

Unnatural Rights

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I was in bondage in Missouri, too. I can't say that my treatment was bad. In one respect I say it was not bad, but in another I consider it was as bad as could be. I was a slave. That covers it all. I had not the rights of a man.¹

It cannot be too often repeated: peasants and workmen have no natural rights, not one. Only we ought instantly to add, that kings and nobles have none either.²

I

A central tenet of normative political philosophy is that individuals possess certain rights independently of whether they have been implemented into custom, positive law, or otherwise socially recognized, maintained, and enforced. These rights, variously referred to as 'rights of man,' 'natural rights,' 'human rights,' and 'moral rights' are taken to mark the scope and limits of political authority and to provide a normative basis for criticizing social practices, institutions, and individual conduct. These terms can be used interchangeably if we simply mean rights whose existence are not the product of human design but ones that

1 Benjamin Miller, an ex-slave in a Freedman's Inquiry Commission interview, cited in *Slave Testimony*, John W. Blassingame, ed. (Baton Rouge: Louisiana State University Press 1977), 439.

2 Matthew Arnold, *Mixed Essays, Irish Essays and Others* (New York: Macmillan & Co. 1883), 36

subjects possess merely in virtue of their natures.³ According to the orthodoxy, these rights are taken to differ from legal and other conventional rights whose existence is not tied to the nature of subjects but are instead products of human design. In defending the thesis that moral rights are a species of *unnatural* rights I am rejecting the conventional wisdom that subjects possess moral rights merely in virtue of their natures.⁴ My objective is not to deny that subjects possess moral rights. Rather it is to propose and defend an alternative account of what possessing these rights comes to. What is distinctive about this account, which I shall refer to as ‘rights externalism,’ is that it assigns certain social practices an essential role in grounding moral rights.

3 Of course one can deny that moral rights are products of human design without also holding that such rights stem from the ‘nature’ of subjects. For instance, one can deny that they are products of human design and hold instead that possessing them is merely a matter of having a morally valid claim to act or be treated in a certain way. For an articulation of this view, see Joel Feinberg, ‘The Nature and Value of Rights,’ reprinted in his *Rights, Justice, and the Bounds of Liberty* (Princeton: Princeton University Press 1980) 143-55.

4 No doubt some readers will find the thesis that moral rights are a species of unnatural rights shocking. But once we see that worlds without natural rights would not be morally impoverished, that there are serious drawbacks to the orthodox view, and that imposing a social constraint on moral rights possession has certain virtues, this thesis will be rendered much less shocking. Though in the end some readers may still believe that this thesis is false (despite the fact that they would be hard-pressed to defend this claim), rendering it less shocking would be a substantial victory. For this would be enough to force us to reconsider the central role that we have assigned to natural rights in normative political philosophy as well as in our everyday practices of guiding, justifying, and criticizing human conduct. Furthermore, it would make us more amenable to the recent suggestion that the demise of natural rights may ultimately result in a more ideal democracy — where serious argument and debate take the place of bald rights assertions — which would certainly be ironic in the United States of America given that this country, hailed by many as the greatest democracy in history, was founded upon natural rights. See, for example, Michael P. Zuckert, *The Natural Rights Republic: Studies in the Foundation of the American Political Tradition* (Notre Dame: University of Notre Dame Press 1996). With respect to the limitations of natural rights thinking within a democratic regime, I am sympathetic to some of the criticisms raised by Mary Ann Glendon, *Rights Talk: The Impoverishment of Political Discourse* (New York: The Free Press 1991), ch. 7. I cannot substantiate this comprehensive case for rethinking the source and value of moral rights in a single essay. So I shall settle for articulating and defending my alternative position. Elsewhere I argue that worlds without natural rights would not be morally impoverished, Derrick Darby, ‘Are Worlds Without Natural Rights Morally Impoverished?’ *The Southern Journal of Philosophy* 37 (1999) 397-417, and I identify a virtue of a socially oriented conception of moral rights possession in Darby, ‘Two Conceptions of Rights Possession,’ *Social Theory and Practice* 27 (2001) 387-417.

According to a weak interpretation to say that certain social practices play an essential role in grounding moral rights is merely to say that we cannot effectively enjoy the moral rights that we already possess independently of these practices unless they are in place. On this interpretation the relevant social practices are necessary for the exercise or enjoyment of moral rights though not for their existence or possession. According to a strong interpretation the relevant social practices are not merely essential for the exercise or enjoyment of moral rights; moreover, they are essential for the very existence or possession of moral rights. Were these social practices not to obtain subjects who merely had morally valid claims to act or be treated in a certain way would not possess moral *rights*, though they would indeed possess morally valid *claims*. The point is that more than moral validity is required to convert a claim into a right. Insofar as I embrace the strong interpretation I contend that there is a conceptual connection between moral rights possession and the instantiation of certain social practice conditions that include the authoritative social recognition and enforcement of morally valid claims. Thus the unnatural rights thesis is that social practices play an essential role in grounding moral rights in this strong sense.

