation of Rights* (Oxford: Clarendon

several virtues. It successfully accounts for our moral judgements and offers a coherent explanation of how right-holders acquire the standing to demand certain actions—or omissions—from duty-bearers. Furthermore, the view does not deprive human beings of important moral protections. True, on this view, rights cannot exist unless there are positive norms. But this does not prevent us from acknowledging the existence of natural duties placing constraints on how we may permissibly treat one another even in the absence of those norms.

The paper is structured as follows. In Section 2, I clarify key terminology. In Section 3, I present a scenario that casts doubt on natural-rights views and offers some intuitive motivation for the positive-norm view. In Section 4, I articulate the positive-norm view and highlight its virtues. In Section 5, I respond to objections and further demonstrate the explanatory dispensability of natural rights. In Section 6, I suggest that the popularity of natural rights might be due, at least in part, to ambiguities in the very notion of “a right.” Section 7 concludes. My discussion is premised on a commitment to normative individualism: the idea that individual agents—specifically, human beings—are equal and ultimate units of moral concern.

Press, 1987). However, their main arguments differ from mine. Due to space constraints, I will not engage with those arguments in the main text, but just briefly mention them here. Darby’s *case against* natural rights points to (i) the existence of deep disagreement about what feature of human nature grounds allegedly natural rights, and (ii) the fact that natural-rights views lead to a proliferation of rights and right-holders. Darby’s *defence* of the social-recognition view insists that grounding rights in social practices (i) does not prevent us from using the language of rights to combat oppression, and (ii) allows us to avoid rights-proliferation. The arguments offered in this paper largely differ from Darby’s (there are some affinities only in Section 5.4, and these are noted in footnotes). Sumner’s critique of natural rights follows Bentham’s, reaching the conclusion that such rights are ultimately incoherent: a claim I am not committed to. Furthermore, Sumner’s justification of practice-based moral rights is consequentialist, while mine—as will become apparent—has a strong deontological flavour, stemming from the principle of respect for agency.

2. Natural rights and duties

What is a right? This question is the object of lively debates in moral, legal, and political philosophy.⁴ Since settling these debates is not my aim here, I will sidestep them, and rely on a characterization of “a right” that both accords with ordinary language use and picks out an important normative attribute.

To elucidate the notion of a right, one must first characterize the related notion of a duty. A duty is a moral ought, a moral imperative falling on an agent. To say that I have duties to walk the dog, donate to charity, and keep the environment clean is to say that I ought to perform all of these actions, and that I would act wrongly if I failed to perform them.

Rights, as I understand them here, presuppose duties, but are not reducible to them: they are *claims* that *correlate to* duties.⁵ A right-holder is someone with a claim to the performance of a duty, hence with the *standing to demand* the fulfilment of that duty.⁶ Demanding is to be understood broadly. It involves putting pressure on the duty-bearer, for instance, by insisting that the duty be acted on, by threatening sanctions in case of non-compliance, or—as a last resort—by using physical compulsion. Bluntly put, insisting verbally, threatening sanctions, and using physical force are all ways of “bossing others around.” Right-holders, then, are in a special

⁴ For a comprehensive overview—including discussion of the will theory, interest theory, kind-desire theory, demand theory, and so on—see Leif Wenar, “Rights,” in *The Stanford Encyclopedia of Philosophy*, ed. Edward N. Zalta, 2015, <http://plato.stanford.edu/archives/fall2015/entries/rights/>.

⁵ Cf. the notion of a Hohfeldian claim right. Wesley Newcomb Hohfeld, “Fundamental Legal Conceptions as Applied in Judicial Reasoning,” *The Yale Law Journal* 26, 8 (1917): 710–70. See also Joel Feinberg, “The Nature and Value of Rights,” *The Journal of Value Inquiry* 4, 4 (1970): 243–60. Duties correlative to rights are often equated to *directed duties* or *duties owed to others*, such that their violation *wrongs* particular persons. As explained in Section 5.1, I think that the phenomena of directedness and rights-correlativity are conceptually distinct and differently grounded. For a discussion of directedness, see Simon Căbulea May, “Directed Duties,” *Philosophy Compass* 10, 8 (2015): 523–32.

⁶ John Skorupski, *The Domain of Reasons* (Oxford: Oxford University Press, 2010), sec. 12.6. Cf. also Nicolas Cornell, “Wrongs, Rights, and Third Parties,” *Philosophy & Public Affairs* 43, 2 (2015): 109–43. On the notion of standing, see Margaret Gilbert, *A Theory of Political Obligation: Membership, Commitment, and the Bonds of Society* (Oxford: Clarendon Press, 2006), 103–4; 147ff.

normative position insofar as they have the standing to “boss duty-bearers around” with respect to the performance of their duties.

Not all duties, of course, correlate to rights. For example, I may have a duty to help an elderly lady cross the street, without the lady having a right—hence a claim—that I do so. Imagine she suddenly issued the following demand directed at me: “Help me cross!” It would seem appropriate for me to respond: “Who do you think you are to *demand* that help you? To boss me around like this?” In doing so, the lady would be claiming a kind of deontic power over me that she, in fact, lacks.⁷ Things would be different if she politely asked for some help, or expressed the belief that, in the circumstances, it would be morally appropriate for me to help her. But this is not what happens in the scenario at hand. There, the elderly lady issues a demand. And, as John Skorupski notes, “[a] demand is something stronger than a mere request [...]. To demand is to imply that enforcement would, if necessary [,] be permissible.”⁸

For another example, imagine that my friend has innocently forgotten to return the pencil I lent him last week. The pencil means nothing to me, and I know that, were I to claim it back from him, I would cause him huge embarrassment. In light of this, it would be wrong for me to pettily insist on the pencil, even if he has no *right* that I refrain from claiming the pencil back. In this case too, I have a duty (i.e., not to claim the pencil back), but one that is not correlative to my friend’s, or anyone’s, right.

Unlike the duties described in my two examples, many familiar duties correlate to rights. If, say, I have arranged with a cab company that they send someone to pick me up from the airport, I may demand this service from them,

⁷ The deontic power in question is that of demanding/enforcing the performance of a duty. I am not thereby also referring to the Hohfeldian power to create, weave, or release others from duties.

⁸ Skorupski, *The Domain of Reasons*, 310.

including by threatening sanctions if they fail to show up, for instance, in the form of requesting compensation. Similarly, to have property rights is to have the standing to demand that others respect one's property, and to resort to a variety of enforcement mechanisms, typically through appropriate legal channels, in case they do not.

Which particular forms of enforcement are appropriate depends on the circumstances. As Skorupski again notes, “[p]ermissible enforcement must be proportionate to the seriousness of a right-infringement. [And since] demanding is already a form of enforcement, when a right is sufficiently trivial it may be disproportionate even to make demands.”⁹ In the scenario involving my friend, for instance, I retain the standing to demand that he returns that pencil to me, even if it would be wrong to act on it. In this sense, I have a right to do wrong: the standing to demand the performance of a duty I ought not to demand.¹⁰

This conceptualization of rights captures the widely held view that having a right is a *more powerful* attribute than simply being the beneficiary of a duty.¹¹ If rights are understood in this way, it is clear why having rights matters: it is associated with a special status, which gives right-holders some power over duty-bearers.

