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The Sovereignty of Subjectivity

Pursuing a Philosophically Optimal Justification of
Claims Affirming the Existence of Universal Human
Rights

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ABSTRACT

Anders Reagan: The Sovereignty of Subjectivity
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The United Nation's mandate to engineer international peacecraft is correlated with the promotion of universal human rights. Universal human rights are held to apply consistently to everyone everywhere without conceivable exception. There is some debate as to whether universal human rights possibly exist. This debate centers around two difficulties: 1) the task of identifying a single trait or capability that all human beings necessarily share, and 2) the task of relating human rights to this trait or capability. Conventional epistemic justifications defending the existence of universal human rights attempt to address both difficulties. However, they have become the focus of numerous criticisms. By conducting systematizing and critically reviewing text analyses, I will conclude that conventional epistemic justifications are unable to refute standard criticisms satisfactorily. In their place, I will introduce an epistemic justification from the philosophy of mind. I will attempt to demonstrate that this justification is capable of 1) identifying a single trait that all human beings necessarily share, 2) relating human rights to this trait, and 3) satisfactorily refuting the standard criticisms raised against conventional epistemic theories. I have produced this paper in the hope of further legitimizing the UN's mandate to engineer international peacecraft by providing a more philosophically optimal justification of claims affirming the existence of universal human rights.

Keywords: Human rights, interests theory, will theory, ideal-types, idea-analysis, traditions, problem of other minds, sovereignty of subjectivity

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LIST OF ABBREVIATIONS

UN	United Nations
UDHR	Universal Declaration of Human Rights
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social, and Cultural Rights
IEP	Internet Encyclopedia of Philosophy
SEP	Stanford Encyclopedia of Philosophy

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1 INTRODUCTION

The United Nations (UN) is a global organization created in 1945 to engineer peace universally for all people without exception.^{1 2} The UN Charter, the Universal Declaration of Human Rights (UDHR), the International Covenant on Civil and Political Rights (ICCPR), and the International Covenant on Economic, Social, and Cultural Rights (ICESCR) all proclaim that there exists an inherent correlation between the UN's mandate to engineer international peacecraft and the promotion of universal human rights.^{3 4} The term "human rights" is defined as, "rights which human beings possess simply in virtue of being human, however widely they differ [and] independently of positive law (*legal positivism)."⁵ The standard identification of specific human rights is contained within the UDHR, the ICCPR, and the ICESCR. The following lists some examples of human rights that the UDHR identifies: the right to equality (Article 1); freedom from discrimination (Article 2); the right to life, liberty, and personal security (Article 3); freedom from slavery (Article 4); freedom from torture and degrading treatment (Article 5); the freedom of belief and religion (Article 18); the freedom of opinion and information (Article 19); and the right to peaceful assembly and association (Article 20). Additionally, the UDHR, ICCPR, and ICESCR all proclaim that human rights are universal. Universality in this context means that these human rights "claim validity everywhere and for everyone, irrespective of whether they have received comprehensive legal recognition, and

¹ The UN Charter references "succeeding generations," "mankind," "the human person," "men and women," and "all peoples" in its preamble. These terms signify the universal application of the UN Charter to everyone without exception. See: United Nations, Charter of the United Nations, 24 October 1945, 1 UNTS XVI, available at <http://www.refworld.org/docid/3ae6b3930.html> [accessed 7 April 2017]

² "History of The UN | United Nations Seventieth Anniversary." (2017). *United Nations*, accessed 2 Mar. 2017, available at <http://www.un.org/en/sections/history/history-united-nations/index.html>.

³ Merriam-Webster defines the term "Warcraft" as: "the art of war; knowledge and skill in the conduct of military operations." I have here taken the liberty of conceiving of the reciprocal term "peacecraft" in the same context as "Warcraft" and defined in juxtaposition to mean "the art of peace; knowledge and skill in the conduct of peace operations" for the remainder of this document. Source: "Definition of Warcraft." (2017). *Merriam-Webster*, accessed 11 Apr. 2017, available at <https://www.merriam-webster.com/dictionary/warcraft>.

⁴ Universal Declaration of Human Rights, 10 December 1948, 217 A (III), available at <http://www.refworld.org/docid/3ae6b3712c.html> [accessed 19 April 2017]; UN General Assembly, UN General Assembly, International Covenant on Civil and Political Rights, 16 December 1966, United Nations, Treaty Series, vol. 999, available at <http://www.refworld.org/docid/3ae6b3aa0.html> [accessed 23 April 2017]; UN General Assembly, International Covenant on Economic, Social and Cultural Rights, 16 December 1966, United Nations, Treaty Series, vol. 993, available at <http://www.refworld.org/docid/3ae6b36c0.html> [accessed 23 April 2017]

⁵ Honderich, T. (2006) *The Oxford Companion to Philosophy*, 1st ed. Enskede: TPB. p. 403

even irrespective of whether everyone is [in] agreement with the claims and principles of human rights.”⁶

I personally support the UN's ambition to engineer international peacecraft. Consequently, I find it desirable that the UN's mandate is as convincingly well-grounded and motivated as is conceivably possible. For this reason, it is important to justify the UN's critical claim that universal human rights exist.

1.1 Problem

To clarify, I do not think that the UN's mandate is conditional upon justifying the existence of universal human rights; however, the UN has claimed that universal human rights exist. A satisfactory justification on this account would certainly serve to further legitimize the UN's work. To this end, I wonder if it is possible to justify claims affirming the existence of universal human rights in a way that is philosophically optimal.

By the phrase “philosophically optimal” justification, I mean to indicate justification that is free from circular reasoning and significant external criticisms.⁷ A circular justification of claims affirming the existence of universal human rights might rely on codified human rights documents to make its claim. Such a justification might appear as follows: *Universal human rights exist because the UDHR states that human rights are universal. The UDHR states that human rights are universal because it codifies human rights, which are, by nature, universal. Human rights are, by nature, universal because the UDHR states that they are.* Examples of circular reasoning like this usually indicate a defect in the argument “where the conclusion is doubtful and the premisses are supposed to be a less doubtful basis for proving the conclusion.”⁸ To avoid circular reasoning, it is preferable to avoid grounding any justification of claims affirming the existence of universal human rights in human rights codification.⁹ This can be accomplished by identifying a universal value or principle *beyond* human rights codification and relating that value or principle to human rights.

⁶ Fagan, A. (2017). “Human Rights,” *Iep.utm.edu.*, accessed 14 Feb. 2017, available at <<http://www.iep.utm.edu/hum-rts/#H4>>.

⁷ For more on circular reasoning, see: Honderich, T. (2006) *The Oxford Companion to Philosophy*, 1st ed. Enskede: TPB. p. 142

⁸ Honderich, T. (2006) *The Oxford Companion to Philosophy*, p. 142 (Original spelling)

⁹ Additionally, the Oxford Companion to Philosophy states in its definition of human rights that they exist “independently of positive law (*legal positivism).” Therefore, one ought not to elevate any instance of positive law in evidence of claims affirming the existence of universal human rights. See: Honderich, T. (2006) *The Oxford Companion to Philosophy*, p. 403

“[...] the explanatory justification of claims of right and the resolution of many conflicting claims of right require us to identify values and principles which need not be expressed in terms of rights [...]”¹⁰

The problem that this paper will address is that even justifications of this sort have become the focus of significant criticisms.

1.2 Purpose

This paper will identify and evaluate justifications of claims affirming the existence of universal human rights in search of one that is as philosophically optimal as is conceivably possible. My hope is that identifying a philosophically optimal justification of claims affirming the existence of universal human rights will further legitimize the UN’s mandate to engineer international peacecraft.

1.3 Research Question

Consequently, my research question is as follows: *What would a philosophically optimal justification of claims affirming the existence of universal human rights look like?*

¹⁰ Finnis, J. (1980). *Natural Law and Natural Rights*, Oxford: Clarendon Press. p. 198

2 THEORY

My aim is to identify the most philosophically optimal justification of claims affirming the existence of universal human rights. According to Fumerton, there are two kinds of justifications.¹¹ To identify the *most* philosophically optimal among them, I will need to examine which is better suited to the task of affirming the existence of universal human rights.

The first kind is *epistemic* justification. Epistemic justification improves the *likelihood* that a claim is true. For example, imagine that I say, “There exist universal human rights because (X)” and “X” is an epistemic justification. In this case, the support of “X” will *increase the likelihood* that there *actually* exist universal human rights. The second type of justification is called *nonepistemic justification*. Nonepistemic justification bypasses entirely whether a claim is true or not and focuses instead on what happens *if I believe* that the claim is true. For example: “The existence of universal human rights is justified because, *if I believe* that there exist universal human rights, *then* I will be motivated to treat my neighbor well.” Notice that this justification doesn’t increase the likelihood that universal human rights *actually* exist; it focuses more on the causal “*if – then*” aspect of *believing* that the claim is true. It then employs the results of this belief to justify the claim.

I am searching for a justification that will be able to satisfactorily affirm the existence of universal human rights. A nonepistemic justification of claims affirming the existence of universal human rights would not address the question of whether or not universal human rights exist; it would only emphasize the effects of *believing* in the existence of universal human rights. I do not think that this type of justification is particularly philosophically optimal because it does not directly address the genuine content of the claim that it supports. In my research, I have encountered proponents of universal human rights that assert that nonepistemic justifications of claims affirming the existence of universal human rights are the only possible type. The utilitarian position, for example, promotes this assertion.¹² I do not agree with this assertion. I am searching for the most conceivably optimal justification of claims affirming the existence of universal human rights. Epistemic justifications are theoretically preferable to nonepistemic justifications because they provide a more philosophically direct examination of

¹¹ Fumerton, R. (2002). “Theories of Justification.” Published in: P. K. Moser (ed.), *The Oxford Handbook of Epistemology*. Oxford University Press. p. 205

¹² Utilitarianism is one example of a nonepistemic theoretical foundation supporting the existence of universal human rights. For more on utilitarian justifications of claims affirming the existence of universal human rights see: Gibbard, A. (1984). “Utilitarianism and Human Rights,” *Social Philosophy and Policy*, vol. 1, no. 2, p. 92; Mill, J. S. (1871). *Utilitarianism*, Longmans, Green, Reader, and Dyer; Bentham, J. (1789). *An Introduction to the Principles of Morals and Legislation*, London: T. Payne.

the claims they support. A sound epistemic justification of claims affirming the existence of universal human rights would improve the *likelihood* that universal human rights *actually* exist – a nonepistemic justification would not. I will therefore restrict my analysis to focus on epistemic justifications and to exclude nonepistemic justifications.

In the foregoing chapter, I defined “philosophically optimal” to denote justifications free from circular reasoning and free from significant external criticism. In light of the foregoing, I will develop my definition of “philosophically optimal” to indicate *a universally applicable justification that is epistemic, free from circular reasoning, and satisfactorily able to refute any significant external criticism.*

In the coming chapter, I will identify several candidates for philosophically optimal justifications of claims affirming the existence of universal human rights.