The natural/unnatural rights dichotomy would not serve us well if facts about a subject's nature played a necessary though not sufficient role in grounding moral rights. It is certainly plausible to think that facts such as whether a subject can reason, think, or suffer will play some role in grounding these rights. While I concede that these ontological considerations do indeed have a role to play, I shall propose that they do not play a *constitutive* role in grounding moral rights. More precisely, the mere fact that a subject has these traits does not justify concluding that the subject possesses moral rights. Alternatively, I shall propose that these traits play a *practical* role in grounding moral rights (SVII). They serve as considerations for (or against) affording a subject the social standing or respect that is necessary for making it a moral rightholder. So, for instance, the mere fact that a subject can reason or suffer could indeed justify concluding that the subject ought to possess a moral right to be left alone or assisted in some way. In this case the fact that the subject can reason or suffer would be a consideration for affording it the social standing that is necessary for making it a rightholder. From this vantage point these ontological traits (facts about how the subject is constituted) play a practical and not a constitutive role in grounding moral rights.⁵ Hence insofar as I deny that facts about a subject's nature

5 I suspect that one could not give the kind of account I offer in this paper — one which imposes a social constraint on moral rights possession — without also

play a constitutive role in grounding moral rights, the natural/unnatural rights dichotomy is quite apt.⁶

II A Political Justification for Rights Externalism

While the critical value of natural rights is undoubtedly their greatest source of appeal, some critics have argued that believing in them is too costly. For example, Jeremy Bentham, one of the most influential critics of natural rights, held that the postulation of such rights was both logically absurd and morally pernicious.⁷ For Bentham, neither God, nor natural law, nor rational nature as such, was the source of rights. On the contrary he held that all *bona fide* rights are products of positive law.⁸ Were we to accept this constraint we could pursue the extreme option of denying that moral rights (as opposed to merely conventional rights) are *bona fide* rights insofar as they are not products of positive law, or we could pursue the less extreme and more attractive option of rethinking what possessing moral rights must amount to if they are to satisfy this constraint. Because I favor this latter strategy I shall take a slight modification of Bentham's constraint as my point of departure with an eye toward developing and defending a conception that assigns certain social practices an essential role in grounding moral rights. A conse-

rethinking the role of these ontological traits. But I will not argue that my proposal is the only plausible one.

- 6 And as for the connotation of the phrase 'human rights,' which seems to carry with it the idea that human beings possess certain rights merely in virtue of being human, on the view that I shall develop we can still construe these as rights that all human beings are taken to possess, though we cannot say that they possess these rights simply in virtue of their humanity (or simply in virtue of some other feature of their constitution). If we said this, the natural/unnatural rights dichotomy would not be apt.
- 7 *The Works of Jeremy Bentham*, John Bowring, ed. (Edinburgh: William Tait 1843), Vol. III, 221. For illuminating reconstructions of Bentham's critique of natural rights, see H.L.A. Hart, *Essays on Bentham: Studies in Jurisprudence and Political Theory* (Oxford: Clarendon Press 1982), ch. 4; John Deigh, 'Rights and the Authority of Law,' *The University of Chicago Law Review* 51 (1984) 668-99; and L.W. Sumner, *The Moral Foundation of Rights* (Oxford: Clarendon Press 1987), ch. 4.
- 8 *Works* III, 221. Several commentators on Bentham's work have rightly pointed out that this view is too strong, since non-legal conventional practices can also give rise to rights that are not natural. For instance, see Hart, *Essays on Bentham*, 84 and Sumner, *The Moral Foundation of Rights*, 113. My modification of Bentham's constraint will reflect this insight.

quence of the thesis that moral rights are a species of unnatural rights is that possessing moral rights is similar to possessing legal and other conventional rights in that social practices play an essential role in grounding them as well. But this raises the question, 'Why should we impose a social constraint on moral rights possession in the first place?' In this section I shall briefly develop a political justification for imposing a social constraint on moral rights possession.

From the earliest defenders of natural rights during the American War of Independence with Great Britain, to those who appropriated natural rights to criticize chattel slavery and the subordination of women in the United States of America, and, most recently, to those who have marshaled them to protect animals and the natural environment, as well as those who have used them to justify intervention into the domestic affairs of sovereign nations, natural rights (and its modern progeny) have been used to condemn various forms of oppression. They have served this function by providing social actors with a powerful standard for criticizing — as morally wrong or unjust — the conduct of governments and individuals. Hence, a general justification, and arguably the primary justification, for postulating a class of rights that exist prior to or independently of human invention has been a political one, namely that doing so is politically instrumental for condemning, as immoral or unjust, oppressive social practices and institutions. Although embracing a theory of rights for a political reason may not be the best reason for doing so, nor should it be our only reason for doing so, it has been and continues to be a primary reason for allegiance to the doctrine of natural rights.

Rather than take issue with the adequacy of embracing a conceptual analysis for political reasons, in what follows I shall offer a political justification for imposing a social constraint on moral rights possession. To develop this justification I will begin with a brief summary of a general critique of rights discourse championed most recently by some critical legal studies scholars. The basis of this critique, which I shall refer

9 Although many philosophers may believe that we should embrace a conceptual thesis or philosophical theory only if it is true and can be demonstrated to be true, it is certainly not unusual for political reasons to motivate theory selection. For instance, it has been recently argued that Kant's egalitarian moral philosophy provides better resources for social change that brings about the full recognition of women as moral and political equals, which gives feminists a reason to prefer it over a theory that gives feeling a prominent and positive role. See Marcia Baron, 'Kantian Ethics and Claims of Detachment,' in *Feminist Interpretations of Immanuel Kant*, Robin May Schott, ed. (University Park: The Pennsylvania State University Press 1997), 148.