That said, not everyone will share this understanding of a right. As anticipated, my aim is not to engage in a conceptual dispute about the definition of rights. (Though I shall briefly return to this topic in Section 6.) Instead, I want to ask what grounds rights, if we understand rights as I have suggested. It should be evident that, on this understanding, grounding rights requires more than grounding duties. This is because rights presuppose duties but are not reducible to them. So, whenever we assert that a right exists, we must explain what generates *both* a given ought *and* the

⁹ Skorupski, *The Domain of Reasons*, 310.

¹⁰ Cf. Jeremy Waldron, “A Right to Do Wrong,” *Ethics* 92, 1 (1981): 21–39.

¹¹ H.L.A. Hart, “Are There Any Natural Rights?” *The Philosophical Review* 64, 2 (1955): 175–91, 180–81.

standing to demand its performance. This brings me to my main topic: natural rights and duties.

A duty or a right is natural if, and only if, it exists independently of institutional or social recognition. When considering whether there are natural duties and rights, four positions are particularly salient.

1. There are neither natural rights, nor natural duties: all of morality is institutional.
2. There are natural duties, but no natural rights.
3. There are natural duties and only very few natural rights (i.e., rights to non-interference).
4. There are natural duties and extensive natural rights (i.e., rights to non-interference as well as rights to goods and services).

For present purposes, I set aside option 1: my arguments do not attempt to convince its advocates. My main targets are options 3 and 4. Option 4, in particular, seems to be dominant in contemporary moral and political philosophy, and it is easy to see why. It allows us to make the rhetorically powerful claim that human beings have a good number of rights just by virtue of being human, and to criticize institutions for failing to recognize those rights. Versions of this view are frequently found in the human-rights literature and supported by interest-based approaches to rights.¹² On the classic construal of those approaches, rights exist whenever an agent's interests are weighty enough—in relation to the burdens imposed on the prospective duty-

¹² For arguments along these lines in the contemporary human-rights literature, see, e.g., John Tasioulas, "On the Foundations of Human Rights," in *Philosophical Foundations of Human Rights*, ed. Rowan Cruft, S. Matthew Liao, and Massimo Renzo (New York: Oxford University Press, 2015), 45–70; James Griffin, *On Human Rights* (Oxford: Oxford University Press, 2008).

bearers—to place duties on others.¹³ Unsurprisingly, human interests in non-interference as well as access to resources very often satisfy the “weighty enough” condition.¹⁴

Adherents of option 3 partly disagree. They draw a principled distinction between rights to non-interference and rights to resources, and argue that only the former may exist in the absence of institutional or social recognition.¹⁵ This is not the place to evaluate their arguments, however.¹⁶ What matters is that, like advocates of 4, proponents of 3 affirm the existence of (at least some) natural rights. This is the claim I dispute. I do not question the existence of natural duties—of “oughts” that bind us independently of practices and institutions—but deny that there exist natural rights. I argue that institutions and practices, and specifically the positive norms that constitute them, are essential to giving individuals the moral standing to demand the performance one another’s duties.

3. Lessons from intuitive judgements

Let us begin by considering the following scenario. A number of important lessons about the grounding of moral rights can be drawn from it.

¹³ Joseph Raz, *The Morality of Freedom* (Oxford: Clarendon Press, 1986), chap. 7.

¹⁴ The interest theory offers an account of both the concept of a right and the grounds of rights. See Adina Preda, “Rights: Concept and Justification,” *Ratio Juris* 28, 3 (2015): 408–415.

¹⁵ Onora O’Neill, *Towards Justice and Virtue: A Constructive Account of Practical Reasoning* (Cambridge: Cambridge University Press, 1996), 131; cf. Hart, “Are There Any Natural Rights?”

¹⁶ In a nutshell, the main argument goes as follows. Liberty rights (i.e., rights to non-interference), unlike rights to resources, do not require institutional specification to be actionable: the bearers of the duties correlative to them can be automatically identified. *All* human beings hold duties to refrain from restricting one another’s liberty. By contrast, rights to resources cannot be natural, because the bearers of the correlative duties cannot be identified without institutional specification. This argument has been—in my view, successfully—questioned by several critics. Therefore, my case against natural rights shall mostly focus on the deficiencies of position 4. See Henry Shue, *Basic Rights: Subsistence, Affluence, and U.S. Foreign Policy* (Princeton, N.J.: Princeton University Press, 1996); 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 (New York: Oxford University Press, 2007), 75–102; Elizabeth Ashford, “The Alleged Dichotomy Between Positive and Negative Rights and Duties,” in *Global Basic Rights*, ed. Charles R. Beitz and Robert E. Goodin (Oxford: Oxford University Press, 2011), 92–112.

Division of Labour: Anna and Becky have been sharing an apartment for over a year, and have adopted a fair system of norms to distribute household tasks. Tonight, it is Anna's turn to do the dishes. Anna, however, is unwell: she is weak and feverish. Becky notices this and thinks to herself: "Since I have nothing better to do, I ought to do the dishes instead." As Becky is heading towards the kitchen, intending to help with the washing up, Anna issues the instruction: "Becky, you do the dishes tonight!" Becky is taken aback by Anna's statement. She wonders: "Who does Anna think she is to *demand* that I do the dishes? If anything, I could demand this from her: it's her turn after all!"

Becky's initial thought—that she ought to help—seems correct. If your flatmate is unwell, and you have nothing better to do, it would be wrong not to help her. Her interest in resting while being unwell places a duty on you to assist.¹⁷ Of course, the duty won't be particularly weighty: the stakes are not that high. But if we think it is wrong to ignore our flatmate's illness when the cost of helping her is vanishingly small, we thereby imply that we have a duty to help.¹⁸

Becky seems equally right in finding Anna's demand out of place. Anna is not merely suggesting that, in her view, it would be better if Becky did the dishes. Nor is she politely asking whether Becky could do the dishes. Instead, Anna's statement, in

¹⁷ Cf. Raz, *The Morality of Freedom*, chap. 7.

¹⁸ One might respond that, while Becky has some moral reason to do the dishes, she has no duty proper. This response seems to presuppose the view—recently advanced by Elizabeth Harman—that there can be morally permissible moral mistakes. On this view, although Becky could be criticized for failing to help Anna (since she ignored a moral reason), her failure would not amount to a violation of duty. I find this response unconvincing on parsimony grounds. Why appeal to the unusual notion of morally permissible moral mistakes to account for what we can simply call a mild moral wrong—i.e., the violation of a not-so-weighty duty? Thanks to Ryan Davis and Massimo Renzo for discussion. See Elizabeth Harman, "Morally Permissible Moral Mistakes," *Ethics* 126, 2 (2015): 366–93.

the context in which it is uttered, amounts to a *demand*: Anna is acting as if she could boss Becky around in relation to the dishwashing. The judgement that, by issuing that demand, Anna is overstepping her authority, suggests that Anna has no right to be helped by Becky.

What is more, if anyone has the standing to demand anything, that person seems Becky herself. Of course, “[t]o say one has the standing to do something does not [...] mean that one has some justification for doing it.”¹⁹ And, as Becky acknowledges, in light of the circumstances, it would be wrong of her to insist on Anna doing the washing up.