3 BACKGROUND RESEARCH

“There is wide-ranging disagreement in contemporary discourse about the justification [...] of human rights.”¹³ In the interest of brevity and clarity, I have limited this section to regard only four schools of epistemic justification of claims affirming the existence of universal human rights. I have selected these four schools by cross-referencing the human rights articles and definitions from the Internet Encyclopedia of Philosophy (IEP), the Stanford Encyclopedia of Philosophy (SEP), and the Oxford Companion to Philosophy.¹⁴ I offer that any wider treatment of human rights theory would risk being redundant or unnecessarily entangled.

One need not necessarily rely on a school in order to epistemically justify claims affirming the existence of universal human rights; however, the benefit of relying on a school is that they attempt to account not only for why universal human rights should exist but also for why specific human rights should be universal. In short, schools of epistemic justification provide more explanatory power than single theories. For this reason, I have chosen to use these schools as a framework for my research.

In the following sections, I introduce each of the schools that I encountered in my research and then select those that I consider most relevant for this paper. I present these schools in no particular order.

3.1 Overlapping Consensus

The first school offers that the personal, social, cultural, and national differences between people can generate many different justifications of universal human rights.¹⁵ Nonetheless, all of these different justifications will invariably result in universal support for human rights. Human rights are therefore justified universally.¹⁶ Consequently, human rights exist universally.

This school of epistemic justification is commonly referred to as “overlapping consensus.” This school offers that the content of the UDHR, for example, relates to instances of overlapping consensus; we have the right to life, liberty, and personal security (Article 3)

¹³ Benhabib, S. (2012). “Is There a Human Right to Democracy? Beyond Interventionism and Indifference.” Published in: C. Corradetti, ed. *Philosophical Dimensions of Human Rights*. Dordrecht: Springer. p. 191

¹⁴ Fagan, A. (2017). “Human Rights;” Nickel, J. (2017). “Human Rights,” *Plato.stanford.edu.*, accessed 11 May 2017, available at <<https://plato.stanford.edu/entries/rights-human/>>; Honderich, T. (2006) *The Oxford Companion to Philosophy*. p. 403

¹⁵ See: Westacott, E. (2017). “*Moral Relativism*,” *Iep.utm.edu.*, accessed 24 Apr. 2017, available at <<http://www.iep.utm.edu/moral-re/>>.

¹⁶ Rawls, J. (1987). “The Idea of An Overlapping Consensus,” *Oxford Journal of Legal Studies*, vol. 7, no. 1, pp. 1-25.

because these are, in some sense, instances where components of every moral code have become intertwined, thus forming an overlapping consensus.

The overlapping consensus school certainly has its merits; however, I offer that the identification of a *single universally applicable justification* would be more philosophically optimal than the overlapping of disintegrated *components* from many different justifications. As such, the school of overlapping consensus does not offer a philosophically optimal justification of claims affirming the existence of universal human rights. I have therefore elected to exclude it from my analysis.

If I am unable to identify a more philosophically optimal justification of claims affirming the existence of universal human rights, then I may have to acknowledge that the overlapping consensus school is a tolerable alternative. I will do this only in the absence of the identification of a single universally applicable epistemic justification.

3.2 Judeo-Christian Theocentric Assumptions

This school offers that an epistemic justification of claims affirming the existence of universal human rights must appeal to theistic assumptions.¹⁷ It claims that all human beings share an inherent worth/value that they have received from the Judeo-Christian God. Human rights are seen herein to express this inherent worth/value. Because human rights safeguard this universal human trait, they exist universally. The Judeo-Christian theocentric perspective offers that the content of the UDHR, for example, relates to humanity's worth/value; we have the right to life, liberty, and personal security (Article 3) because these are, in some sense, necessary expressions of our worth/value.

This school attempts to justify its claims via belief in the Judeo-Christian God. It does not, however, attempt to claim that all people *believe* in the Judeo-Christian God. Someone who does not believe in the Judeo-Christian God may have a hard time believing that the Judeo-Christian God is responsible for generating their worth/value.

The Judeo-Christian theocentric school could have easily factored into the overlapping consensus school above as one of many possible justifications that an individual might have for affirming the existence of universal human rights. This school does not present a single universally applicable justification because it is dependent on belief in the Judeo-Christian God and not all people believe in the Judeo-Christian God. Just as I mentioned above, the identification of a single universally applicable justification would be more philosophically

¹⁷ Wolderstorff, N. (2008). *Justice: Rights and Wrongs*, Princeton: Princeton University Press. Ch. 16

optimal than a belief system help only by specific individuals and only in some parts of the world. As such, the Judeo-Christian theocentric perspective does not offer a philosophically optimal justification of claims affirming the existence of universal human rights. I have therefore elected to exclude it from my analysis.

If I am unable to identify a more philosophically optimal justification affirming the claim that universal human rights exist, then I may have to acknowledge that the Judeo-Christian theocentric perspective is a tolerable alternative. I will do this only in the absence of the identification of a single universally applicable epistemic justification.

3.3 Interests Theory

“The interests approach is [...] primarily concerned to identify the social and biological prerequisites for human beings leading a minimally good life. The universality of human rights is grounded in what are considered to be the same social and biological prerequisites for well-being, which all of us are deemed necessarily to share.”¹⁸

According to the interests theory approach, all people share the same social and biological prerequisites for leading a minimally good life. The interests theory approach offers that the content of the UDHR, for example, relates to these fundamental prerequisites; we have the right to life, liberty, and personal security (Article 3) because these are, in some sense, expressions of our social and biological prerequisites for well-being. Therefore, there exist universal human rights to the extent that there exist universal social and biological prerequisites for well-being. Because human rights express and safeguard the same social and biological prerequisites for everyone, they exist universally.

The interests theory approach provides the type of single universally applicable justification that I am interested in evaluating. It attempts to justify claims affirming the existence of universal human rights by relating human rights to traits that it claims are universally shared by all people. This school is wholly different from the overlapping consensus school or the Judeo-Christian theocentric school in this way; it attempts to provide a universal epistemic justification that is more philosophically optimal. I will, therefore, include the interests theory approach in my analysis.¹⁹

¹⁸ Fagan, A. (2017). “Human Rights.”

¹⁹ For a complete examination of the interests theory approach see: Habermas, J. (2010). The Concept of Human Dignity and the Realistic Utopia of Human Rights. *Metaphilosophy*, vol. 41, no. 4, pp. 464-480; Nickel, J. (2007). *Making Sense of Human Rights*, 2nd edn., Malden, MA: Blackwell Publishing; Finnis, J. (1980). *Natural Law and Natural Rights*; Rawls, J. (1987). “The Idea of An Overlapping Consensus;” Nussbaum, M. (1997). “Capabilities and Human Rights.” *Fordham Law Review*, vol. 66, pp. 273-300, accessed 15

3.4 Will Theory

“[...] will theory attempts to establish the philosophical validity of human rights upon a single human attribute: the capacity for freedom. Will theorists argue that [...] the capacity for freedom [...] ought to constitute the core of any account of rights.”²⁰

The will theory approach asserts that all people universally share the capacity for freedom. Therefore, there exist universal human rights to the extent that there exists a universal capacity for freedom. Because human rights express and safeguard the capacity for freedom for everyone, they exist universally. This approach offers that the content of the UDHR, for example, relates to this capacity for freedom; we have the right to life, liberty, and personal security (Article 3) because these are, in some sense, necessary preconditions of our universal capacity for freedom.

The will theory approach provides the type of single universally applicable justification that I am interested in evaluating. It attempts to justify claims affirming the existence of universal human rights by relating human rights to a trait that it claims is universally shared by all people. This school is wholly different from the overlapping consensus school or the Judeo-Christian theocentric school in this way; it attempts to provide a universal epistemic justification that is more philosophically optimal. I will, therefore, include the will theory approach in my analysis.²¹

Feb. 2017, available at <<http://ir.lawnet.fordham.edu/r/vol66/iss2/2>>; Griffin, J., 2008. *On Human Rights*, Oxford: Oxford University Press.

²⁰ Fagan, A. (2017). “Human Rights.”

²¹ For a complete examination of the will theory approach see: Gewirth, A. (1978). *Reason and Morality*, Chicago: University of Chicago Press; Benhabib, S. (2012). “Is There a Human Right to Democracy? Beyond Interventionism and Indifference;” Forst, R. (2010). The Justification of Human Rights and the Basic Right to Justification: A Reflexive Approach. *Ethics*, vol. 120, no. 4, pp. 711-740; Ignatieff, M. (2001). *Human rights as politics and idolatry*. Princeton: Princeton University Press; Donnelly, J. (2002). *Universal human rights: Theory and practice*. Cornell: Cornell University Press.

4 SOURCE MATERIAL

My analysis will attempt to determine whether the interests theory approach or the will theory approach is more capable of optimally justifying the existence of universal human rights. To evaluate the interests theory approach and the will theory approach in their best possible forms, I will rely on a selection of benchmark texts illustrating the highest available standard of representation for both theories.²² These benchmark texts set the standard for how the interests theory approach and the will theory approach are to be regarded. Having selected my benchmark texts, I will treat them according to the “principle of generosity,” which states that one should select an interpretation of any given theory that ascribes the maximum reasonability and consistency in terms of factual and logical context and content to that theory.²³ Only in having done this can any evaluation of theory via its countenance in specific texts be truly meaningful. In ignoring this practice of strictly elevating the best representations of a given theory, one runs the risk of addressing only a strawman representation of the theory.²⁴

Having cross-referenced the SEP and the IEP with the curriculum of the Uppsala University Human Rights Master’s Program, I have arrived at four benchmark texts – two for each theory – that are routinely elevated as authentic representations of the interests theory approach and the will theory approach. The authors that I have selected to represent the interests theory approach are John Finnis and Martha Nussbaum. The authors that I have selected to represent the will theory approach are Alan Gewirth and Seyla Benhabib. I find it important to mention here that, due to the specific purpose of my research, I will not be scrutinizing the full range of work produced by these selected authors. I am herein only interested in the aspects of their work that regard epistemic justifications of claims affirming the existence of universal human rights.

²² Gustafson described benchmark texts as: “[...] points of indication for defending and developing my own argument, and I select from them to show further the distinguishing features of it.” From: Gustafson, J. M. (1981). *Ethics from A Theocentric Perspective*, 1st ed. Chicago: University of Chicago Press. p. 25

²³ Grenholm, C. (2010). *Att Förstå Religion*, 1st ed. Lund: Studentlitteratur. p. 240 (My translation).

²⁴ Hansen, H. (2017). “Fallacies,” *Plato.stanford.edu.*, accessed 21 Apr. 2017, available at <<https://plato.stanford.edu/entries/fallacies>>.

5 METHOD

My analysis will evaluate these benchmark texts. In light of my source material and my intended analysis, I offer that employing the text analysis method is most appropriate because it is designed specifically for analyzing ideas in the form of text.²⁵ The text analysis method has two specializations: systematizing content and critically reviewing content.²⁶ For the first part of my analysis, I will produce a systematizing text analysis, and for the second part, I will produce a critically reviewing text analysis.