to this as the 'legitimation critique of rights,' is that rights discourse is ideological insofar as appeals to rights often serve to legitimize oppressive social arrangements and institutions.¹⁰ Drawing inspiration from critical social theory these critical legal studies scholars presume that by making agents aware of both the fact and causes of their oppression, critical theories endeavor to free agents from the grip of self-imposed oppression and place them in a position to positively transform social or legal arrangements. While all oppression is backed by coercion, the most devastating forms of oppression are supported by both external and self-imposed coercion. The former is when external force or the threat of external force is used to sustain oppressive social or legal arrangements. Though critical theories are clearly concerned with external coercion, they take self-imposed coercion to be more pernicious. For one, as a form of mental bondage, self-imposed coercion usually goes undetected and, as a result, it is more difficult to free oneself from chains that one cannot see. Secondly, although we can imagine brute force being sufficient to maintain systems of domination, because external coercion is arguably easier to sustain if self-imposed coercion is widespread and effective, freedom from mental bondage is crucial to gaining freedom from physical bondage. Thus critical theories are especially concerned with emancipating agents from mental bondage by making them aware of the way in which they actively participate in their own oppression by accepting forms of consciousness that legitimate existing social or legal arrangements which favor the dominate classes.

According to critical theorists, exposing forms of consciousness as ideological is a crucial step in the direction of enlightenment and emancipation since progressive social or legal transformation of society and ideological critique go hand and hand. Suppose that a form of consciousness is narrowly understood as a particular constellation of beliefs having certain distinctive properties: (1) they are widely shared; (2) they are systematically connected; (3) they strongly influence agents' behavior; and (4) their content is usually about central human issues, for example, human nature, society, politics, law, economics, ethics, and religion. Although forms of consciousness are not inherently problematic, to call a form of consciousness ideological in a pejorative sense is to disparage it, to indicate that it is something to be exposed, rejected, and

10 For well-developed versions of this critique, see Karl Klare, 'Labor Law as Ideology: Toward a New Historiography of Collective Bargaining Law,' *Industrial Relations Law Journal* 4 (1981) 450-82, and Peter Gabel, 'The Phenomenology of Rights-Consciousness and the Pact of the Withdrawn Selves,' *Texas Law Review* 62 (1984) 1563-99.

overcome. One of the ways in which a form of consciousness can be ideological in a pejorative sense is by legitimizing reprehensible social or legal arrangements, institutions, or practices. For purposes of this discussion I shall use the term 'ideology' to refer to forms of consciousness that serve this very specific function.¹¹

Some critical legal studies scholars claim that rights consciousness is ideological in a pejorative sense. Very roughly, this is to say that rights consciousness is part of a particular constellation of beliefs about law, rights, and the nature and limits of interactions between individuals, and between individuals and the state, that are widely shared, systematically connected, action-guiding, and that function to legitimize reprehensible social and legal practices. They contend that rights consciousness has legitimized oppressive social and legal arrangements in at least two ways: first, by moralizing them, in other words, by representing them as just, fair, or moral, and thereby suggesting that agents should accept the existing status quo out of a sense of justice or out of respect for morality. Hence one way to encourage people to consent to their own oppression, or to discourage them from resisting oppression, is to appeal to their moral sensibilities. Rights consciousness, which presents the appearance that things are as they are as a matter of right or justice, is taken to be well suited for this task. Rights consciousness also legitimizes oppressive social and legal arrangements by *reification*, for instance, by representing them as natural and inevitable.¹² Rights consciousness can accomplish this by convincing agents that their subordination is the result of their natural 'inferiority' or their 'defective' character.

To be sure, the notion of reification must be used with care. It can mean seeing certain relations, or more relevantly for present purposes, certain statuses (erroneously) as natural and immutable and not the product of social selection. But it can also mean solidifying existing oppressive social relations. These are not the same thing, however, since one can reify many things and many sorts of things in the first sense but not all

11 Here I follow Raymond Geuss, *The Idea of a Critical Theory: Habermas and the Frankfurt School* (Cambridge: Cambridge University Press 1981).

12 Gabel, 'The Phenomenology of Rights-Consciousness and the Pact of the Withdrawn Selves,' 1581; Diane Polan, 'Toward a Theory of Law and Patriarchy,' in *The Politics of Law: A Progressive Critique*, David Kairys, ed. (New York: Pantheon Books 1982), 298-9; Robert W. Gordon, 'New Developments in Legal Theory,' *The Politics of Law: A Progressive Critique* (Revised Edition), David Kairys, ed. (New York: Pantheon Books 1990), 422-3; Cheryl Harris, 'Whiteness as Property,' *Critical Race Theory: The Key Writings That Formed The Movement*, Kimberlé Crenshaw, Neil Gotanda, Gary Peller, and Kendall Thomas, eds. (New York: The New Press 1995), 283, 286, 287.

such reifications are oppressive. The natural rights thesis, as I have articulated it, reifies rights possession in the first sense, namely by representing the status of being a moral rightholder as natural and not the product of social selection. While this particular sort of reification need not be oppressive, it certainly can be, especially when a subject is believed not to be a rightholder on the grounds that it lacks the relevant nature or constitution. Bearing this clarification in mind, one way to flesh out this reification criticism is to claim that another way to encourage people to consent to their own oppression, or to discourage them from resisting oppression, is to dupe them into thinking that their situation is not the result of human agency or convention, but the result of facts that they have no control over. So, for example, an ideological use of rights would encourage a slave and others to think that his lacking moral rights is either because he has not been endowed with a certain nature, for instance, a rational nature, or perhaps because his rational nature is not fully developed. Furthermore, it would encourage the slave and others to think that the master and other members of the dominate race possess moral rights precisely because they have been endowed with rational natures or because their rational natures are fully developed.¹³