Some may find this diagnosis of *Division of Labour* unconvincing. In particular, they may question the assertion that Anna is under a duty to do the dishes even when she is unwell.²⁰ Would she not be justified in ignoring them for the evening? Perhaps. But the fact that Anna may justifiably ignore the dishes does not imply that she is under no duty to wash up. That duty, like most duties, is only *pro tanto*. And even if Anna were justified in (temporarily) neglecting its demands, this would leave a moral remainder, for which she should apologize, or at least justify herself, to Becky.

Others might worry that Anna’s demand comes across as inappropriate simply because it breaches politeness conventions. If Anna were to ask politely, so the objection goes, then there would be nothing wrong with her request. The expression “asking politely” is ambiguous, and might mean *either* (a) asking Becky for a favour *or* (b) still issuing a demand, but adding a courtesy particle such as “please.” I agree that Anna’s request would be harmless if it were an instance of (a). But in that case, Anna would not be claiming the standing to “boss Becky around”: no rights-claim

¹⁹ Gilbert, *A Theory of Political Obligation*, 104.

²⁰ I thank Tim Campbell and Miriam Ronzoni for independently raising a concern along these lines.

would be in play. Option (b), by contrast, is just as problematic as the original. We can easily imagine a version of *Division of Labour* in which Anna says “Becky, you do the dishes please!,” where intonation and body language make it clear that Anna is still issuing a demand. After all, whether a speech act counts as a demand, a request for a favour, a reminder, or something altogether different is not merely a function of its wording: it depends on context. For example, uttered by a notoriously authoritarian boss, even a sentence as apparently innocent as “I would be grateful if you could deliver the report by midnight” could be euphemistic, and in fact convey the following demand: “Deliver the report by midnight, otherwise there will be consequences!” What is troubling about *Division of Labour* is that Anna issues a demand when she has no standing to do so, independently of how politely stated her demand is.

To sum up, in *Division of Labour*, Anna has a duty to wash up, where the duty is correlative to Becky’s right; Becky has a duty to help Anna; but Anna has no right to Becky’s help. As anticipated, my reason for introducing this scenario is that important lessons can be learnt from it. These are both positive lessons about what can ground rights and negative ones about what cannot. On the negative side, our judgments about *Division of Labour* suggest that, while other people’s interests can place duties on us—e.g., Anna’s interests place a duty on Becky—this does not automatically result in these people’s having the standing to demand the performance of those duties. In other words, interests (of entities with fundamental moral status, like humans) may suffice to generate duties, but not rights.²¹

²¹ See Frances M. Kamm, “Rights,” in *The Oxford Handbook of Jurisprudence and Philosophy of Law*, ed. Jules L. Coleman, Kenneth E. Himma, and Scott J. Shapiro (Oxford: Oxford University Press, 2002), 476–513, 484, and *Intricate Ethics: Rights, Responsibilities, and Permissible Harm* (New York: Oxford University Press, 2007), 244–45.

It might be tempting to respond that this conclusion only holds in cases like *Division of Labour*, where the interests at stake are of comparatively small significance. Instead, when weighty interests are in play—e.g., interests in life, bodily integrity, basic needs fulfillment, and non-interference—both duties and rights are generated. This response is problematically ad hoc. While the weight of the interests at stake may be reflected in the weight of the duties generated, it is not clear why it should also give rise to a particular claim, and the related assignment of the standing to demand the performance of those duties, namely to rights.

For instance, my duty to save a drowning child at little personal cost is certainly much weightier than Becky's duty to do the dishes in Anna's place. This means that refusing to save the child would be a much more serious wrong than refusing to help Anna. But the duty-generating mechanism is the same in both cases: someone's interests are weighty enough to place a duty on others. And it is unclear how the same duty-generating mechanism could give rise to duties simpliciter in one case and to rights-correlative duties in another case *just because* the duties in the latter are weightier than those in the former. As Gopal Sreenivasan correctly points out: "the question of correlation [...] is independent of what justifies either the existence *or the weight* of a given duty."²²

This is not to deny the intuition that we have rights to the performance of duties grounded in our weighty interests: rights to life, bodily integrity, freedom of movement, subsistence, and so on. I readily acknowledge that our intuitions about rights *correlate* with the greater weight of the interests at stake. But, as it is often said, "correlation is not causation" or, in this case, "correlation is not grounding." All I

²² Gopal Sreenivasan, "A Hybrid Theory of Claim-Rights," *Oxford Journal of Legal Studies* 25, 2 (2005): 271, original emphasis. Sreenivasan uses the language of justification to refer to what I call grounding.

have claimed is that the greater weight of the interests at stake is not sufficient to ground rights. It does not *explain* how those rights come about, even though it might *fit* our intuitions.

To recap, our first lesson from *Division of Labour* is that our interests suffice to generate duties, but not rights. This negative lesson is accompanied by a positive one, which alerts us to a key ingredient in the grounding of rights. Recall that, in *Division of Labour*, a right did seem to be involved: Becky's right to Anna's dishwashing. And while we concluded that Becky should not act on it, its existence needs to be explained. So, where does that right come from? The answer is simple: the right comes from the positive (i.e., de facto) norm concerning the division of housework that Becky and Anna have accepted and which they created when they first moved in together. It is that norm, to which they both committed, that confers on Becky the standing to demand the performance of Anna's duty.

I want to argue that this diagnosis tells us something about the grounding of moral rights in general. The standing to demand the performance of others' duties is not something we possess by nature. Instead, we confer it on each other through our commitments, crystallized in positive norms. On this view, which I call "the positive-norm view of rights," positive norms are (at least) necessary existence conditions of *all* moral rights, including the right to life, to physical integrity, to freedom from exploitation and oppression, and to material subsistence.

While readers might agree that positive norms, such as those established through contracts and agreements, generate *some* moral rights, they are likely to find my claim that *all* moral rights require positive norms seriously misguided. *Division of Labour* is admittedly insufficient to vindicate it. Offering a full vindication of it is my task in the rest of this paper.

4. The positive-norm view of rights

Positive-norm view: An agent (A) has a moral right to X against another agent (B) in context (C) only if, in C, there exists a natural-duty-compatible positive norm that confers on A a right to X against B.

The view only states that positive norms are necessary for grounding moral rights. This is all I need in order to deny the existence of natural rights. It may well be that natural-duty-compatible positive norms are also sufficient to generate rights, but since I need not make this stronger claim, I remain agnostic about it.²³ I first elucidate the content of the positive-norm view, and then defend it.

4.1 *What are natural-duty-compatible positive norms?*

A positive norm exists in a context C whenever a large enough number of individuals in that context accept a given “ought,” an imperative, as a matter of common knowledge.²⁴ Acceptance of an imperative involves the intention to treat the corresponding norm as a guide for behaviour.²⁵ For example, in the United Kingdom, there is a positive norm that requires queuing at the supermarket cashier. A very large number of people in the UK intend for the queuing norm to function as a guide for behaviour, and know that this intention is shared by many others (and vice versa). Equally, in many countries, there are positive norms that prohibit using others’

²³ For instance, we may want to add the further condition that natural-duty-compatible positive norms generate rights only if the oughts they impose satisfy the “ought implies can” proviso.