5.1 Systematizing Text Analysis

The systematizing text analysis is a method characterized by two phases. The first phase involves developing categories. The second phase involves systematizing benchmark texts into these categories.

In Phase 1, I will develop two categories: one of the interests theory approach and one of the will theory approach. To develop my categories with the greatest possible reliability and transparency, I will construct them as ideal-types.²⁷ An ideal-type is a category that circumscribes a typical example of a given phenomenon. What constitutes a “*typical* five-year-old” in terms of behavior, worldview, and abilities will be broader than the dictionary definition of a “five-year-old.” The difference herein lies between the ideal-type of five-year-olds and their definition.²⁸ I wish to identify what ideally constitutes a typical interests theory approach and a typical will theory approach. The ideal-type method is particularly suited for this task. I will construct these ideal-types in Phase 1 by cross-referencing the IEP, the SEP, and the Oxford Companion to Philosophy. Then, in Phase 2, I will systematize my benchmark texts into my ideal-types.

5.2 Critically Reviewing Text Analysis

To execute my critical reviews, I will be relying on the method of idea-critique. Idea-critique is a critical method of analysis that aims to take a position regarding the extent to which a given argument lives up to predetermined norms.²⁹ In my case, the given arguments are those presented by my benchmark texts, and the predetermined norms are the standard criticisms

²⁵ Esaiasson, P., Gilljam, M., Oscarsson, H., Wängnerud, L. (2012). *Metodpraktikan*, 1st ed. Stockholm: Norstedts juridik. p. 210

²⁶ Ibid.

²⁷ Bergström, G., Boréus, K. (2012). *Textens mening och makt*, 1st ed. Lund: Studentlitteratur; Esaiasson, P., Gilljam, M., Oscarsson, H., Wängnerud, L. (2012). *Metodpraktikan*. p. 211

²⁸ Ibid. p. 140

²⁹ Esaiasson, P., Gilljam, M., Oscarsson, H., Wängnerud, L. (2012). *Metodpraktikan*. p. 212

raised against the interests theory approach and the will theory approach. I introduce these standard criticisms below.

Once I have systematized my benchmark texts, I will subject them to the criticisms against the interests theory approach and the will theory approach respectively. As a result, my critically reviewing text analysis will be conducted parallel to Phase 2 of my systematizing text analysis. I offer that this approach will provide greater clarity to the research narrative of my work.

Should my benchmark texts seem incapable of refuting these standard criticisms, then I will conclude that a more philosophically optimal justification of claims affirming the existence of universal human rights may yet remain unidentified. In this case, I may offer tentative suggestions for a more philosophically optimal justification of claims affirming the existence of universal human rights.

5.2.1 Standard Criticisms

I introduce the standard criticisms against the interests theory approach and the will theory approach below. I identified these criticisms by cross-referencing the human rights articles and definitions provided by the IEP and the SEP against the arguments promoted in each of my benchmark texts. I have named each criticism to facilitate their use later on in this paper.

My research has identified three standard criticisms against the interests theory approach. What I will term the “universal accuracy criticism” challenges the interests theory approach with being unable to account for why any individual or collective should be capable, from the empirical data of their personal lives, of accurately identifying the *genuine universal* social and biological prerequisites for everyone to lead minimally good lives. This post-colonial problem of moral relativity is precisely what Andreas Eckert spoke to when citing the existence of significantly varying values “between the communitarian and collectivist nature of African societies and the more individualistic societies of the West,” such that any “African human rights treaty would [...] have to go beyond the Universal Declaration and reflect individuals as right holders enmeshed in communities, with collective rights and specific duties to others.”³⁰ ³¹ What is to say that any individualistic or collectivistic endeavor to identify universal prerequisites for well-being would not generate the same type of paternalistic

³⁰ Eckert, A. (2011). “African Nationalists and Human Rights, 1940s-1970s.” Published in: S. Hoffmann, ed. *Human Rights in the Twentieth Century*. Cambridge: Cambridge University Press. p. 299

³¹ For more on “moral relativism,” see: Westacott, E. (2017). “Moral Relativism.”

“double-standard” that ultimately resulted in the controversy surrounding Britain’s Mau Mau war in Kenya and the French-Algerian war?^{32 33}

What I will term the “altruism criticism” charges the interests theory approach with purging the motivation of altruism from the human rights mission. If everyone has the same prerequisites for well-being, then what motivation does a wealthy woman from the United States have for ensuring the human rights of a poor man in Iraq? Is it not better, in light of the interests theory approach, for the wealthy woman to secure her own prerequisites for well-being even at the risk of depriving the poor man of his own? What does she benefit from securing his well-being? The interests theory approach seems to have a difficult time answering these questions.

What I will term the “freedom criticism” challenges the interests theory approach with neglecting to identify that the capacity for freedom in and of itself seems to have a moral quality. It further asserts that, as a result of neglecting freedom’s role in morality, the interests theory approach effectively reduces people to automatons operating in a framework of predetermined social and biological conditions for morality and well-being.

My research has identified one criticism against the will theory approach. What I will term the “coma patient criticism” challenges the will theory approach with neglecting to acknowledge that not all people have the capacity for freedom. An infant, a person who is asleep, a patient in a coma, or a patient that has been diagnosed with dementia, depression, or schizophrenia will be demonstrably incapable of anything reasonably identifiable as the capacity for freedom.³⁴ Should these people be excluded from the attribution of human rights? The UN has claimed that human rights are to be implemented universally. So it would seem that human rights are to be implemented even to people who lack the capacity for freedom. And yet a strict reading of the will theory approach would suggest that human rights are not to be attributed to these people.

³² For more on “paternalism,” see: Sadurski, W. (2012). “‘It All Depends’: The Universal and the Contingent in Human Rights.” Published in: C. Corradetti, *Philosophical Dimensions of Human Rights*, Dordrecht: Springer. pp. 125-156

³³ By the term, “double-standard,” I am referring to Eckert’s description recounted as follows: “While Britain and France as the main colonial powers in Africa took part in the creation of a human rights regime which emerged in the immediate postwar period, these powers, at the same time, continued to deny ‘dignity’ and ‘equal rights’ to many of their colonized subjects and regularly subjected them to ‘torture or to cruel, inhuman or degrading treatment or punishment’.” Quoted from: Eckert, A. (2011). “African Nationalists and Human Rights, 1940s-1970s.” p. 286

³⁴ Nussbaum, M. (1997). “Capabilities and Human Rights.” p. 273

6 ANALYSIS

6.1 Phase 1 of the Systematizing Text Analysis

Below are my constructed ideal-types for the interests theory approach and the will theory approach.

Table 1: Interests theory approach ideal-type

- All human beings uniformly share the same *social and biological prerequisites for leading a minimally good life*.
- Human rights *uniformly* express and safeguard these prerequisites for leading a minimally good life.
- Therefore, universal human rights exist.

Table 2: Will theory approach ideal-type

- All human beings uniformly share the *capacity for freedom*.
- Human rights *uniformly* express and safeguard the capacity for freedom.
- Therefore, universal human rights exist.

6.2 Phase 2 of the Systematizing Text Analysis and the Critical Review

In this phase of the systematizing text analysis, I will systematize my benchmark texts into my ideal-types. Once I have systematized a benchmark text, I will immediately critically review it. In each critical review, I will subject the benchmark text to the standard criticisms against either the interests theory approach or the will theory approach depending on where it has been systematized.

6.2.1 John Finnis

Systematization

John Finnis is an Australian legal scholar and philosopher specializing in the Philosophy of Law.³⁵ The core of Finnis' epistemic justification of claims affirming the existence of universal human rights is grounded in emphasizing universal human equality through "the truth that every human being is a locus of human flourishing which is to be considered with favour in him or her as much as in anybody else."³⁶ Finnis holds that "[...] everyone is equally entitled

³⁵ "Oxford Law | Profile of John Finnis." (2017). *Web.archive.org*, accessed 22 May 2017, available at <<https://web.archive.org/web/20110907000846/http://www.law.ox.ac.uk/profile/john.finnis>>.

³⁶ Finnis, J. (1980). *Natural Law and Natural Rights*. p. 221

to respectful consideration in the distribution of the common stock and the incidents of common life [...].”³⁷ The “human flourishing” that he refers to here is combined with his “incidents of common life” to produce what he terms the “basic forms of human good.” These “basic forms of human good” are illustrated by Finnis in the form of a list. This list is comprised of: life and its capacity for development; the acquisition of knowledge, as an end in itself; play, as the capacity for recreation; aesthetic expression; sociability and friendship; practical reasonableness, the capacity for intelligent and reasonable thought processes; and finally, religion, or the capacity for spiritual experience.³⁸ “When we survey this list we realize what the modern ‘manifesto’ conception of human rights amounts to. It is simply a way of sketching the outlines of the common good, the various aspects of individual well-being in community.”³⁹ Therefore, without maintaining these basic forms of human good for oneself, one cannot, in so far as Finnis has determined, live in a state of well-being. According to Finnis, human rights are not necessarily designed to maintain the common good as much as they are a part of its content.⁴⁰ The neglect of human rights, however, interrupts well-being. For instance, Finnis might offer that the right to life, liberty, and personal security (UDHR, Article 3) are universal human rights because they are directly related to “life and its capacity for development” which is one of the basic forms of human good.

Finnis claims that there exist universal human rights to the extent that it is always “unreasonable to choose directly against any basic value, whether in oneself or in one’s fellow human beings.”⁴¹ Conclusively, according to Finnis, universal human rights exist in as far as they relate to the universal basic forms of human good.

I have systematized Finnis’ theory of the “basic forms of human good” into my interests theory approach ideal-type. Finnis’ work supports the claim that human beings uniformly share the same social and biological prerequisites for leading a minimally good life – one of well-being. This claim, in turn, supports the conclusion that there exist universal human rights because, according to Finnis, they are essential expressions of the universal forms of good which are universal prerequisites for well-being.

³⁷ Ibid. p. 223

³⁸ Finnis, J. (1980). *Natural Law and Natural Rights*. Referenced in: Fagan, A. (2017). “Human Rights.”

³⁹ Finnis, J. (1980). *Natural Law and Natural Rights*. p. 214

⁴⁰ Ibid. p. 218

⁴¹ Ibid. p. 225

Critical review

The Universal Accuracy Criticism

Finnis claims that he developed his list of the basic forms of good by “sympathetically see[ing] the point of actions, lifestyles, characters, and cultures that one would not choose for oneself.”⁴² By the process of elimination, Finnis has arrived at a list of values necessary for well-being. Finnis addresses the universal accuracy criticism in stating that,

“There is no need for the reader to accept the present list, just as it stands, still less its nomenclature [...]. [...] Still, it seems to me that those seven purposes are all of the basic purposes of human action, and that any other purpose which you or I might recognize and pursue will turn out to represent, or be constituted of, some aspect(s) of some or all of them.”⁴³

The way that Finnis speaks here reflects an academic tradition that precedes the influence of post-colonialism and moral relativism. Finnis admits that his list may not be exhaustive but says that *he* cannot see how it would not be. This does not seem to me to be adequate reason for accepting that Finnis’ list indeed details *the genuine universal* social and biological prerequisites for *everyone* to lead minimally good lives. We are given no reason why this list is exhaustive besides that it “seems” to Finnis that this list details all of the necessary essential ingredients for well-being. Were Finnis writing in the post-colonial tradition, then perhaps he would be more obliged to provide further reasons justifying his selection of the items on his list. With this in mind, the above quote is perhaps more an implicit admission that the interests theory approach is unable to adequately address the universal accuracy criticism. This part of my critical review concludes that Finnis’ theory has not sufficiently refuted the universal accuracy criticism against the interests theory approach.