Due in part to this particular ideological function of rights in legitimizing oppressive social and legal relations, some critical theorists have concluded that rights cannot be reliable conceptual instruments to aid social struggles aimed at the radical transformation of society and have proposed that we reject them altogether and search for alternative political discourses. Although the reification critique of rights is not without merit, an outright rejection of rights is premature, unnecessary, and quite possibly counterproductive. The representation of moral rightholder status as something natural can be effectively addressed without rejecting moral rights altogether. Alternatively, it can be addressed by rethinking the source of rights so that certain social practices are taken to be an essential component in the possession of all rights, not just conventional or legal ones. In addition to enabling critical theorists to undermine attempts to represent exclusion from (and inclusion within)

13 Frederick Douglass, 'What the Black Man Wants,' in *Let Nobody Turn Us Around: Voices of Resistance, Reform, and Renewal*, Manning Marable and Leith Mullings, eds. (Lanham: Rowman & Littlefield 2000), 128, brilliantly expresses this point in very general terms:

The story of our inferiority is an old dodge, as I have said; for wherever men oppress their fellows, wherever they enslave them, they will endeavor to find the needed apology for such enslavement and oppression in the character of the people oppressed and enslaved.... So, too, the Negro, when he is to be robbed of any right which is justly his, is an 'inferior man.'

the realm of moral rightholders as a matter of natural as opposed to social selection, rethinking the source of moral rights instead of rejecting them outright will not foreclose the possibility of using moral rights for critical purposes (though we will certainly have to rethink what this amounts to if social practices are taken to play an essential role in grounding moral rights).¹⁴ Therefore, if it is an important goal of a critical theory to enlighten agents by making them aware of the fact and causes of oppression so that they can be better situated to combat it, then we can accomplish this goal within a rights framework by embracing rights externalism, which conceives of moral rights possession as a social fact and not as an ontological one.

Consider one payoff of adopting rights externalism. One difference between the received approach to moral rights possession and rights externalism is that the former represents inclusion into (and exclusion from) the realm of moral rightholders as beyond the power of human authority to change. Whether a subject makes the cut is simply a matter of what kind of being it is — for instance, if it can reason, think, suffer, pursue projects, or act for moral reasons, then it counts, but if it cannot do these things then it does not count. For those subjects whose status as natural or moral rightholders has never been challenged or in doubt (for example, kings, nobles, and masters) this is a welcomed result, since it renders their enjoyment of the alleged benefits of moral rightholdership relatively secure. But for those whose status as natural or moral rightholders has been challenged or doubted (for example, peasants, Native Americans, slaves, and women) this is not such a welcomed result, since it represents their exclusion from the realm of moral rightholders (and the associated benefits) as an ontological shortcoming — an unfortunate result of failing to be endowed with the relevant nature or failing to be a certain kind of being. But the rights externalist contends that this is a misdiagnosis of the situation of kings and masters and slaves and women, one that misdirects our attention away from the social conditions that create and sustain existing social relations of domination and subordination, which can indeed be altered through social struggle and resistance.

I am not suggesting that a natural rights theorist will *necessarily* be, or will tend to be, less alert than an unnatural rights theorist in recognizing the need for social activism in making rights real and effective. While it could be the case that if you think of rights as natural, you will think of them as something people already have, and so you will be less alert to

14 Later I will take up this issue of how to rethink the critical value of moral rights if we impose a social constraint on moral rights possession, §VI.

the possibility that their having them is not effective because of lack of social recognition, this need not be the case. A natural rights theorist can believe that people have natural rights and that societies and governments have not respected them. And they could be very militant in arguing for the need to get societies and governments to respect these rights. My main concern is simply to show that rights externalists can also give a political justification for their position. It would clearly take much more work to show that one side has a clear-cut political advantage over the other.¹⁵

Hence by reconceptualizing moral rights possession as a social fact, that is, by adopting rights externalism, the practical aim of combating oppression through enlightenment can still proceed *even within a rights framework*. Rethinking the source of rights along social as opposed to ontological lines affords us a pragmatic account of the situation of those who are excluded from the realm of moral rightholders, what is at stake in their exclusion, and what is needed to overcome it. A pragmatic theory of moral rights possession tells us that their predicament is not the result of failing to be endowed with a certain nature. Rather it is the result of failing to be afforded a certain kind of treatment or respect.¹⁶ For peasants, slaves, women, animals, and other subjects whose status as moral rightholders has been challenged, emancipation is not about getting others to recognize, maintain, and enforce natural rights that these subjects possess prior to or independently of whether certain ways in which they may act or be treated have been socially recognized, maintained, and enforced. Rather it is about the establishment of social conditions in which these ways of acting and being treated *are* socially recognized, maintained, and enforced. Hence by adopting this general approach to rights possession one can claim that social activism on the part of subjects and/or their advocates is necessary to create the social conditions whose instantiation is an essential ingredient in the very possession of moral rights, since their exclusion from the realm of moral rightholders is the result of social forces and, therefore, well within their power and the power of others to change.