²⁴ See Geoffrey Brennan, Lina Eriksson, Robert Goodin, Nicholas Southwood, *Explaining Norms* (Oxford: Oxford University Press, 2013); John R. Searle, “Social Ontology: Some Basic Principles,” *Papers* 80 (2006): 51–71; Nicholas Southwood and Lina Eriksson, “Norms and Conventions,” *Philosophical Explorations* 14, 2 (2011): 195–217.

²⁵ Cf. H. L. A. Hart, *The Concept of Law* (Oxford: Clarendon Press, 1961), 55–57.

property without their consent, that mandate tax payment, that prohibit littering, that mandate tipping for good service, stopping at red lights, and so forth.

Some of the oughts contained in the positive norms I have just mentioned are correlative to rights and some are not. For instance, property norms confer a bundle of rights on owners. Relative to those norms, owners have the standing to demand others' compliance with certain duties vis-à-vis their property. The norm prescribing tipping for good service, by contrast, does not appear to generate rights—at least in many countries. Arguably, nobody has a right that I tip them. It would just be wrong, relative to that norm, if I failed to do so.

So far, I have talked about positive (i.e., de facto) oughts and correlative rights, but I have said nothing about how these oughts and rights translate into moral ones. To do so, I turn to the idea of *natural-duty compatibility*. As I noted in the previous section, individuals' weighty interests place duties on others to attend to those interests, quite independently of the existence of positive norms structuring the relationships between persons.²⁶ Candidate interests include: life, bodily integrity, freedom from oppression/exploitation, basic-needs fulfilment and, more generally, the free exercise of one's agency.²⁷ My duty not to violate others' bodily integrity, for instance, is independent of any positive norm. The same goes for the duty to assist others in need and to refrain from oppressing or exploiting them. In fact, to the extent that the demands of forbearance from harm and need fulfilment can be best discharged by building institutions, there is also a natural duty—such as the one

²⁶ This, I think, is correct in Raz's interest theory of rights—although I would rename that theory a theory of *duties*.

²⁷ I am not trying to be comprehensive here, these are just some fairly uncontroversial examples of weighty human interests.

Immanuel Kant posited—to leave the state of nature and enter a civil condition.²⁸ Absent a network of positive norms providing coordination and mutual assurance, individuals would do a very poor job attending to each other’s interests. Call this a natural duty to establish fair schemes of social cooperation, governed by an extensive set of positive norms.²⁹

Independently of what the precise list of natural duties is (readers may plug in their own), on my view, positive norms can contribute to grounding rights only provided that the rights they establish are consistent with natural duties. This makes the moral force of rights-conferring positive norms *conditional*, but does not yet tell us what explains it. This explanation is to be found in the duty to respect persons’ morally permissible exercises of agency.

4.2 *What gives positive norms moral normativity?*

Human beings have a legitimate interest in pursuing their commitments and goals—i.e., in exercising their agency—provided they do so consistently with natural duties. This legitimate interest grounds a corresponding duty.³⁰ This duty, in turn, lends moral normativity to natural-duty-compatible positive norms.

Recall that positive norms exist by virtue of individuals’ collective acceptance of certain oughts. Provided acceptance is not coerced—a point to which I shall return shortly—it is true to say that norm-supporters are *committed* to the norms. This means

²⁸ Immanuel Kant, *Metaphysical Elements of Justice: Part I of The Metaphysics of Morals*, trans. John Ladd (Indianapolis: Hackett Publishing, 1999).

²⁹ See also Anna Stilz, *Liberal Loyalty: Freedom, Obligation, and the State* (Princeton, N.J.: Princeton University Press, 2009).

³⁰ Cf. John Christman, “Autonomy in Moral and Political Philosophy,” in *The Stanford Encyclopedia of Philosophy*, ed. Edward N. Zalta, Spring 2015 (Metaphysics Research Lab, Stanford University, 2015), <https://plato.stanford.edu/archives/spr2015/entries/autonomy-moral/>.

that they have genuinely adopted those norms as standards of behaviour.³¹ And if those norms are consistent with natural duties, accommodating their demands is necessary to respect their supporters' morally permissible exercises of agency: their particular commitments.

Note that to be committed to norm X one need not have consented to X, or regard X as the all-things-considered best norm governing a certain domain of action. For instance, it makes perfect sense to say that I am committed to the norm that one ought not to steal others' property: I endorse that norm and intend to be guided by it. It makes little sense, however, to say that I have consented to being governed by the norm, or that I have a genuine choice in the matter, given that behaviour contrary to this commitment would come at a heavy social cost.

Or else, many of those who stand for election to Parliament in the United Kingdom may not think that first-past-the-post is the best electoral system. Some would likely prefer a proportional system instead. Yet, it still makes sense to say that they are committed to the first-past-the-post rule. They accept the democratic verdicts delivered by that rule as authoritative and would immediately condemn anything that deviated from that rule as election fraud—including a sudden, unconstitutional switch to their favoured, proportional system. This shows that they intend for the first-past-the-post rule to function as a guide for behaviour. It would be odd to suggest that, somehow, because they do not believe that the rule is optimal, their commitment is not a genuine expression of their agency.

³¹ On commitments, see, e.g., Cheshire Calhoun, "What Good Is Commitment?," *Ethics* 119, 4 (2009): 613–41. Calhoun emphasizes the active dimension of commitment. For another comprehensive discussion of commitments, emphasizing their volitional nature, see Ruth Chang, "Commitment, Reasons, and the Will," in *Oxford Studies in Metaethics, Vol. 8*, ed. Russ Shafer-Landau (Oxford University Press, 2013), 74–113. Both authors link commitment to exercises of agency.

In sum, commitments to norms require neither consent nor a belief in the optimality of norms involved. To be sure, not everything that looks like a genuine commitment is one. People may be the victims of false consciousness or adaptive preferences: i.e., be coerced into certain commitments, such that we cannot regard those commitments as properly theirs. An example of this phenomenon may be some women's "commitment" to patriarchal gender norms.

Bearing this important caveat in mind, however, many (though clearly not all) positive norms are underpinned by genuine commitments, including the norms mentioned in my examples, about property rights and collective decision-making. In light of this, *the natural duty to respect people's morally permissible exercises of agency gives moral normativity to natural-duty-compatible positive norms.*

As I noted earlier, many of the positive norms we are familiar with—from those prescribing respect for property, to those protecting free speech and bodily integrity—establish rights. The relevant oughts are accompanied, as a matter of social fact, by a particular assignment of the standing to demand their performance. In such cases, respect for the agency of those who are committed to the norms confers moral normativity on those rights, too.

At this point, the following question is likely to come to a reader's mind: What about respect for the agency of those who reject existing, natural-duty-compatible norms? In response, we need to distinguish between two forms of norm-rejection. One involves rejecting the norms' *assignment of rights*, but not the underlying oughts. The other involves *altogether rejecting the norms*, on the ground that, despite their natural-duty-compatibility, they are not deemed to be optimal. I discuss each in turn.

As an illustration of the first type of rejection, consider the case of a housewife called Mary. Suppose that, in her view, wives should submit to their husbands, and

should not have the standing to demand non-abusive treatment from them.³² To be sure, husbands should treat their wives with dignity, but wives—in Mary’s view—should have no right to that kind of treatment. The norms prevalent in Mary’s society, though, precisely decree that wives have rights to be treated non-abusively by their husbands. Does Mary have an agency-based complaint against the norms in question? She does not.