The Altruism Criticism

What does Finnis say about maintaining the basic forms of human good beyond their utility for one’s personal sphere of experience? Finnis claims that these basic forms of human good are in and of themselves universal by virtue of being *human* goods. When these goods are hoarded, reserved, or guarded, then Finnis claims that they are not present in their truest forms because “[s]elfishness, cruelty, etc., stand in need of some explanation, in a way that curiosity, friendliness, etc., do not.”⁴⁴ Often the explanation of greediness is that one wishes to attain or hoard one or another basic form of good. The basic forms of good, however, do not require

⁴² Ibid. p. 85

⁴³ Ibid. p. 92

⁴⁴ Ibid. p. 91

further explanation. The reasons one has for promoting and pursuing them for oneself and others are self-evident. Because human rights are consistent with the basic forms of human good, Finnis offers that human rights are inherently universal to the same degree that the basic forms of human good are inherently altruistic. Any definition, descriptive or normative, of human rights as anything less than universally altruistic, is, therefore, incompatible with the basic forms of human good.⁴⁵ This part of my critical review concludes that Finnis' theory has sufficiently refuted the altruism criticism against the interests theory approach.

The Freedom Criticism

In his conversation with Nozick, Finnis distinctly mentions that the capacity for authentic self-determination and self-realization are intrinsically bound up in the urge to maintain the basic forms of human good. To reach the greatest realization of well-being, one must be striving to maintain the basic forms of human good via a distinct sensation of self-actualization and self-determination; otherwise, the state of well-being becomes hollow.⁴⁶ However, free self-determination in and of itself is not what generates morality. It is only when Finnis' list is maintained freely that the items on it truly guide morality. Finnis does not envision freedom as a finite capacity that is either present or not present in a given instance. He states, "one's self-determination and self-realization is never consummated, never successfully and finally completed. And none of the basic aspects of one's well-being is ever fully realized or finally completed."⁴⁷ Freedom is herein seen as an endless task; one that is integral to the basic forms of human rights but is not counted among them.

Freedom is, therefore, an implicit member of the basic forms of human good. However, according to Finnis, the exercise of freedom alone is not sufficient to generate a moral bearing. Therefore, according to Finnis' theory, the exercise of freedom cannot be conceived of as being moral in and of itself. Instead, morality is derived from a free pursuit of the basic forms of human good. Therefore, this part of my critical review concludes that Finnis' theory has not sufficiently refuted the freedom criticism against the interests theory approach.

Results of my Critical Review of Finnis

According to my critical review of Finnis', his theory of the "basic forms of human good" is able to sufficiently refute only two of the three standard criticisms against the interests theory approach. Consequently, I offer that, in so far as Finnis portrays it, the interests theory

⁴⁵ Ibid.

⁴⁶ Ibid. pp. 95-96

⁴⁷ Ibid. p. 96

approach does not provide a philosophically optimal justification of claims affirming the existence of universal human rights because it is unable to satisfactorily refute two significant external criticisms.

6.2.2 Martha Nussbaum

Systematization

Martha Nussbaum is an American philosopher and the current Ernst Freund Distinguished Service Professor of Law and Ethics at the University of Chicago. She is jointly appointed in the Law School and the Philosophy department.⁴⁸ Nussbaum's approach to epistemically justifying claims affirming the existence of universal human rights is remarkably similar to Finnis'. Both make an attempt to develop a uniform measurement of what constitutes "human well-being." Instead of developing "basic forms of human good" like Finnis, Nussbaum attempts to identify universal human "capabilities." Nussbaum developed the capabilities approach in an attempt to give international policy makers a more concrete and relevant way of cross-examining the extent to which human rights are either promoted or violated within any given country.

"I believe that the most illuminating way of thinking about the capabilities approach is that it is an account of the space within which we make comparisons between individuals and across nations as to how well they are doing."⁴⁹

Nussbaum offers that a high quality of human life "seems to consist of a plurality of distinct features that cannot be simply reduced to quantities of one another."⁵⁰ These distinct and irreducible features make up the items on Nussbaum's list of capabilities. She offers that this list provides policymakers with a new tool to understand quality of life, not in terms of GDP, but rather regarding "how well even the worst-off citizens are doing [...]."⁵¹

"[The capabilities approach] is concerned with what is actually going on in the life in question: not how many resources are sitting around, but how they are actually going to work in enabling people to function in a fully human way."⁵²

In the same vein as Finnis' "basic forms of human good," Nussbaum claims that her "[...] capabilities [...]" have value in themselves, in making a life fully human."⁵³ She proposes

⁴⁸ "Martha C. Nussbaum | University of Chicago Law School." (2017). *Law.uchicago.edu*, accessed 22 May 2017, available at <<http://www.law.uchicago.edu/faculty/nussbaum/>>.

⁴⁹ Nussbaum, M. (1997). "Capabilities and Human Rights." p. 279

⁵⁰ *Ibid.* p. 282

⁵¹ *Ibid.* p. 283

⁵² *Ibid.* p. 285

⁵³ *Ibid.* p. 286

that they are, in essence, required for a person to live in a *fully human way*. She lists these universal social and biological prerequisites for every individual to live in a fully human way in her “capabilities” list: life; bodily health; bodily integrity; senses, imagination, and thought; emotions; practical reason; affiliation of friendship with respect; other species; play; and control over one’s political and material environment.⁵⁴ Throughout her work, Nussbaum relates human rights to human capabilities. “[...] thinking in terms of capability gives us a benchmark in thinking about what it is really to secure a right to someone.”⁵⁵ In this way, human rights are proposed to relate to capabilities. For instance, Nussbaum would offer that the right to life, liberty, and personal security (UDHR, Article 3) are universal human rights because they are directly related to the universal human capabilities of life, bodily health, bodily integrity, etc. Nussbaum advocates for the existence of universal human rights when she says that the very purpose of human rights language “is to point to the fact that human beings are entitled to certain types of treatment *whether or not* the state in which they happen to live recognizes this fact.”⁵⁶

I have systematized Nussbaum’s theory of “capabilities” into my interests theory approach ideal-type. Nussbaum’s work supports the claim that human beings uniformly share the same social and biological prerequisites for leading a minimally good life. This claim, in turn, supports the conclusion that there exist universal human rights because, according to Nussbaum, they are directly related to universal capabilities which are prerequisites for well-being.

Critical Review

The Universal Accuracy Criticism

Nussbaum provides a clear attempt in her work to account for the universal accuracy criticism.⁵⁷ She states:

⁵⁴ This list is admittedly a simplification. However, I offer that a simplification of this list has no bearing on the principle of generosity for Nussbaum’s theory. For a more detailed account of Nussbaum’s list of capabilities, see: Nussbaum, M. (1997). “Capabilities and Human Rights.”

⁵⁵ Nussbaum, M. (1997). “Capabilities and Human Rights.” p. 294

⁵⁶ Ibid. p. 274 (Author’s emphasis).

⁵⁷ “In “Elements of a Theory of Human Rights,” Amartya Sen criticizes Nussbaum’s attempt to identify an “overarching ‘list of capabilities,’” on the grounds that such a “canonical list,” as well as the weight to be attributed to the various items on this list, cannot be chosen without a further specification of context. More importantly, Sen sees in such a procedure “a substantive diminution of the domain of public reasoning.” Quote from: Benhabib, S. (2012). “Is There a Human Right to Democracy? Beyond Interventionism and Indifference.” p. 201. Quotes references: Sen, A. (2004). Elements of a theory of human rights, *Philosophy and Public Affairs*, vol. 32, no. 4, pp. 333.

“[The capabilities list] is open-ended and humble; it can always be contested and remade. [...] Nor does it deny that the items on the list are to some extent differently constructed by different societies. Indeed, part of the idea of the list is that its members can be more concretely specified in accordance with local beliefs and circumstances.”⁵⁸

This admission does not, in my opinion, save her theory from the universal accuracy criticism. In fact, the admission that her list is intended to be flexible and *not intended to be exhaustive* only increases my suspicion that it does not exhaustively identify the *genuine* universal social and biological prerequisites *for everyone* to lead minimally good lives. I offer that a case could be made indicating that Nussbaum’s intention of being “open-ended and humble” is an implicit recognition that the interests theory approach cannot sufficiently address the universal accuracy criticism and thus does not live up to its universal ambitions.

Nussbaum’s attempt to address the universal accuracy criticism is considerably more conscious of its burden than Finnis’ effort. Perhaps this awareness is a result of writing after the influence of post-colonialism and moral relativism. Finnis, who wrote before post-colonialism, seems to be satisfied in claiming that he need not necessarily address the possibility that his understanding of human well-being could be different from someone else’s and that this difference could cause problems for the universal claims of his theory. Nussbaum attempts to address this possibility but is, in my opinion, just as unable – even in her awareness of post-colonialism – to offer satisfactory reasons why her list should be exhaustive. This part of my critical review concludes that Nussbaum’s theory has not sufficiently refuted the universal accuracy criticism against the interests theory approach.

The Altruism Criticism

Nussbaum writes primarily from the perspective of policy makers. Her capabilities list is designed as a tool to help people analyze the extent to which human rights are actualized practically in the lives of individual citizens.⁵⁹ The capabilities method does precious little to make any normative claims because it was developed primarily as a descriptive surveying tool. Nussbaum even goes as far as stating that,

“One might agree that capabilities are the relevant space within which to compare lives and nations, and yet hold that equality of capability is not the appropriate goal. Capabilities inform us as to what type of equality might be thought pertinent; they do not by themselves tell us whether we *should* value an equal distribution or some other distribution.”⁶⁰

⁵⁸ Nussbaum, M. (1997). “Capabilities and Human Rights.” p. 286

⁵⁹ Nussbaum, M. (1997). “Capabilities and Human Rights.” p. 279

⁶⁰ Ibid. p. 280 (Emphasis added)

This quote speaks to the inability of the capabilities method to generate normative goals. The capabilities method is not designed as a moral/normative project. Why should a person with fulfilled capabilities *care* about a stranger with unfulfilled capabilities? Because human rights are moral, we expect that a philosophically optimal justification of claims affirming the existence of universal human rights would be able to account for this moral normative quality. And yet the capabilities theory seems unable to provide a satisfactory answer to the scenario above. This part of my critical review concludes that Nussbaum's theory has not sufficiently refuted the altruism criticism against the interests theory approach.