Earlier I conceded that embracing a conceptual analysis of moral rights possession for a political reason may not be the best reason for doing so, nor should it be our only reason for doing so. But insofar as this has been and continues to be a primary reason for allegiance to the doctrine of

15 I am grateful to an anonymous referee for pressing me to make clear that I am not attempting to argue for this stronger thesis.

16 The kind of respect I take to be relevant will be discussed shortly, §IV.

natural rights, my concern in this section has been to supply a political justification for imposing a social constraint on moral rights possession. To be sure, the political justification for embracing natural rights differs in content from the justification for embracing the unnatural rights thesis, though both are equally concerned with conceptualizing moral rights possession in a way that enables us to combat oppression. Of course, once we see that both approaches can stake a claim to being able to combat oppression, one may wonder whether one or the other conceptualization of moral rights possession affords us a better way to combat oppression. But even if it turns out that one view does provide better resources for combating oppression, this does not undermine the main point of this section, namely that we can justify embracing both of these conceptions of moral rights possession on political grounds.

In this section I have argued that the same general reason that has historically motivated embracing the doctrine of natural rights, namely concern with combating oppression, also justifies embracing rights externalism.¹⁷ But even if one can provide reasons for imposing a social constraint on moral rights possession this approach appears to be confronted with two seemingly insurmountable obstacles. For one, if moral rights are analogous to conventional rights in that both are products of the same social practices, then there seems to be no way to distinguish between possessing a mere conventional right from possessing a moral one. Secondly, and perhaps most importantly, if moral rights are products of social practices, then we cannot appeal to these rights to criticize existing social practices in cases where we most need and want to, namely in cases where certain ways of acting and being treated have *not* been socially recognized, maintained, and enforced. In the sections that follow I shall develop the unnatural rights thesis in greater detail and argue that the foregoing obstacles are surmountable.

17 There are two other recent attempts in the philosophy of rights to systematically develop and defend a conception of moral rights possession that satisfies a social constraint. See Sumner, *The Moral Foundation of Rights*; and Rex Martin, *A System of Rights*, (Oxford: Clarendon Press 1993). While I have benefited greatly from their work, my account differs from their accounts in important respects. One very important difference is that we are led to this approach for different reasons. Neither Sumner nor Martin offers a *political* justification for imposing a social constraint on moral rights possession. Yet collectively our work builds a very powerful case for a conceptual position regarding the source of moral rights that has not been taken seriously enough.

III The Slave Case

The case I discuss in this section serves two purposes: (1) to underscore some important differences between the received view of moral rights possession and my alternative; and (2) to further elaborate on the political justification for imposing a social constraint on moral rights possession. Admittedly, as I will make clear, this case can be read in two different ways. Read in one way it is an excellent case for illustrating the political value of the received view; however, read in another way it is an excellent case for illustrating the political value of imposing a social constraint on moral rights possession.

Suppose that Dred is a slave. He is chattel that can be bought and sold and used as his owner sees fit. Dred's life is completely at the disposal of his master. He cannot go and come as he pleases; he cannot eat and sleep when he chooses; he cannot marry and raise children; he cannot sell his labor for a wage to the highest bidder or enter into any other contractual arrangements, nor can he own property, speak his mind to his master, learn to read and write, or even worship God. It is important to underscore the distinction between 'being able to do these things' and 'being able to do them with impunity.' For example, although Dred can run away, if successful he will live in constant fear of being captured and returned to his master and possibly even killed to set an example for other slaves. Furthermore, those who object to Dred's enslavement and who aid his escape will also live in constant fear of being discovered and subsequently sanctioned for assisting a runaway slave. In contrast, Dred's master and others who uphold slavery do so with impunity. Even the most abominable offense against one's slaves, namely killing them, meets with either mild or negligible punishment, while lesser offenses such as rape, whipping, and depriving them of adequate nourishment, shelter, and rest, meet with no punishment at all. Thus the relevant sense in which Dred 'cannot' do these things is that he is not able to do them with impunity.

Suppose further that Dred is a human being and possesses all of the traits typically found in human beings: he can think, reason, select and pursue projects, distinguish right from wrong, and can experience both higher and lower pleasures and pains. Furthermore, suppose that the immorality of slavery is not in doubt. It is fitting to criticize the practice of slavery as immoral or unjust, to accuse slaveholders of committing a moral wrong or injustice by holding slaves, to cite the immorality or injustice of slavery as a reason for abolishing it and for punishing those who participate in it, and it is even fitting to cite the immorality or injustice of slavery as a reason for its eventual demise. Now consider the following questions: Does Dred have a right to go and come as he pleases? Does he have a right to marry and raise children? Does he have

a right to sell his labor for a wage to the highest bidder or to enter into any other contractual arrangements? Does he have a right to own property, to speak his mind, to learn to read and write, or even to worship God?