By turning a natural duty—i.e., not to abuse others—into a right, the positive norms prevailing in her society confer on Mary a standing she would not otherwise have: that of demanding the performance of her husband’s duties. Turning a natural duty into a right is like giving someone an in-principle option they may take or leave. The duty-bearer has a duty all the same: whether correlative to a right or not. The beneficiary of the duty—Mary, in our case—now may in principle take action to ensure its performance, but remains at liberty not to do so. She thus lacks any agency-based complaint against the positive norms in question.

What about her husband, who is now in-principle susceptible to being on the receiving end of certain demands, due to the existence of rights-conferring positive norms?³³ He, too, cannot complain that the norms illegitimately violate his agency. This is because the demands he is susceptible to do not concern actions he is at moral liberty to perform in the first place: abusing one’s wife is clearly not a morally permissible exercise of agency.

Let me now turn to the second type of rejection of positive norms. Consider again those standing for election to the UK Parliament, and who believe that a proportional system would be a superior institutionalization of democratic principles. Could they not reject the current, majoritarian system, insisting that it undermines

³² Thanks to Leif Wenar for suggesting this example.

³³ I am grateful to Massimo Renzo for raising this concern.

their agency? The answer is, again, negative. Support for the existing system—provided this is compatible with natural duties—is itself a moral requirement. In particular, it is what the natural duty to build and support reasonably just institutions demands. As Gerald Gaus explains, if we take this natural duty seriously, once a reasonable equilibrium is reached—i.e., once a society has settled on a network of natural-duty compatible positive norms—we ought to sustain the relevant equilibrium, even if we would have preferred a somewhat different one.³⁴ It would thus be incompatible with independent moral demands for our hypothetical prospective MPs to reject the current system, insisting that its positive norms are not binding on them.

This does not forbid them from trying to convince their fellow citizens that things should change, that a proportional system would be preferable—hence an appropriate reform should take place. But this is different from being morally at liberty to reject existing norms, acting contrary to their demands. The former is permissible, and consistent with natural duties; the latter is wrongful. Those whose favourite norms deviate from existing ones cannot complain that their moral agency is violated, hence that their status in society is lesser than that of a moral equal. At most, they can regard themselves as less lucky than those (very few) whose views about “what’s best” happen to be fully reflected in existing institutions.³⁵

³⁴ See Gerald F. Gaus, *The Order of Public Reason* (New York: Cambridge University Press, 2011), chap. 7.

³⁵ In the case of highly disaffected minorities, who would be able to set up an alternative and natural-duty compatible institutional system, secession may be an option. However, if carried out unilaterally—i.e., not in line with existing positive norms—secession would at least involve a pro tanto wrong. Cf. Anna Stilz, “The Value of Self-Determination,” in *Oxford Studies in Political Philosophy*, vol. 2 (New York: Oxford University Press, 2016), 98–127. Thanks to Anna Stilz for pressing me on this.

In sum, on the view I propose, the moral force of natural-duty compatible positive norms—including rights-conferring ones—stems from the imperative to respect persons’ morally permissible exercises of agency.

4.3 *The virtues of the positive-norm view*

The positive-norm view exhibits three virtues: explanatory power, fit with our considered judgements, and theoretical elegance.

First, the positive-norm view does not merely stipulate moral rights, but it accounts for how they come into existence. It answers the question “Where does A’s claim to B’s duties—i.e., her standing to demand the fulfilment of those duties—come from?” by pointing to the way agents confer that standing on each other via positive norms, and the commitments that underpin them. This explanation is consistent with the fundamental moral equality of persons, insofar as it links the existence of rights to a mutual conferral of standing. Metaphorically put, if A and B commit to appointing C boss relative to some of their duties, C’s newly acquired standing is not at odds with A’s and B’s moral equality.³⁶

Second, the positive-norm view fits many of our intuitive judgements. It not only matches our original diagnosis of *Division of Labour*, but it also tallies with our ordinary understanding of rights, to the extent that our social world is structured by countless rights-establishing norms. At least in liberal democracies, most natural duties have been “turned into” rights. Consider rights against torture, physical harm, exploitation, rights to civil liberties and to access certain material resources. Intuitions telling us that these rights would also exist in pre-institutional settings are a likely by-product of the fact that our moral thinking has evolved in a context very much shaped

³⁶ Of course, unilateral attribution of standing to oneself would instead be at odds with our fundamental moral equality.

by rights-conferring positive norms. It is thus unsurprising that we “see” rights even where the relevant background institutions are absent. This casts doubt on the reliability of our natural-rights intuitions, and makes the case for postulating natural rights all the more feeble.

This conclusion is further supported by the frequently made observation that, while the notion of a duty or responsibility is central to many moral codes, that of individual pre-institutional rights is more closely associated with the Western liberal tradition, and “quite foreign to [...] Islamic, African, Chinese, and Indian approaches.”³⁷ To be sure, given the complexities involved in inter-cultural translation, such observations must be taken with more than just a grain of salt.³⁸ But if there is some truth to them, then, in the absence of a credible error theory explaining why these other approaches get morality wrong, we have all the more reason to regard duties, not individual rights, as part of “natural” (i.e., pre-institutional) morality. Again, the positive-norm view, unlike natural-rights views, fits this piece of evidence.

Finally, the positive-norm view offers a unified account of the grounds of moral rights. Many believe that only *some* moral rights are the product of particular commitments, such as those we make through institutions like contracts and

³⁷ I am using this term for lack of a better expression. See, e.g., Jack Donnelly, “Human Rights and Human Dignity: An Analytic Critique of Non-Western Conceptions of Human Rights,” *The American Political Science Review* 76, 2 (1982): 303–16, 303 and 306-7; Fred Halliday, “Relativism and Universalism in Human Rights: The Case of the Islamic Middle East,” in *Politics and Human Rights*, ed. D. Beetham (Oxford: Blackwell, 1995), 152–67; Stephen C. Angle, *Human Rights in Chinese Thought. A Cross-Cultural Inquiry* (Cambridge: Cambridge University Press, 2002).

³⁸ For instance, Bernard Lewis states that “[t]raditional Islam has no doctrine of human rights, the very notion of which might seem an impiety.” But he also hastens to add that the duties rulers have towards their subjects according to Islam may come very close to what “Westerners” call rights. Bernard Lewis, “Islam and Liberal Democracy,” *The Atlantic*, February 1993, <https://www.theatlantic.com/magazine/archive/1993/02/islam-and-liberal-democracy/308509/>.

promising.³⁹ On the positive-norm view, by contrast, ultimately commitments feature in the grounding of all moral rights. While not decisive, this theoretical elegance is a further virtue of the approach defended here.

5. Challenges to the positive-norm view

It is now time to turn to the perceived vices of the positive-norm view. I consider five. First, the view may be criticised for under-generating wrongings of others. Second, the view may seem to give highly counter-intuitive recommendations in settings not governed by positive norms. Third, the view may be thought to preclude the ascription of rights to children and people with severe mental disabilities. Fourth, the view may be accused of conflating positive and moral rights. Fifth, and finally, the view may seem to rob us of a language with which to express the moral urgency of establishing legal human rights. I address these objections in turn. In doing so, I corroborate the positive-norm view and cast further doubt on natural-rights approaches.