The Freedom Criticism

Nussbaum addresses the role of freedom in her capabilities method when she says,

“Citizens must be left free to determine their course after they have the capabilities. The person with plenty of food may always choose to fast, but there is a great difference between fasting and starving, and it is this difference that we wish to capture.”⁶¹

These words illustrate that Nussbaum sees the role of freedom as subordinate to her capabilities framework. Freedom comes into the picture, so to speak, only within the framework of capabilities. How one behaves takes on a moral or immoral quality depending on how each action relates to the capabilities of all the relevant parties. It is the capabilities that ultimately determine the moral or immoral shading of behavior and not the freedom to behave itself.

I find that Nussbaum's account does not effectively refute the freedom criticism against interests theory. It claims to respect human beings as free individuals who shape their lives. Yet it simultaneously claims that the capacity to exercise that freedom in a moral way is dependent on a set list of “capabilities” that are predetermined. Therefore, according to Nussbaum's theory, the exercise of freedom cannot be conceived of as being moral in and of itself. This part of my critical review concludes that Nussbaum's theory has not sufficiently refuted the freedom criticism against the interests theory approach.

Results of my Critical Review of Nussbaum

According to my critical review of Nussbaum, her “capabilities” theory is not sufficiently able to refute any of the standard criticisms against the interests theory approach. Consequently, I offer that, in so far as Nussbaum portrays it, the interests theory approach does not provide a philosophically optimal justification of claims affirming the existence of universal human rights.

⁶¹ Ibid. p. 289

6.2.3 Alan Gewirth

Systematization

Before his passing, Alan Gewirth was an American Professor of Philosophy at the University of Chicago.⁶² I summarize Gewirth's theory of "agency" as follows:

Gewirth offers that, to act, an agent must hold that his purposes are good; otherwise he would not strive to achieve them. Because freedom and well-being are required to act, an agent must hold that freedom and well-being are good. Because an agent holds that freedom and well-being are good, he must also hold that he has rights to them. If he were to deny this, then he would be opening himself up to the possibility that he may be stripped of his freedom and well-being. He cannot be stripped of his freedom and well-being because he necessarily must have them to be an agent. Therefore, so long as one acts one also claims that freedom and well-being are rights of the agent. Conclusively, then, the agent must accept that all prospective purposive agents have rights to freedom and well-being.⁶³

Note that Gewirth is claiming that human rights do not relate to a state of being human but rather to a state of human *being*; that is, to the inherent capability of having an intention and acting based on it. The core of Gewirth's dialectical argument is that if any person were to deny the necessary conditions of agency to any other person, then a contradiction would emerge whereby the person would deny the necessary conditions that he must hold to be present for his own agency.⁶⁴

Gewirth offers that all human beings uniformly share the same capacity for agency and that human rights relate to the universal capacity for agency. For instance, he would offer that the right to life, liberty, and personal security (UDHR, Article 3) are universal human rights because they are direct expressions of the universal human capacity of agency. Consequently, human rights are constrained in their ubiquity only by the absence of agency. As I understand it, Gewirth would support the proposition that there exist universal human rights because there necessarily exists universal human agency.

Gewirth's work supports the claim that human beings uniformly share the same capacity for freedom. This claim, in turn, supports the conclusion that there exist universal human rights because, according to Gewirth, they are direct expressions of the universal capacity for agency.

⁶² "Alan Gewirth, 1912-2004, rational ethicist who challenged Golden Rule." (2017). *Www-news.uchicago.edu*, accessed 22 May 2017, available at <<http://www-news.uchicago.edu/releases/04/040517.gewirth.shtml>>.

⁶³ Gewirth, A. (1978). *Reason and Morality*. For a more in-depth treatment of Gewirth's theory of agency, see: Wolderstorff, N. (2008). *Justice: Rights and Wrongs*, Princeton: Princeton University Press. p. 335

⁶⁴ Gewirth, A. (1985). "Why There Are Human Rights," *Social Theory and Practice*, vol. 11, no. 2, p. 236

Consequently, I have systematized Gewirth's theory of "agency" into my will theory approach ideal-type.

Critical Review

The Coma Patient Criticism

There is some debate as to whether Gewirth's argument is free from fallacious reasoning.⁶⁵ The central criticism against Gewirth's theory, however, accepts his theory earnestly in all of its suppositions and claims. This criticism then states that Gewirth's argument "would ground not human rights but only the rights of those human beings who are capable of rational agency."⁶⁶ Take, for example, a patient in a comatose state.⁶⁷ This person is human and yet cannot be said to be capable of agency. Should this person be excluded from the protection of human rights? A strict reading of Gewirth's theory would not attribute human rights universally but only to those people with the purpose to fulfill their intentions. This definition would prevent human rights from applying to infants, anyone who is asleep, or anyone who is suffering from schizophrenia, a coma, depression, or dementia.

In refutation of this criticism, Gewirth claims that agency is not necessarily a capacity that is measured in the present. "[H]uman rights are concerned with future or prospective as well as present agency."⁶⁸ In other words, the extent to which a coma patient has had agency in the past or will have it again in the future informs upon whether they should receive the full protection of human rights or not.

I accept this defense. It would explain why one does not attribute human rights to a corpse, but one does attribute them to a coma patient. It is here, however, that Gewirth is met with an interesting thought experiment. Gewirth is asked what would happen if both a fully conscious person and a coma patient are in need of a lifesaving transfusion but there is only enough blood to save one of them. In response, Gewirth states that the fully conscious person ought to be given the transfusion *because* this person has "more capabilities for action than does [the coma patient], and the point of human rights is to protect and fulfill these

⁶⁵ Wolderstorff, N. (2008). *Justice: Rights and Wrongs*. p. 339

⁶⁶ *Ibid.* p. 339

⁶⁷ One of Gewirth's central defenses of his theory of agency regards the case of Karen Quinlan who, in 1975, lapsed into a coma at the age of twenty-one having consumed diazepam along with alcohol. She remained in a coma for ten years until she was taken off of life support. The moral aspects of her case were of central importance to the eventual decision to end her life. Even today the extent to which human rights should have protected her life even in her hopeless vegetative state remains open for debate. For more information see: McDougall, J., Gorman, M. (2007). *Euthanasia: A Reference Handbook*, ABC-CLIO. pp. 141–142.

⁶⁸ Gewirth, A. (1985). "Why There Are Human Rights," p. 239

capabilities.”⁶⁹ With this answer, Gewirth acknowledges that the human rights of a normally functioning individual should come before those of the coma patient.

“It must be emphasized that, in my theory, inequalities or diminutions of rights are justified only when the capabilities for agency are lacking beyond a bare minimum. [...] In all other cases, where there are normal human agents, they have the human rights equally and in full.”⁷⁰

As I see it, this is an implicit admission that the will theory approach is susceptible to the coma patient criticism and is consequently unable to live up to its universal ambitions.

Results of my Critical Review of Gewirth

According to my critical review of Gewirth, his theory of “agency” is unable to sufficiently refute the standard criticism against the will theory approach. Consequently, I offer that, in so far as Gewirth portrays it, the will theory approach does not provide a philosophically optimal justification of claims affirming the existence of universal human rights.

6.2.4 Seyla Benhabib

Systematization

Seyla Benhabib is an Adjunct Professor of Law at Yale Law School and the Eugene Meyer Professor of Political Science and Philosophy at Yale University.⁷¹ She critiques Gewirth’s theory of agency in saying,

“It is the weakness of all agent-centric accounts of human rights that they abstract from the social embeddedness of agency in such shared contexts of speech and action, and instead focus on the isolated agent as the privileged model for reasoning about rights.”⁷²

To confront this weakness, Benhabib develops her theory “from a view of the human agent as an individual embedded in contexts of communication as well as interaction.”⁷³ It is this *interactive* aspect of agency which comprises the core of Benhabib’s theory and distinguishes it from other theories of agency. Benhabib offers that this interactive aspect of agency, specifically that which is bound up with the minimum requirements for communication, is a universal human trait.

⁶⁹ Ibid. p. 243

⁷⁰ Ibid. p. 245

⁷¹ “Yale Law School | Seyla Benhabib.” (2017). *Web.archive.org*, accessed 22 May 2017, available at <<https://web.archive.org/web/20110222050647/http://www.law.yale.edu/faculty/SBenhabib.htm>>.

⁷² Benhabib, S. (2012). “Is There a Human Right to Democracy? Beyond Interventionism and Indifference.” p. 196

⁷³ Ibid. p. 196

“To have rights [...] means the capacity to initiate action and opinion to be shared by others through an interpretation of the very right claim itself.”⁷⁴

Benhabib asserts that human rights relate to our universal capacity for communicative freedom. Consequently, human rights are universal to the extent that they express and safeguard this universal capacity for communicative freedom. For example, the right to life, liberty, and personal security (UDHR, Article 3) is a universal human right because it is a necessary precondition for the universal capacity for communicative freedom.

Benhabib’s argument affirming the existence of universal human rights is similar to Gewirth’s in its reflexive nature. One cannot challenge the existence of universal human rights while relying on the very universal capacities – agency and/or communicative freedom – that inherently relate to human rights. To attempt this would be to commit a logical contradiction.

Benhabib’s work supports the claim that human beings uniformly share the same capacity for communicative freedom. This claim, in turn, supports the conclusion that there exist universal human rights because, according to Benhabib, they are directly related to the universal capacity for communicative freedom. The similarities between Gewirth’s and Benhabib’s theories have prompted me to systematize Benhabib’s theory of “communicative freedom” into my will theory approach ideal-type.

Critical Review

The Coma Patient Criticism

I find that Benhabib’s theory is just as susceptible to the coma patient criticism as Gewirth’s theory. Additionally, unlike in Gewirth’s case, my research has revealed no explicit attempt by Benhabib to address this criticism. Like with agency, the problem with claiming that universal human rights relate to communicative freedom is that not all people are capable of communicative freedom. Infants, any person who is asleep, or anyone who is suffering from schizophrenia, a coma, depression, or dementia may not be capable of genuine communicative freedom. Should these people be excluded from the attribution of human rights? Certainly not. And yet a strict reading of Benhabib’s theory would seem to imply that human rights ought to exist in a manner consistent with the capacity for communicative freedom. This would exclude an attribution of human rights to any individual incapable of communication, like a coma patient. Benhabib states that her theory of communicative freedom is an extension of the theory of agency.⁷⁵ We have already seen that Gewirth’s attempt to refute this critique results in an

⁷⁴ Ibid. p. 208

⁷⁵ Ibid. p. 196

implicit admission that the will theory approach is unable to live up to its universal ambitions and is susceptible to the coma patient criticism. If Benhabib's refutation is anything like Gewirth's, and I offer that it likely would be given the similarity of their theories, then Benhabib's theory would also have difficulty satisfactorily refuting this criticism.

Results of my Critical Review of Benhabib

According to my critical review of Benhabib, her theory of "communicative agency" is not sufficiently able to refute the standard criticism against the will theory approach. Consequently, I offer that, in so far as Benhabib portrays it, the will theory approach does not provide a philosophically optimal justification of claims affirming the existence of universal human rights.