Both defenders of natural rights and rights externalists can agree that Dred does not have any of the foregoing rights under slavery if the rights at issue are mere conventional or legal rights. Yet the former will quickly add that although Dred may not have a legal right to go and come as he pleases under slavery, or a legal right to marry and raise children, or a legal right to sell his labor, or any other legal rights for that matter, he does have a natural right to go and come as he pleases, to marry and raise children, and to sell his labor. Moreover, they will add that having such rights benefits Dred by enabling us to criticize the institution of slavery as a violation of these natural rights.¹⁸ Indeed, this is a political payoff we gain by embracing the received view. But insofar as proponents of this approach hold that these rights are not products of social conventions or positive law they owe us an alternative account of their source. Among the proposals that have been the most widely discussed include grounding these preexisting rights in natural as opposed to positive law, grounding them in the very nature of the subjects that possess them, and grounding them in general moral principles. I have chosen to focus on the second proposal since it best represents the view that I am proposing an alternative to.¹⁹

18 Obviously, natural rights theorists would reject Bentham's view that all *bona fide* rights are products of positive law. Presumably they believe that natural rights are *bona fide* rights even though these rights are not products of positive law. Consequently, it would be fruitless to take the choice between the natural rights approach and rights externalism to turn on the issue of what constitutes a *bona fide* right. By taking a version of Bentham's definition as my point of departure I am not begging any questions against natural rights theorists, since I am not arguing from this definition to a social practice conception of moral rights possession, or from this definition against a natural rights conception. Rather I am simply assuming this definition, offering a conception of rights that squares with it, and showing that certain objections to this conception can be answered. But this qualification notwithstanding, the political justification for rights externalism advanced in the previous section does indeed offer us a positive reason for imposing a social constraint on moral rights possession. Hence my case for rights externalism is not merely a negative one.

19 For a critique of this first proposal, see Sumner, *The Moral Foundation of Rights*, ch. 4, where he develops and deepens some of Bentham's criticisms. For a critique of the third proposal, see Martin, *A System of Rights*, ch. 3. Collectively our work builds a comprehensive case against all three ways of accounting for the source of rights that are taken to exist independently of social practices.

But first let me elaborate briefly on the approach that grounds these rights in general moral principles, since it raises a theme that will play a role in the subsequent discussion. According to this approach a subject is taken to possess a moral right if and only if the subject possesses a valid claim (to act or be treated in a certain way) whose validity is justified by general moral principles. On this view the moral justification of a claim is both necessary and sufficient for converting a mere claim into a moral right.²⁰ Later I will make recourse to this moral justification requirement. But I will propose that moral justification is *necessary* but not sufficient for the possession of a moral right. One might contend that this approach to grounding moral rights is a more formidable target since it does not forge a connection between rights possession and ontology. In other words, it does not attempt to represent moral rights possession as a fact about how subjects are constituted, or as a matter of subjects possessing certain right-endowing properties or characteristics. While this approach avoids directly linking the possession of moral rights with ontological considerations, once we ask, 'What is required for a subject to possess a claim?' facts about the nature of subjects become relevant. Indeed, Joel Feinberg, the greatest champion of the valid claims view, defends the connection between rightholder status and ontology more directly by arguing that 'having interests' is the relevant claim-endowing and hence right-endowing property. Therefore, the moral justification approach does appear to rest on a connection albeit an indirect one between rights possession and ontology.²¹ Yet the important insight that I will take from this approach is the appeal to the theme of moral justification to distinguish between moral and legal rights possession.

Henceforth I shall use the term 'rights internalism' to designate the view that a subject possesses moral rights if and only if it possesses the

20 Feinberg has been the most influential defender of this approach and Martin has been his foremost critic from a rights externalist perspective. I contrast their approaches to grounding human rights and defend Martin's in 'Feinberg and Martin on Human Rights' (forthcoming in *The Journal of Social Philosophy*).

21 For the valid claims approach to rights and a defense of the interest criterion of rights possession, see Feinberg, 'The Nature and Value of Rights' and 'The Rights of Animals and Unborn Generations' respectively, in *Rights, Justice, and the Bounds of Liberty*. For a useful recent discussion of the general connection between rights possession and ontology, which also criticizes Feinberg's proposed right-endowing criterion and offers another in its place, see George E. Panichas, 'The Rights-Ascription Problem,' *Social Theory and Practice* 23 (1997) 365-98. I will return to this point about the connection between rights possession and ontology later, §VII.

relevant right-endowing nature or property.²² To be sure, there is considerable disagreement about what constitutes the 'relevant' right-endowing nature: human nature as such or some characteristic thought to be an essential mark of humanity such as rationality, moral agency, or self-consciousness are among the most popular candidates. Nevertheless, insofar as subjects are taken to possess moral rights not in virtue of human (or divine) activity, but merely in virtue of being constituted in a certain way, moral rights possession is best understood as an ontological and not a social fact according to this approach. It should now be readily apparent how grounding moral rights in facts about how a subject is constituted enables a natural rights theorist to defend the claim that Dred has rights prior to or independently of social convention and positive law. They can say, for instance, that Dred has a natural right to go and come as he pleases, even under slavery, merely in virtue of his humanity, or in virtue of his rational capacity, or in virtue of possessing some other relevant right-endowing property. A salient aspect of this approach is that the possession of such rights need not be manifested in the overt behavior of either the rightholder or those who are bound by these rights. In other words, a subject can have such a right even though the right is not exercisable with impunity, or even though others can disregard it with impunity. And this must be so if these rights are to provide the political payoff of supplying a moral standard for criticizing Dred's enslavement.

In contrast, if we return to the slave example we see that a rights externalist would offer a different response to the question of whether Dred has rights in the cases under discussion. In contrast to the rights internalist, a rights externalist would say that Dred has neither a legal right to go and come as he pleases, to marry and raise children, to sell his labor, nor a *moral* right to do these things if he cannot do them with impunity, or if others can prevent him for doing them with impunity.²³

22 Compare my use of the terms 'rights internalism' and 'rights externalism' with Loren Lomasky's usage in *Persons, Rights, and the Moral Community* (Oxford: Oxford University Press 1987), ch. 7.