5.1 Under-generation of wrongings

In several cases where our intuitions tell us that a given action or inaction would wrong someone in particular, the positive-norm view appears to support a different conclusion. Consider physically harming innocent others. Many intuitively think that, even where no positive norms exist, assaulting someone who poses no threat to me is not merely wrong, but wrongs *that* person in particular. Yet, on the positive-norm view, it looks like harming an innocent stranger in pre-institutional settings is wrong, but does not wrong that stranger.

³⁹ As previously argued, although promises and contracts typically involve consent and choice, consent and choice are not necessary for genuine commitments.

This objection stems from the assumption that violations of duties correlative to rights are equivalent to wrongings of particular others. And since my view denies that, in the scenario just presented, rights exist, it also seems to deny that wrongings occur. However, as Nicolas Cornell has recently argued, violations of duties correlative to rights and wrongings should not be seen as referring to the same phenomenon. For example, we could plausibly use the notion of “wronging someone” to designate the violation of duties grounded in this person’s interests, without equating wrongings to the violation of duties correlative to rights.⁴⁰ If we accept this use of terminology, it follows that, on the positive-norm view, harming or assaulting someone in pre-institutional settings wrongs that person in particular. This, however, does not automatically imply that the victim has rights: the standing to enforce the performance of (natural) duties.

On this use of terminology, agents can (i) be wronged without having their rights violated; (ii) be wronged and have their rights violated; (iii) have their rights violated without being wronged. Case (i) corresponds to the hypothetical pre-institutional scenarios just discussed. Case (ii) corresponds, for instance, to situations involving assaults and other violations of natural duties occurring in contexts where positive norms confer rights on the relevant victims. Finally, an example of case (iii) could be the violation of a duty grounded in a minor’s interests, but which an adult

⁴⁰ My suggestion echoes, but differs from, Cornell’s. In Cornell’s view, wrongings simpliciter occur when others are made worse off by someone’s failure to act on a duty that they have (E.g., If I fail to look after your sister after promising you I would, and she ends up worse off, I have wronged her even if I have not violated her rights). See Cornell, “Wrongs, Rights, and Third Parties.” I am not persuaded by Cornell’s characterization of wrongings, since it is not clear that making agents worse off through violating duties always generates wrongings. As Rowan Cruft has suggested to me, if my employer fails to pay me and I buy fewer goods from my local grocery shop as a result, it would seem odd to suggest that my employer has not only wronged me but also the grocer. Cf. a similar example offered in Matthew Kramer, “Refining the Interest Theory of Rights,” *American Journal of Jurisprudence* 55, 1 (2010): 31–39, 36.

has the standing to enforce. In this case, the minor, not the adult—i.e., the right-holder—would be the wronged party. (More on the latter case in Section 5.3.)

Several paradigmatic examples of individual rights belong to category (ii). This is probably why we tend to regard rights as normative relations characterized by *both* duties grounded in a given agent's interests *and* the beneficiary's claim to those duties. But, as my discussion has shown, although in our world these two properties tend to co-occur—because this is how we have set up our positive norms—their co-occurrence is not a matter of necessity. Interests alone cannot ground rights. Consequently, wrongings, as I have defined them, and violations of rights may come apart.

5.2 Morally implausible implications

Even an objector satisfied with my response to the first worry is likely to follow up with a second. This is that, on my view, people can be wronged in the state of nature, but lack a permission to defend themselves. Without rights-conferring positive norms, so the objection goes, victims lack the standing to enforce perpetrators' duties not to harm them. But this seems absurd. Surely we are permitted to defend ourselves from wrongful harm independently of the presence of positive norms.

The objector is right: we are permitted to defend ourselves. But the permission to defend ourselves and the standing to demand (enforce) others' duties are not the same thing, even if there are cases in which the actions involved in self-defence and duty-enforcement look the same. Let me explain. On the view I have outlined, the reason why, in the state of nature, the innocent victim of an attack is permitted to inflict harm on the perpetrator is that she lacks a duty not to do so. While, under normal circumstances, others' interest in bodily integrity is weighty enough to place a

duty on us not to physically harm them, in situations involving violent attacks the conditions for duty-generation are not fulfilled. The cost to the victim of being bound by that duty would be too high: not inflicting harm on the perpetrator means becoming the victim of harm. Since the victim has no duty not to harm the perpetrator, she is permitted to harm him and thereby defend herself. She does, however, lack the second-order standing to demand the performance of the perpetrator's duty. Differently put, she may affect the perpetrator, but she may not "boss him around," i.e., demand that he stops and threaten to inflict harm on him *on duty-enforcement grounds*.

Although, as in this self-defence case, the permission to harm the perpetrator and the standing to demand the performance his duties may license very similar actions, the distinction between the two is an important one to bear in mind. The former follows from a simple lack of duty. But to ground the latter, we need to explain how someone acquires a special kind of standing vis-à-vis others.

5.3 The rights of small children and people with severe mental disabilities

Readers might be alarmed by my claim that the moral force of positive norms stems from individuals' permissible commitments. This claim seems to imply that, on my view, only individuals whose agency is sophisticated enough to allow for complex commitments can have rights. But aren't small children and people with serious mental impairments, who lack these higher agential capacities, those who are most in need of rights-protection? This objection is frequently levelled at the will theory of rights, according to which only agents capable of choice may, in principle, hold

rights.⁴¹ Does it equally apply to my view? It does not. There are two responses available to a proponent of the positive-norm view, both of which I present here. I find the second more compelling than the first, but leave it up to readers to choose the one they find most congenial.

First, I have argued that positive norms are necessary existence conditions of moral rights, and that respect for permissible commitments is what gives positive norms moral significance: what makes them morally binding. But there is no reason why, on my view, our answers to the following two questions should coincide:

1. What gives moral normativity to a key existence condition of rights?
2. Who may qualify as a right holder?

“Morally permissible commitments” is my answer to the first question. The answer to the second is something that my view outsources to positive norms themselves. It is those norms that determine who has rights and who does not.

If a natural-duty-compatible system of positive norms states that babies have rights, then—provided possible further conditions are satisfied—babies in a context governed by that system do in fact have moral rights. Of course, they may not exercise those rights themselves: someone will have to claim them on their behalf. But this is hardly problematic. In fact, it is something we routinely recognize. Some human beings have the standing to claim certain duties, but lack the capacity to do so. When this is the case, third parties are given the power—and often the duty—to act

⁴¹ See, e.g., Neil MacCormick, *Legal Right and Social Democracy Essays in Legal and Political Philosophy* (Oxford: Clarendon/Oxford University Press, 1982), chap. 8. For defences of the will theory see, e.g., Hart, “Are There Any Natural Rights?”; Hillel Steiner, “Working Rights,” in *A Debate Over Rights: Philosophical Enquiries*, ed. Matthew H. Kramer, Nigel E. Simmonds, and Hillel Steiner, New edition (Oxford: Oxford University Press, 1998), 233–302.

on their behalf. So, while giving prominence to agency like the will theory, my view can avoid the will theory's most unpalatable implication.