7 DISCUSSION

The mission of the UN is to promote peace to all people. According to the UN Charter, the UDHR, the ICCPR, and the ICESCE, this mission is inherently correlated to claims affirming the existence of universal human rights. It would be considerably advantageous for the promotion of peace if these claims could be satisfactorily justified. This is not to say that the UN is incapable of engineering peacecraft without satisfactorily justifying these claims; however, a satisfactory justification of these claims would serve to further legitimize the UN's mission. In supporting the UN's mission, I find it desirable that the existence of universal human rights is as convincingly well-grounded as is conceivably possible. To this end, I have conducted my research in pursuit of the most philosophically optimal theory capable of satisfactorily justifying claims affirming the existence of universal human rights.

Thus far, this paper has presented and analyzed two schools of epistemic justification: the interests theory approach and the will theory approach. I have identified and operationalized the standard criticisms against benchmark texts representing each school. Neither school seemed able to refute all standard criticisms satisfactorily. Consequently, I have concluded that *neither school presents a philosophically optimal justification of claims affirming the existence of universal human rights*. What is to be done at this point? Should I accept the interests theory approach or the will theory approach despite the fact that neither school is philosophically optimal? Or should I accept that the overlapping consensus and the Judeo-Christian theocentric perspective provide tolerable alternatives despite their aforementioned partiality and selectivity? Should I perhaps admit that the utilitarian position is correct in asserting that only nonepistemic justifications of claims affirming the existence of universal human rights are possible?

Perhaps there is another option. One that has not yet been sufficiently explored within human rights discourse.

7.1 MacIntyre's Traditions

In 1988, the Scottish philosopher Alasdair MacIntyre introduced the notion that ideas evolve through periods of transformation called "traditions." MacIntyre defined a "tradition" as:

"[...] a conception according to which the standards of rational justification themselves emerge from and are part of a history in which they are vindicated by the way in which they transcend

the limitations of and provide remedies for the defects of their predecessors within the history of that same tradition.”⁷⁶

MacIntyre proposed that after ideas are born, they face new criticisms, and are adapted to refute these criticisms.⁷⁷ Each new evolution of an idea brings it into contact with new criticisms which spurs on even greater evolutions. Ideas that cannot be adapted to face criticism are abandoned in favor of less stagnant ideas.

My intention in introducing MacIntyre here is to offer that a case can be made for thinking of the interests theory approach and the will theory approach as the first two traditions of epistemic justification of claims affirming the existence of universal human rights.

This tentative chronology could be developed as follows: Gewirth introduced the will theory tradition in 1978. His theory of “agency” was received by academics who realized that it was susceptible to the coma patient criticism. Three years later, in 1981, Finnis developed the interests theory tradition to refute the coma patient criticism. Scholars realized that this tradition was susceptible to the universal accuracy criticism, the altruism criticism, and the freedom criticism. In 1997, Nussbaum attempted to evolve the interests theory tradition to refute its three criticisms. She was unable to satisfactorily achieve this. Then in 2012, Benhabib broke off from the tradition of interests theory and returned to the tradition of will theory.⁷⁸ She attempted to adapt it to refute the coma patient criticism. She was unable to satisfactorily achieve this. Today we are no further along in this attempt to develop a philosophically optimal justification of claims affirming the existence of universal human rights.

This narrative is perhaps more connect-the-dots than anything else. But in truth, it does not matter much which tradition came first, or that they may have evolved parallel. This is because, as concluded by my analysis, neither tradition seems capable of refuting the standard criticisms raised against it. According to MacIntyre’s framework, traditions that cannot be adequately adapted to refute the criticisms raised against them ought to be abandoned in favor of more viable options. It seems logical therefore to offer that a third tradition ought to be introduced in an attempt to refute the criticisms raised against both the interests theory approach and the will theory approach.

⁷⁶ Ibid. p. 7

⁷⁷ MacIntyre, A. (1988). *Whose justice? Which rationality?*, 1st ed. Notre Dame, Ind.: University of Notre Dame Press.

⁷⁸ The IEP supports the notion that the will theory approach was developed in response to the interests theory approach’s inability to account for human agency. See: Fagan, A. (2017). “Human Rights.”

Even without the framework of MacIntyre's traditions, it is evident that the significant criticisms raised against the interests theory approach and the will theory approach have yet to be satisfactorily refuted. If an epistemic justification of universal human rights exists that is either free of these criticisms or able to satisfactorily refute them, then it is certainly worth investigating.

7.2 Building a Third Tradition

In constructing my two ideal-types, I have established something of a blueprint for what is required of any epistemic attempt to justify claims affirming the existence of universal human rights. This blueprint consists of two stages: Stage 1) identify a need or capacity that all human beings uniformly share;⁷⁹ Stage 2) relate human rights to this need/capacity.

What will distinguish any third tradition from the previous two will be the content that it identifies in Stage 1. Thus far, my research has revealed that the interests theory approach and the will theory approach are not capable of adequately identifying a Stage 1 universal human need/capacity. This is due in part to how difficult it is to demonstrate that any *social or biological prerequisite for leading a minimally good life* or *capacity for freedom* is uniformly universal. What is required then, is the introduction of a new suggestion for a Stage 1 need/capacity that is as conceivably universal as human rights are intended to be.

In considering what this need/capacity could be, I consider the following thought experiment: I imagine myself in the future. I am standing before an advanced robot replica of myself. My personality has been downloaded and programmed into the robot's computer. As a result, the robot behaves like I would in any given circumstance. The robot replica of myself has been engineered to perfection such that even my closest friends and relatives would be unable to tell us apart. The robot has synthetic skin which feels real to the touch. It requires both food and sleep in order to function. It behaves in all of the ways that I normally would. The only difference is that the robot has been *programmed* to do these things and I have not. The robot does not *feel* its programming nor is it self-aware. Does this robot warrant an attribution of human rights? Apparently not. If I were to tear the robot apart, despite its programmed pleas of mercy, no violation of human rights would be incurred. However, if I were tortured and torn apart, despite my pleas of mercy, then a violation of my human rights would be incurred. Therefore, there must be some aspect that distinguishes the robot from

⁷⁹ "The philosophical justification for the human rights agenda is based on an identification of the needs and capacities common to all humans, whatever the differences between them." From: Beetham, D. (1995). *Human Rights and Democracy*, 1st ed. Leeds: Centre for Democratization Studies, University of Leeds.

myself; something that I have which the robot lacks; something that warrants the attribution of human rights.

I offer that this aspect is *subjectivity*. Subjectivity is defined in the Oxford Companion to Philosophy as, “pertaining to the subject and his or her particular perspective, feelings, beliefs, and desires.”⁸⁰ Thomas Nagel is a University Professor of Philosophy and Law Emeritus who teaches at New York University and specializes in the Philosophy of Mind. He defines conscious mental states as follows: “[...] an organism has conscious mental states if and only if there is *something that it is to be that organism*—something *it is like* for the organism. We may call this the subjective character of experience.”⁸¹ “Subjectivity [...] is phenomenological experience, or ‘what it’s like to be’ a certain conscious being (for example, a man, a woman, or a bat) [...]”⁸² I do not have time in this paper to go into detail regarding where to draw the line of definitions of subjective experience between, say, people, fetuses, animals, and so on. Suffice to say that for present purposes I will be settling for a rather broad and open conception of the term and limit my discussion to human beings. I will also use the terms “subjectivity”, “experience”, and “conscious mental states” interchangeably.

Where myself and the robot are concerned, I am conscious of experiencing subjective mental states. There is something that it is like to *be* me; I have a particular perspective, feelings, beliefs, and desires. The robot, on the other hand, is not conscious of experiencing subjective mental states. There is nothing that it is like to *be* the robot; it does not have any particular perspective, feelings, beliefs, or desires. It has programmed objectives and parameters for behavior but no subjective experience as such.⁸³

Let us imagine that the robot suddenly becomes conscious. That it is self-aware and yet unaware of its programming. There is now something that it is to *be* the robot; a subjective robot experience. If I were to deprive this robot of food, or not allow it to sleep, such that the robot felt like its feelings and desires were not being respected, then would I be treating this robot cruelly? If I were to rip this robot apart, and in so doing cause it to feel pain, would this act constitute a violation of the robot’s human rights? It would seem so. And yet the robot is

⁸⁰ Solomon, R. C. (2005). "Subjectivity." Published in: T. Honderich, *Oxford Companion to Philosophy*. Oxford University Press. p. 900

⁸¹ Nagel, T. (1974). “What Is It Like to Be a Bat?,” *The Philosophical Review*, vol. 83, no. 4, p. 435. (Emphasis added)

⁸² Ibid.

⁸³ As Nagel admits, “perhaps there could not actually be such robots. Perhaps anything complex enough to behave like a person would have experiences. But that, if true, is a fact which cannot be discovered merely by analyzing the concept of experience.” Quote from: Nagel, T. (1974). “What Is It Like to Be a Bat?,” p. 436, note 2

still a robot. It is still programmed. So, what has changed? Subjectivity was added to the equation. The addition of subjectivity seemed to suddenly warrant the attribution of human rights and generated questions regarding violations of human rights.

In attempting to offer that the capacity for subjective experience is shared uniformly between all human beings, I have encountered a well-established problem from the philosophy of mind; namely, the problem of “other minds,” which emphasizes how notoriously difficult it is to conceive of the existence of subjectivities beyond one’s own.⁸⁴ “Facts about conscious experience can be at best incompletely understood from an outside third person point of view [...]”⁸⁵ From this difficulty springs the bigger problem of ascribing experience to anything, or anyone, other than oneself.⁸⁶ If experiences are private, then how am I to know if anyone else has them?

To further illustrate this problem, consider the following: Imagine that I am sitting opposite you. You want to know if I have subjective experience or if I am a robot. You ask me to prove to you that I have subjective experience. Already with this task, the challenge cannot be completed. Confined as I am by natural parameters, I am *incapable of demonstrating the existence of my subjectivity* to you. I may talk about my experiences, try to describe them for you, or even express them via art. But you won’t be able to take this behavior as proof of my subjectivity. If I were a robot with sufficiently advance programming, I could be producing this behavior and still not have subjective experience. Therefore, patterns of behavior cannot confirm the existence of conscious mental states. The only way that I could *prove* to you that I have subjective experience would be to take your first-person perspective into my subjectivity and share that experience with you directly. The task of directly sharing first-person experience is something that human beings are ultimately and principally incapable of doing.

Nagel attempts to address this problem by offering that it is possible to have “[...] rich external evidence of conscious inner life, but only limited application of our own mental concepts—mostly general ones—to describe it.”⁸⁷ In other words, one should be able to use

⁸⁴ Nagel, T. (1986). *The View from Nowhere*, 1st ed. Oxford: Oxford University Press. Ch. II Section. 3 “Other Minds,” pp. 13-25

⁸⁵ Van Gulick, R. (2017). “Consciousness,” *Plato.stanford.edu.*, accessed 12 May 2017, available at <<https://plato.stanford.edu/archives/sum2017/entries/consciousness/>>.