23 This example could be made more precise (as well as more complex) by formulating it using the Hohfeldian classificatory scheme for rights. For example, to say that Dred does not have a right to go and come as he pleases is to say that others do not have a duty to assist him or to refrain from interfering with him. Thus this would be to deny that Dred has a claim-right to go and come as he pleases. And to take just one more example, to deny that Dred can sell his labor for a wage is to say that someone has a claim-right that Dred would be violating by doing so. But for the sake of simplicity I will not develop my analysis using the Hohfeldian classificatory scheme.

And, as is the case with possessing legal and other conventional rights, for these circumstances to materialize certain social practices having to do with the social recognition, maintenance, and enforcement of certain ways of acting and being treated must obtain. Rights externalism takes the instantiation of these social practice conditions to be necessary for the very possession of moral rights. To wit, the obtaining of these conditions renders moral rights possession a social as opposed to an ideal reality.

So, for example, my having a moral right to enjoy a meal at a fine restaurant covers the social reality of being able to do so without fear of being hauled away by local law enforcement officials. Of course I may have a moral right to enjoy the meal yet still have some fear of being hauled away by the local police, since it is possible that these individual law enforcement authorities may not recognize my right to enjoy a meal at this particular restaurant. But so long as I can count on the backing of a higher positive authority to enforce my being able to eat in this restaurant — backing which might be offered by sending federal troops to escort me into the restaurant or by imposing stiff sanctions on the proprietors and the local police — then my right remains a social reality. But it is quite possible that a higher positive authority, and perhaps even the highest political authority, refuses to recognize my right to dine in the restaurant. In this case my alleged right would *not* be a social reality. For it would not have any practical efficacy: I will not be able to eat at the restaurant without fear of being hauled off to prison, nor will I have the assurance of knowing that those responsible for hauling me off to prison will be legally sanctioned for doing so. Obviously this same reasoning applies in Dred's case. Dred's having a moral right to go and come as he pleases covers the social reality of being able to do so without fear of being tracked down by fugitive slave catchers and hauled back to the plantation for punishment. Hence, from the perspective of rights externalism, Dred's having a moral right to go and come as he please covers the social reality of his being able to go and come as one pleases without fear of being sanctioned and with the assurance that those who interfere or prevent him from doing so will be sanctioned or at least threatened with sanctions.

Perhaps the most striking difference between rights internalism and rights externalism, then, is that the latter forges a necessary connection between moral rights possession and the existence of certain social practice conditions and the former does not. Reading this case in the initial way brings out the political value of embracing rights internalism. However reading this case from a critical theory standpoint brings out the political value of rights externalism. This conception offers us a more pragmatic account of the situation of those who are excluded from the realm of moral rightholders, what is at stake in their exclusion, and what

is needed to overcome it. For someone like Dred, whose status as a moral rightholder has been denied, this enables us to overcome ideological attempts to appropriate rights to legitimize his oppression by suggesting that his predicament is the result of failing to be endowed with a certain nature, rather than the result of failing to be afforded a certain kind of treatment or respect. Hence by embracing rights externalism the political aim of combating oppression through enlightenment can still proceed even within a rights framework. From this vantage point emancipation will involve the establishment of social conditions in which certain ways in which Dred may act, and ways in which he may be treated, are socially recognized, maintained, and enforced, which, the rights externalist will add, is well within the power of social actors to change. Another very important difference between these approaches, which I will return to later, regards the resources that they have at their disposal for moral argument. For example, defenders of both approaches agree that slavery is morally objectionable; however, a rights externalist cannot offer the same explanation as the rights internalist about why it is morally objectionable. The latter can appeal to natural rights but the former cannot. Below I shall show that this outcome is not as troubling as it initially appears (§VI) but first I will develop rights externalism in more detail.

IV The Social Dimension of Rights Possession

In what follows I elucidate the social dimension of rights possession using the idea of ‘institutional respect.’ I assume that affording a subject legal rights is a paradigm case of affording it institutional respect. Accordingly, we can gain a clear statement of what being afforded institutional respect amounts to by specifying the conditions for legal rights possession.²⁴ For this purpose I shall assume that all rights are established practices, i.e., established ways of acting or being treated.²⁵

24 It does not follow from this that we must develop the idea of institutional respect using a legal model. If we wish to impose a social constraint on moral rights possession, we need not suppose that only formal legal practices as opposed to more informal social practices can suffice for this constraint. Although I do think that there are reasons for grounding moral rights possession in more formal social practices, the argument of this paper does not require ruling out the possibility that the respect necessary for grounding moral rights could be imparted by less formal social practices. Still, I will use the legal model for expository purposes. My presentation of this model borrows from Hart, *The Concept of Law* (Oxford: Clarendon Press 1961).

25 Here I follow Martin, *A System of Rights*.

Furthermore I shall assume that the social establishment of ways of acting or being treated by certain authorities is required to convert a mere way of acting or being treated into a right. And the point is not merely that these authorities agree that the relevant ways of acting and being treated constitute rights. Rather the point is much stronger, namely, that they can do things that have the effect of turning them into rights in much the same way that an umpire can turn a pitch into a strike or a Queen can make a man a knight. To be sure, which authorities are empowered to turn them into rights, and which of their activities are relevant, can vary from society to society and even within the same society depending upon the kind of right at issue. Finally, if we assume that a legal system is operative when it is generally efficacious, and that it is generally efficacious when the rules regulating the conduct of individuals under its jurisdiction are generally complied with, and the rules conferring legislative and adjudicative powers on public officials are endorsed by these officials, the possession conditions for legal rights can be understood as follows:

S possesses legal rights if and only if S's acting in a certain way or being treated in a certain way is legally established within an operative legal system.