Second, some might question whether it is possible for an entity to have the standing to demand the performance of a duty and yet lack the corresponding capacity to do so. On this view, it would be incoherent for a system of positive norms to confer rights on small children and people with severe mental impairments. What, instead, we should say in these cases is that (i) there exist duties grounded in the interests of non-autonomous agents, such that the violation of these duties wrongs them and (ii) the rights correlated to these duties fall on third parties. We would then have to conclude that children and people with serious mental impairments lack rights, but would still be able to hold that all sorts of duty-violations *wrong them* in particular (not their parents or guardians).

This seems far from implausible, especially given that the worry about denying the rights of children and people with severe mental impairments emphasizes how they are most in need of rights protection. But surely, if rights-protection has to be more than a mere slogan—i.e., one that repeats that someone's interests ground duties—there has to be some agent with the standing and the capacity to enforce this protection. Typically, parents—and, indirectly, the state—are much better placed to do so than small children and people with severe mental disabilities themselves. What we must bear in mind is simply that the justification for parents' and state authorities' possession of the relevant standing goes back—at least to a large extent—to the interests of children. It is a good thing to confer this standing on parents because doing so best protects children's interests. The positive-norm view of rights allows us to keep this important fact in sight.

5.4 *A conflation of positive and moral rights?*

One might worry that the view I have defended conflates positive (i.e., de facto) and moral rights. To be sure, the objector might say, there exists a large set of positive rights, such as those contained in the law. But it is crucial to distinguish between those rights and the moral rights on the basis of which we critically evaluate positive law. Imagine, the objector would continue, a society containing norms of slavery, giving some individuals the right to keep other human beings as personal property. The norms of that society generate some positive rights. Yet these are positive rights we would have reason to criticize, in light of individuals' *natural moral rights* against being enslaved; or so the objector would conclude.

As should be evident from the discussion so far, critiquing positive norms does not require presupposing natural rights. Natural duties—e.g., the natural duty not to enslave others—suffice for this critical purpose. The objector is unlikely to be satisfied with this answer, however. She will insist that, although natural duties allow us to criticize morally objectionable positive norms, they prevent us from saying something we intuitively want to say. To paraphrase Joel Feinberg's famous passage, they prevent us from saying that every slave has the standing to look their master in the eye and claim a right not to be enslaved. Not being able to say this, the objector concludes, is an unacceptable implication, one that reveals a failure to acknowledge the *value* of rights.⁴²

It is true that my view carries this implication, and that this implication is intuitively hard to swallow.⁴³ But I think we have good reason to accept it all things

⁴² Feinberg, "The Nature and Value of Rights." For critical discussion, see Derrick Darby, "Are Worlds Without Natural Rights Morally Impoverished?," *The Southern Journal of Philosophy* 37, 3 (1999): 397–417.

⁴³ Note, though, that in line with the argument in Section 5.2, slaves would be permitted to defend themselves. They would just lack the standing to enforce their master's duties.

considered. First, as I have already argued, the intuition that one has certain rights even in circumstances where those rights are not institutionally established is not reliable evidence that such pre-institutional rights exist. Second, when used in defence of natural rights, Feinberg's "looking-others-in-the-eye" argument is unconvincing.⁴⁴ Feinberg proceeds by describing an imaginary society, Nowheresville, where everyone takes themselves to be under, and acts on, many duties, but nobody has rights correlative to those duties. Feinberg finds Nowheresville morally impoverished, because in it nobody has the standing to "look others in the eye" and demand the performance of certain duties. In Feinberg's view, rights confer a *valuable* status on individuals: they express their dignity. This, in turn, explains what is wrong with a world without rights.⁴⁵

The difficulty with this argument, *if used in support of natural rights*, is twofold. To begin with, it is mysterious how the fact that moral-rights possession is valuable supports the conclusion that there exist natural, pre-institutional rights. By analogy, being a citizen is a valuable status, but this doesn't seem to be evidence for the existence of "pre-institutional citizenship." What is more, it is unclear in what way natural-rights possession per se—i.e., even when it is not accompanied by social acknowledgement—is valuable. For instance, what is the value of having pre-institutional moral rights in a prison camp, where those rights do nothing for you? I am not denying that if we had pre-institutional moral rights, their *recognition* would be a good thing. What I doubt is the value of possessing pre-institutional moral rights *independently of recognition*.

⁴⁴ It is not entirely clear to me, though, whether this is how Feinberg himself intended his argument to be used.

⁴⁵ Feinberg, "The Nature and Value of Rights," 252–3.

Some may respond that pre-institutional rights have non-instrumental, expressive value. In particular, they express individuals' distinctive inviolability.⁴⁶ Two points can be made in response. First, as I have already suggested, duties grounded in persons' interests can also account for individuals' inviolability. Second, and more importantly, it is unclear how a bare moral fact—e.g., the alleged existence of natural rights (or indeed duties)—can have *expressive value*. Plausibly, for something to have expressive value, it must involve, or be interpretable as, an expressive speech act. Consider, for example, the often-made claim that the value of democracy stems, in part, from its expressing citizens' equal status. By giving citizens an equal right to vote, the state, via the agents supporting its institutions, expresses their equal standing. The implementation of democracy is, in that sense, an expressive speech act. Pre-institutional rights cannot have expressive value in this sense. Their existence alone does not involve, or is interpretable as, a speech act of any sort: it is a bare moral fact.⁴⁷ The phrase “natural rights express the inviolability of the person” is best understood simply as meaning “natural rights *specify* what the inviolability of the person amounts to.” By analogy, we sometimes say things such as “H₂O expresses the chemical composition of water,” but “expression” here simply means “specification.”

Unlike natural-rights views, the positive-norm view can non-mysteriously account for the value of rights. This is because, on this view, having rights entails the existence of social structures in the world that give effect to these rights.⁴⁸ On the positive-norm view, there cannot be moral rights without these rights being

⁴⁶ See Kamm, *Intricate Ethics*, 271. See also Massimo Renzo, “Human Needs, Human Rights,” in *Philosophical Foundations of Human Rights*, ed. Rowan Cruft, S. Matthew Liao, and Massimo Renzo (New York: Oxford University Press, 2015), 570–87, 581–83; Rowan Cruft, “On the Non-Instrumental Value of Basic Rights,” *Journal of Moral Philosophy* 7, 4 (2010): 441–61.

⁴⁷ One could say that natural rights are given to us by God, hence that they express God's love. However, this theistic grounding of natural rights is controversial.

⁴⁸ For this kind of view, see Darby, *Rights, Race, and Recognition*; cf. Susan James, “Rights as Enforceable Claims,” *Proceedings of the Aristotelian Society* 103, 1 (2003): 133–47.

acknowledged. Moral rights established through positive norms confer on their holders a distinctive standing. This standing, in turn, is *instrumentally* valuable in securing the protection of right-holders' interests and *expresses* their privileged position vis-à-vis duty-bearers.

So, contrary to what might appear at first, saying that there are no natural rights is consistent with the ability to criticize, for example, the moral failings of a slave society, in which slaves are denied institutional rights, and it is also consistent with vindicating the value of rights. In a slave society, slaves are egregiously wronged because natural duties grounded in their interests are routinely violated. In addition, that society is morally impoverished because it fails to *confer* an instrumentally and expressively valuable status on (some of) its inhabitants.