⁸⁶ Solipsism presents a somewhat stronger version of this account by claiming that there exist no thoughts, experiences, and emotions other than my own. It does more than just present the possibility that I am the only conscious being; it asserts this. I do not need to go as far as this to make my point and so I shall limit my account of solipsism to the above. For more regarding Solipsism see: Thornton, S. (2017). “Solipsism and The Problem of Other Minds.” *Iep.utm.edu.*, accessed 8 May 2017, available at <<http://www.iep.utm.edu/solipsis/>>.

⁸⁷ Nagel, T. (1986). *The View from Nowhere*, p. 23

evidence, either in the form of behavior or in the form of technology like a brain scan, to justify the belief that an organism is conscious, even if one cannot perceive the content of that being's subjective experience. This would account for why Nagel claims that we can justifiably think that there is some minimal perspectival subjectivity in the mental lives of other species despite not knowing "what it is or even how to think about it."⁸⁸

I disagree with Nagel on this point. How can one possibly gain justifiable belief of the existence of an internal private first-person mental state via external "evidence"? What possible externality could provide proof in support of the existence of conscious mental states? I have previously established in my robot thought experiment that behavior does not suffice as proof of subjectivity. What evidence is Nagel relying on when he claims that he has justified belief in the existence of the subjectivity of other beings? Nagel seems to be relying on the capacity of his imagination to extrapolate his subjective experience onto these beings.

"To think in this way we use not a faculty of external representation, but a general idea of subjective points of view, of which we *imagine* a particular instance and a particular form. [...] All that is involved in the external conception of mind is the *imaginative* use of this point of view—a use that is partly present in the memory and expectation of one's own experiences."⁸⁹

Nagel seems to be claiming that because I know that I am conscious and that I have certain behaviors that relate loosely to my mental states, that I can infer or at least imagine, from seeing those same behaviors portrayed by other people, that they too are conscious. I offer that this justification is insufficient for claiming that the problem of "other minds" has been satisfactorily dealt with. Naturally, I can imagine that a robot is conscious but this does not *render* the robot conscious nor does it provide any further evidence for believing that the robot is conscious. All I am doing here is imagining that the robot is conscious of mental states like mine. But this does not do anything to describe the robot's subjectivity. It is only a description of my subjectivity. What Nagel has provided here is an educated assumption based on the evidence of his experience. But the problem of "other minds" is that one's experience does not allow one to confirm the existence of other subjectivities. I cannot *directly perceive* your thoughts and feelings and, therefore, I cannot justifiably think one way or another that you have any. Nagel's imaginative solution seems to me to be clearly deficient in the face of this problem.

Recall that any epistemic attempt to justify claims affirming the existence of universal human rights must: identify a need/capacity that all human beings uniformly have in common

⁸⁸ Ibid. p. 21

⁸⁹ Ibid. pp. 20-21 (Emphasis added).

(Stage 1), and relate human rights to this need/capacity (Stage 2). In attempting to offer new Stage 1 content, I *would* say that the presence of subjectivity – of having particular feelings, beliefs, and desires – is a capacity that all human beings uniformly have in common. In attempting to offer new Stage 2 content, I *would* say that human rights relate uniformly to this capacity for all people because human rights are designed to ensure that no single individual is dehumanized to the point that they are treated as though they lack conscious mental states. I *would* conclude that universal human rights exist to the extent that subjectivity exists. I *would* claim all of this *but*, as illustrated by the “other minds” problem and the discussion above, I *cannot claim with absolute certainty that any subjectivities besides my own exist*. Therefore, I am forced to rephrase my suggestion of a third tradition to account for the problem of “other minds”.

7.3 Offering a Tentative Third Tradition

I understand that I am conscious of my mental states. I further understand that I am entirely unable to share my experience of subjectivity with any other being. I cannot directly share my thoughts and feelings. I must rely on a crude attempt to express them through the medium of physical behavior if I want to convey them. However, this same expressive behavior can be produced by machines, which I will assume for present purposes lack conscious mental states. Therefore, behavior offers only insufficient evidence of consciousness; it cannot be taken as proof of consciousness. In effect, the problem of “other minds” is introduced. What evidence can I possibly attain for the existence of subjectivities besides my own? The very problem of “other minds” proposes that there exists no possible evidence that can confirm the existence of subjectivities besides my own.

The problem of “other minds” has a silver lining. Because there is no possible evidence that could prove the existence of subjectivities besides my own, there is likewise no evidence that can be attained which would confirm that there definitively *do not exist* any subjectivities besides my own. The existence of other minds cannot be proven and consequently it also cannot be disproven.

Because I cannot directly prove the existence of my thoughts and feelings to other potentially subjective beings, I must acknowledge that it may be possible that other subjective beings face the same predicament with regards to myself. Therefore, I have *no reason not to think* that all people are conscious of personal mental states and are, like me, incapable of directly demonstrating them and proving their existence. Consequently, I have *no reason not to act* as though all people are universally equal in their possession of personal and private

subjectivity. In fact, I *must* adopt this approach. If I do not then I could potentially deny subjectivity to some subjective being and treat them inaccurately and unjustly as though they are an unconscious robot.

Granted, to deny subjectivity to any being would not directly harm me; however, every instance of subjectivity denial introduces and increases the likelihood that I may in future be denied acknowledgment of my own subjectivity; that I myself may be treated as though I lack any perspective, feelings, beliefs, or desires. I understand this because just as I cannot confirm the subjectivity of other beings, I must assume that, if there exist other subjectivities, *they will not be able to confirm my subjectivity*. Having understood this, I further understand that I have neither a moral nor an epistemic right to think that I am a privileged subjective being, i.e. that I am either the only person with subjectivity or one of a select group of individuals with subjectivity. Therefore, I cannot have justifiable moral or epistemic reasons for *treating any individual as though they lack subjectivity*. Consequently, I must treat all individuals as though they are subjective despite my inability to verify that they are.

An epistemic justification of human rights based on the insuperable “other minds” problem would be characterized by the following three affirmations and objectives regarding universal human rights:

- 1) Universal human rights affirm and defend the claim that no person is capable of demonstrating the existence of their subjectivity and that no person is capable of confirming the existence of the subjectivity of any other person.
- 2) Universal human rights affirm and defend the right of each individual to be the *sole* representative of their subjectivity because no other individual could possibly have justifiable epistemic grounds for assuming this role.
- 3) Consequently from 1 and 2 it follows that universal human rights affirm the duty of all individuals to refrain from claiming to perceive or apprehend the content of any subjectivity that is not directly their own.

From this point forward, I will refer to the foregoing three affirmations and objectives regarding universal human rights by the term “the sovereignty of subjectivity.” I use the term “sovereignty” here in the same sense as “state sovereignty” from international relations nomenclature. The term “state sovereignty” means that a state has supreme authority within its own territory. Consequently, foreign states have a reciprocal duty to respect the supreme

authority of a state within its own territory.⁹⁰ In much the same way, I intend my epistemic implementation of “sovereignty” with regards to subjectivity to mean that the individual has a right to be the sole representative of their subjectivity and that consequently all other individuals have a reciprocal duty to respect the right of the individual to be the sole representative of their subjectivity. As I have mentioned before, this duty includes, but is not limited to, refraining from claiming to perceive or apprehend the content of any perspective, feeling, desire, or belief that is not one’s own.

It is important to mention a significant distinction between these two definitions. The definition of state sovereignty identifies the state as the *supreme* authority within its territory. This implies that it is possible that there are other authorities besides the state operating within its territory but that the state is the supreme authority among them. My definition of the sovereignty of subjectivity identifies that, as a result of the insuperable problem of “other minds”, the individual is necessarily the *only possible authority* that can exist within the territory of personal perspective, feelings, desires, and beliefs. Therefore, no person can have justifiable epistemic grounds for claiming to perceive or apprehend the content of any perspective, feeling, desire, or belief that is not their own. This includes claiming to perceive or apprehend the content of any perspective, feeling, desire, or belief that is attributed to a collective.

An international human rights paradigm founded on the sovereignty of subjectivity would exist to ensure that no individual would have their subjectivity potentially denied nor that they would potentially deny the subjectivity of another. This universal and fundamental standard of treatment would necessarily transcend families, communities, states, religions, ethnicities, economic classes, cultures, capabilities, nations, and time. It would be as universal as the “other minds” problem is insuperable.

In this way, I imagine that human rights would function similarly to how Dworkin describes:

“Individual rights are political trumps held by individuals. Individuals have rights when, for some reason, a collective goal is not a sufficient justification for denying them what they wish, as individuals, to have or to do, or not a sufficient justification for imposing some loss or injury upon them.”⁹¹

⁹⁰ Philpott, D. (2017). “Sovereignty,” *Plato.stanford.edu*, accessed 19 May 2017, available at <<https://plato.stanford.edu/entries/sovereignty/#1>>.

⁹¹ Dworkin, R. (1977). *Taking Rights Seriously*. Cambridge: Harvard University Press. p. xi

Human rights, when justified by the sovereignty of subjectivity would ensure that every individual is guaranteed the bare minimum threshold of expressive behavior necessary to convey their subjectivity such that they may operate freely based on the content of their own conscious mental states and without inhibiting any other individual's ability to do the same. This fundamental threshold of treatment would trump any execution of loss or injury upon any individual in the name of collective goals in the utilitarian sense.

Recall the blueprint for what is required of any epistemic attempt to justify claims affirming the existence of universal human rights: Stage 1) identify a need or capacity that all human beings uniformly share; Stage 2) relate human rights to this need/capacity. I will now express the sovereignty of subjectivity in the form of this blueprint. According to the sovereignty of subjectivity: Stage 1) all human beings uniformly share an inability to demonstrate the existence of their own subjectivity or to confirm the existence of the subjectivity of any other person; Stage 2) human rights ensure that every individual is guaranteed the bare minimum threshold of expressive behavior necessary to express their subjectivity such that they can operate freely in their own conscious mental states and according to its content without inhibiting any other individual's ability to do the same. According to the sovereignty of subjectivity approach, universal human rights exist to the same extent that the existence of other minds cannot be disproven. A human rights paradigm, based in the sovereignty of subjectivity approach, would be undeniable and universal common ground for cooperation and respect on any level ranging from inter-personal to inter-national.