5.5 The impossibility of arguing for legal human rights

Finally, an objector might point to a perceived “elephant in the room” in my discussion, namely its repercussions on the popular idea of human rights. The issue here is twofold. First, if human rights are defined as rights we hold solely by virtue of our humanity, my view implies that such rights do not exist. Second, this implication deprives us of a vocabulary, and a set of reasons, for advocating the legal institutionalization of those crucial rights that typically go under the name of human rights.⁴⁹

It is true that, on my view, there are no rights we hold solely by virtue of our humanity. However, this need not imply that there are no human rights. This implication would only follow if human rights were best defined as rights we have by virtue of our humanity alone. But, as proponents of the so-called “political”

⁴⁹ I am grateful to two participants in the IFFS seminar for raising this objection.

conception of human rights have argued—plausibly, in my view—this is not the best way of defining human rights.⁵⁰ So, all my view implies is that *natural* rights do not exist.

Furthermore, denying the existence of pre-institutional rights does not deprive us of arguments for creating legal institutions establishing those rights. On my view, plenty of arguments in support of rights-related institutions are available, they are just different from those invoked by advocates of natural rights. The latter typically argue that institutions ought to *acknowledge or recognize* pre-existing moral rights. On the positive-norm view, as we saw in the previous subsection, we have reasons for *creating* moral rights through institutions.

6. Some remarks on the concept of a right

Before concluding, I wish to go back to my original remarks about the definition of a right. The popularity of the idea of natural rights may depend, at least in part, on ambiguities in that very notion. Specifically, three main understandings of “a right” seem to play a role in our thinking about natural rights.

1. On some accounts, rights just are *duties* that stem from individuals’ fundamental moral status. They tell us that “one *may not* be violated in certain

⁵⁰ See, e.g., Charles R. Beitz, *The Idea of Human Rights* (Oxford: Oxford University Press, 2009); Joseph Raz, “Human Rights without Foundations,” in *The Philosophy of International Law*, J. Tasioulas and S. Besson eds (Oxford: Oxford University Press, 2010), 321–38; John Rawls, *The Law of Peoples: With “The Idea of Public Reason Revisited”* (Cambridge, MA: Harvard University Press, 1999); Laura Valentini, “In What Sense Are Human Rights Political? A Preliminary Exploration,” *Political Studies* 60, 1 (2012): 180–94, and “Dignity and Human Rights: A Reconceptualisation,” *Oxford Journal of Legal Studies*, online early, <https://academic.oup.com/ojls/article-abstract/doi/10.1093/ojls/gqx011/4061560?redirectedFrom=fulltext>.

ways” and that “such treatment is [morally] inadmissible.”⁵¹ If this is what is meant by “a right,” then my discussion poses no challenge to natural rights.

2. On other accounts, rights are the combination of (i) a duty grounded in someone’s fundamental moral status and (ii) this person’s standing to demand the performance of that duty. In this case, my discussion does pose a challenge to the notion of natural rights. In particular, it shows that (ii) cannot obtain in the absence of positive norms.
3. Finally, “a right” can refer to a claim, which involves the standing to demand the performance of a given duty. Here, too, my view challenges the idea that rights can exist by virtue of our human nature alone.

Throughout, I have understood rights in line with this third characterization. The second, as I have shown, is unstable, since its components—(i) and (ii)—refer to different normative attributes, with different grounds. Furthermore, there is something linguistically unparsimonious, if not outright confusing, in including a duty in the defining conditions of a right. Consider the familiar expression “a duty correlative to a right.” If we were to replace “a right” with the corresponding definition according to 2, we would obtain “*a duty correlative to a duty grounded in someone’s fundamental moral status coupled with the standing to exact its performance.*” This is confusing: the notion of a duty should appear once, not twice. For these reasons, characterization 2 strikes me as unhelpful. But what about characterization 1?

As I said at the outset, my aim is not to defend a particular understanding of the notion of a right, but I can nonetheless imagine that some readers may object to my use of language. The reason is that characterization 3, unlike 1, divorces the

⁵¹ Thomas Nagel, “Personal Rights and Public Space,” *Philosophy & Public Affairs* 24, 2 (1995): 83–107, 89–90, original emphasis.

notion of a right from the idea that right-holders are entities with fundamental moral status, and as such command a particular type of treatment. Rights, in other words, play a special role in our practical reasoning, and reflect the fact that a person's "choices, needs and interests ... [have] a special kind of normative significance."⁵² While consequentialist moralities demand that we maximize aggregate impersonal good, rights-based moralities block this aggregative move, and require that we act in particular ways *for the sake of specific individuals*. This is captured by characterization 1.

I concede that these ideas are often associated with the notion of a right; in fact, with deontology more generally. When this is the case, rights are treated as markers of one's fundamental moral status and of the duties associated with it. But rights are equally associated with *claims to* the performance of duties. What my argument shows is that the former moral attribute (i.e., fundamental moral status with its accompanying duties) does not imply the latter (i.e., claims to the performance of those duties).

I find it conceptually cleaner to use the notion of a right precisely to demarcate a special standing one has in relation to someone else's duty. Why? Because, as it is often said, having a right is not the same as being the beneficiary of a duty or as being an ultimate unit of moral concern. But this is, after all, a conceptual quibble. One could even conclude that there are two different *concepts* of rights and that the answer to the question of whether there are natural rights depends on the particular concept one has in mind. Nothing much hinges on this.

What my discussion shows, however, is that there are two distinct normative attributes: (i) first-order duties and (ii) the second-order standing to demand the

⁵² Cornell, "Wrongs, Rights, and Third Parties," 138.

performance of first-order duties. Talk of rights often blurs the line between the two. Keeping them distinct gives us a more nuanced and accurate picture of the moral landscape.

7. Conclusion

While we are fundamental units of moral concern independently of any relational background, and therefore protected by a number of natural duties, we acquire claims to the performance of those duties only against a richer set of rights-conferring positive norms. On this view, even if nobody possesses a natural standing to demand the performance of others' duties, we can confer this standing on one another consistently with our fundamental equality: through positive norms, and the commitments that underpin them.

The alternative, I have suggested, is to postulate that natural rights exist, because it seems “fitting” to ascribe a certain standing to human beings by virtue of the kinds of creatures that they are.⁵³ Although our intuitive judgements might tempt us to make such a postulation, I have shown that they are not to be trusted. The reason why natural-rights views appeal to us is that, as citizens of liberal democracies, our conception of ourselves is bound up with our status as right-holders. This intuitive sense of fittingness, though, is *no evidence* for the claim that this status is in fact natural or pre-institutional. If this is correct, then we have reason to conclude that the belief in natural rights lacks proper grounding. In Jeremy Bentham's words: it rests on “flat assertion.”⁵⁴

⁵³ Warren S. Quinn, “Actions, Intentions, and Consequences: The Doctrine of Doing and Allowing,” *The Philosophical Review* 98, 3 (1989): 287–312, 309.

⁵⁴ Jeremy Bentham, “Anarchical Fallacies,” in *“Nonsense Upon Stilts”: Bentham, Burke, and Marx on the Rights of Man*, ed. Jeremy Waldron (London: Methuen, 1796/1987), 66, cited in Wenar, “Rights.” Of course, the overall perspective taken in this paper is very different from Benthamite utilitarianism.