From the above it follows that the purpose of specific universal human rights would be either to 1) express the universal human inability to demonstrate/confirm subjectivity, or to 2) safeguard the bare minimum threshold of expressive behavior necessary to convey subjectivity. Practically, the sovereignty of subjectivity would relate to the content of the UDHR in the following ways: the right to equality (UDHR, Article 1) would be the right to be treated equally as a subjective entity *despite* being incapable of demonstrating/confirming subjectivity; the freedom from discrimination (UDHR, Article 2) would be the freedom from having the existence of your subjectivity denied; the right to life, liberty, and personal security (UDHR, Article 3) would all be necessary preconditions for maintaining the bare minimum threshold of expressive behavior necessary to express subjectivity; freedom from slavery (UDHR, Article 4) would be a necessary precondition for maintaining the bare minimum threshold of expressive behavior necessary to express subjectivity; the freedom from torture and degrading treatment (UDHR, Article 5) would be a necessary precondition for maintaining the bare minimum

threshold of expressive behavior necessary to express subjectivity; the freedom of thought, conscience and religion (UDHR, Article 18) would acknowledge the universal human incapability to demonstrate/confirm subjectivity; the freedom of opinion and expression (UDHR, Article 19) would be a necessary precondition for maintaining the bare minimum threshold of expressive behavior necessary to express subjectivity; the right to peaceful assembly and association (Article 20) would be a necessary precondition for maintaining the bare minimum threshold of expressive behavior.

7.4 Critical Review of the Sovereignty of Subjectivity Approach

Having tentatively established the sovereignty of subjectivity approach, I will subject this theory to the same standard criticisms raised against the interests theory approach and the will theory approach. Should the sovereignty of subjectivity approach prove capable of refuting all of these criticisms, then I will conclude that it could potentially serve as a philosophically optimal justification of claims affirming the existence of universal human rights.

7.4.1 The Universal Accuracy Criticism

The universal accuracy criticism charges a theory with being unable to account for why any individual or collective should be capable, from the empirical data of their personal lives, of accurately identifying universal traits. In the interests theory approach, Finnis relied on the limits of his reasoning as evidence that he had developed an exhaustive list of “basic forms of human good.” I think that this justification would have been difficult to support in the face of post-colonialism. Nussbaum may have realized this. If so, then this would account for why she implicitly states that her list of “capabilities” is not meant to be exhaustive. But if it is not exhaustive then why should it be considered universal? I found it difficult to justifiably think that it was.

I offer that the sovereignty of subjectivity approach is fully conscious of the inherent difficulty of extrapolating the content of one’s conscious experience to that of other individuals. Indeed, the sovereignty of subjectivity approach is designed based on this incapability. The universal accuracy criticism is relevant for the interests theory approach because it is demonstrably possible to show that specific social and biological prerequisites for leading a minimally good life are not necessarily universal. At the very least it is conceivable that the definition of well-being held by Finnis and Nussbaum is not universally held by every single person in the same way.

This is not the case with the sovereignty of subjectivity approach. This approach establishes that it is inconceivable that any person could ever be in an epistemic position vis a

vis other human beings such that they could 1) know that another human being is void of subjectivity, or 2) perceive the thoughts and feelings of another person from their subjective perspective. Unlike the interests theory approach, the sovereignty of subjectivity approach offers a claim that is conceivably universal in its accuracy. I offer, therefore, that, based on this critical review, the sovereignty of subjectivity approach sufficiently refutes the universal accuracy criticism.

7.4.2 The Altruism Criticism

The altruism criticism charges a theory with being unable to account for why any individual would care whether a stranger is having their human rights maintained or violated. This criticism was especially relevant for the interests theory approach given that social and biological prerequisites for leading a minimally good life were relevant only for one's own state of being. The extent to which others had acquired these prerequisites does not immediately inform on one's own ability to lead a good life.

According to my earlier critical review, Finnis' theory was able to sufficiently refute this criticism by claiming that the very foundations of his epistemic justification were inconsistent with any incarnation of the "basic forms of human good" that was not in itself altruistic. Where altruism was absent so too was Finnis' conception of universal human rights. I concluded that this was a sufficient refutation against the altruism criticism. Nussbaum, on the other hand, had designed her "capabilities" theory to function as a surveying tool. As a result, her presentation was absent of normative claims. "Capabilities [...] do *not* by themselves tell us whether we *should* value an equal distribution or some other distribution [of resources]." ⁹² The responsibility for universal altruism here falls to the human rights themselves and not to the epistemic justification for human rights. I concluded that this was not a sufficient refutation of the altruism criticism.

Where the sovereignty of subjectivity approach is concerned, I do not think that this criticism is particularly relevant. Within the sovereignty of subjectivity approach, *the treatment that one wishes for oneself is exactly the treatment that one should apply to others accounting necessarily for instances where said treatment is inconsistent with the potential subjectivity of any and all parties involved*. Therefore, the more that other's human rights are maintained with regard to their own potential subjectivity, the greater chance that my own will be similarly acknowledged and respected. The impact of universal human rights as they relate to the

⁹² Nussbaum, M. (1997). "Capabilities and Human Rights." p. 280 (Emphasis added)

universal inability to demonstrate/confirm subjectivity is something that is either relevant or irrelevant for all human beings all at once and in all circumstances.⁹³ The altruism criticism receives its power, so to speak, when a case can be made for the application of human rights only to select individuals, leaving the onus of responsibility for the spread of human rights to these empowered individuals. Altruism itself is built into the sovereignty of subjectivity approach. As such, I conclude that the sovereignty of subjectivity approach satisfactorily refutes the altruism criticism.

7.4.3 The Freedom Criticism

The freedom criticism charges a theory with being unable to account for why the act of exercising freedom would be moral in and of itself and not in the service of achieving universal interests.

In both Finnis' and Nussbaum's cases, the exercise of freedom alone is not sufficient to generate a moral bearing. Both theories determine that the capacity to exercise freedom is morally subordinate to a predetermined list of either "basic forms of human good" or "capabilities." Therefore, neither theory can account for why the act of exercising freedom would be moral in and of itself and not in the service of achieving universal interests.

I offer that this criticism is only partially relevant for the sovereignty of subjectivity approach. To a certain degree the sovereignty of subjectivity approach makes moral claims regarding behavior based on a predetermined framework of morality that either denies potential subjectivity or affirms potential subjectivity. How one behaves is seen herein to be either moral, if it affirms potential subjectivity, or immoral if it denies potential subjectivity. However, the whole content of the sovereignty of subjectivity approach is designed to encourage the freedom to act based on perspectives, feelings, desires, and beliefs. In this way, the theory does not equate people with automatons. Instead, it endows each individual with the sole right of representation regarding the content of their personal subjectivity (even if expression cannot confirm the existence of subjectivity). The subtle guidelines that the sovereignty of subjectivity approach places on freedom, such that any expression should not clash with any other individual's ability to express their perspectives, feelings, desires, and beliefs, does not, I offer,

⁹³ This formulation of the subjectivity approach seems strikingly similar to the First Formulation of Kant's Categorical Imperative, which states that one ought to, "Act only according to that maxim whereby you can at the same time will that it should become a universal law." I offer that a case could be made for considering the sovereignty of subjectivity approach as a practical tool to evaluate whether or not any given interpersonal interaction or behavior is in alignment with this First Formulation. For more on the Categorical Imperative see: Kant, I. (1993) [1785]. *Grounding for the Metaphysics of Morals*. Translated by Ellington, James W. (3rd ed.). Hackett. p. 30

render the sovereignty of subjectivity approach fatally vulnerable to the freedom criticism. It still, in all other regards, promotes the exercise of freedom as morally good in and of itself because this exercise is the only way that one can act based on the content of one's perspective, feelings, desires, and beliefs. I, therefore, conclude that the sovereignty of subjectivity approach satisfactorily refutes the freedom criticism.

7.4.4 The Coma Patient Criticism

The coma patient criticism charges a theory with not accounting for the likes of individuals who are either infants, asleep, in a coma, or diagnosed with dementia, depression, or schizophrenia such that they do not exhibit behavior consistent with the full range of the capacity for freedom.

When pressed, Gewirth acknowledges that the human rights of a normally functioning individual would have to be prioritized before those of a coma patient. As I see it, this is an implicit admission that the will theory approach is unable to live up to its universal ambitions and therein cannot sufficiently refute the coma patient criticism. As far as my critical review of Benhabib concluded, her theory offers no such attempt to refute this criticism. But considering the similarities between her theory and Gewirth's, I offer that a case can successfully be made claiming that her attempt would also result in a similar implicit or explicit admission.

In refutation of this criticism, the sovereignty of subjectivity approach offers that no individual could conceivably be excluded from the attribution of universal human rights as a result of their behavior because behavior cannot be taken as proof of subjectivity or as proof of the absence of subjectivity. I, therefore, conclude that the sovereignty of subjectivity approach satisfactorily refutes the coma patient criticism.

7.4.5 Results of my Critical Review of the Sovereignty of Subjectivity Approach

Based on the foregoing, I offer that the sovereignty of subjectivity approach is able to sufficiently refute the universal accuracy criticism, the altruism criticism, the freedom criticism, and the coma patient criticism. It, therefore, improves upon the traditions of the interests theory approach and the will theory approach in terms of credibility. This makes it a more philosophically optimal justification of claims affirming the existence of universal human rights than either the interests theory approach or the will theory approach. Consequently, it is a good candidate for a third tradition and a good candidate for an optimal justification of claims affirming the existence of universal human rights.

As I mentioned previously, I do not think that the success of the UN's peacecraft hangs on justifying the existence of universal human rights; however, a satisfactory explanation on

this account could further legitimize the UN's work. To this end, I have attempted to offer a justification that is as convincingly well-grounded as is conceivably possible. I have termed this tradition the sovereignty of subjectivity approach. In answer to my research question, I offer that the sovereignty of subjectivity approach is capable of providing a philosophically optimal justification of claims affirming the existence of universal human rights because it is a universally applicable justification of the existence of universal human rights that is epistemic, free from circular reasoning, and, at this point, satisfactorily able to refute all significant external criticism.

8 CONCLUSION

“While much has been achieved in [...] the United Nations, one should not underestimate the enormity of the challenge that remains ahead.”⁹⁴ It is my hope that the contribution of this research may serve to further legitimize the mission of the UN to engineer international peacecraft.

I have conducted a systematic text analysis followed by a critically reviewing text analysis upon benchmark texts representing two epistemic theories justifying claims affirming the existence of universal human rights. I have evaluated these theories to see which was most philosophically optimal. I systematized my benchmark texts into my ideal-types and critically reviewed their content via idea-analysis. The idea-analysis revealed that both epistemic theories were significantly vulnerable to criticism.

With MacIntyre as my guide, I considered if perhaps a third tradition would not be more capable of refuting criticism and in so doing providing a more optimal justification of claims affirming the existence of universal human rights. In constructing a third tradition, I encountered the insuperable problem of “other minds”. The sovereignty of subjectivity approach that I developed from this problem seems more capable than either the interests theory approach or the will theory approach of refuting the standard criticisms raised against them. In considering this, I am left to conclude that the sovereignty of subjectivity approach is more capable than either the interests theory approach or the will theory approach of providing a philosophically optimal justification of claims affirming the existence of universal human rights. A human rights doctrine grounded in this theory could potentially legitimize the peacecraft of the UN in a way that has yet to be seen. I offer that such an increase in legitimacy would be to the benefit of all people and ought to be considered with care.

⁹⁴ Ramcharan, B. (2004). “Human rights and human security.” Published in: *Disarmament Forum*. UNIDIR/DF/2004/1 United Nations, Geneva. p. 41

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