The legal establishment of practices involves at least two kinds of activities, officially recognizing a practice as a right and maintaining and enforcing the right-designated practice. If the recognition requirement is satisfied we can say of some practice that it has been officially recognized by some source of valid law as specified by the rule of recognition for a particular legal system. This source is empowered to convert a mere practice into a right by engaging in some kind of legislative activity. The relevant activity can vary. For instance, it might amount to a practice being laid down in a formal document like a Constitution that is upheld by the sovereign authority, or it might amount to its being laid down via the rulings of a judiciary body whose rulings count as law unless overturned by a higher body. The maintenance requirement tells us that any practices officially recognized as rights must also be maintained and enforced by whatever authorities are charged with this duty. Maintaining and enforcing a practice involves, among other things, identifying publicly (or at least making publicly available) the officially recognized practices, backing them up with the threat of force, and when necessary, imposing sanctions for non-compliance.

A distinctive feature of the foregoing conception of rights possession is that it forges a connection between rights possession and practical efficacy by grounding rights socially and thereby rendering them social realities whenever they exist. In addition, this analysis applies to all

rights not just legal or non-legal conventional ones. While my suggestion that the possession of rights requires an institutional framework, which guarantees that they will be practically efficacious whenever they exist is controversial, the general connection between practical efficacy and rights is not meant to be controversial. Even John Locke, perhaps the most famous proponent of natural rights, acknowledges the importance of some kind of social framework for rendering natural rights valuable. Locke's doctrine of executive power makes this quite clear. He argued that the natural rights of man as given by the law of nature would be in vain if there was nobody in the state of nature to enforce these rights. Thus to prevent the law of nature from being a law in name only, and natural rights from being mere nominal rights, Locke argued that every person in the state of nature (minus children and madmen) had the power to enforce the law of nature. Of course this could only be a temporary arrangement, since individuals could not be trusted to enforce the law of nature impartially; they would be too easy on themselves and their associates and too harsh on their enemies, competitors, and strangers. Thus the establishment of a civil government with institutions and officers assigned to interpret the law, adjudicate disputes, and enforce the law would remedy this and other inconveniences of the state of nature.²⁶

For present purposes the relevant point is that Locke thought that it was important to make sure that natural rights would be more than mere nominal rights by assigning individuals in the state of nature the power to enforce these rights. So Locke and I agree that rights must be backed up or enforced in some way if they are to be practically efficacious; however, I differ from Locke in that I take the supporting social framework, which renders rights practically efficacious, to be necessary for the very possession of moral rights. Whereas Locke would say that although they would be in vain we could have natural rights even if they are not efficacious, I would say that the only rights we actually possess are those that are efficacious.

V The Moral Justification Requirement

Having ascertained the possession conditions for legal rights we now have a working model of institutional respect and a more detailed understanding of the social dimension of rights possession. One ques-

26 *Two Treatises of Government*, P. Laslett, ed. (Cambridge: Cambridge University Press 1963), 271-3

tion raised by this analysis is, 'How can we distinguish between moral and legal rights possession if both contain the same social dimension?' Some rights theorists have relied on the idea of moral justification to elucidate the difference between moral and legal rights possession. For instance, Joel Feinberg assigns moral justification a role in determining whether a subject possesses moral rights. According to Feinberg, 'A man has a moral right when he has a claim the recognition of which is called for — not (necessarily) by legal rules — but by moral principles, or the principles of an enlightened conscience.'²⁷ A reasonable interpretation of this point is that subjects possess moral rights if they possess claims that can be morally justified by some substantive moral theory. So, on this reading, the difference between moral and legal rights possession is that one possesses a moral right if one has a claim that is justified by moral principles, and one possesses a legal right if one has claim that is justified by legal rules. A significant difference between Feinberg and myself, however, is that while he takes such justification to be sufficient for possessing moral rights, I maintain that it is necessary but not sufficient. In other words, Feinberg assigns moral justification an exclusive role while I assign it a supporting role. Although Feinberg is silent about which moral principles can or must supply the requisite moral justification, presumably he cannot allow that the most basic moral principles are right-based ones since he is attempting to elucidate the very idea of having moral rights. It would be circular to reintroduce basic moral rights to specify the shape of the justification conferring moral principles. The moral justification requirement, whatever it is for Feinberg, is not and cannot make recourse to basic moral rights on pain of circularity. So, in the final analysis, morally valid claims will have to be validated by some sort of non-rights based general moral principles. There is a sense, then, in which Feinberg and I occupy important common ground: we both want to appeal to moral justification to establish the existence of moral rights and neither of us regards moral rights as being morally basic insofar as they *cannot* supply the requisite moral justification.

L. Wayne Sumner also appeals to moral justification to ground moral rights; however, unlike Feinberg, he does not believe that the existence of a moral right follows directly from the fact that a particular claim is morally justified. Instead, like me, Sumner imposes a social practice constraint on the possession of moral rights. Thus, on his view, moral justification will only be necessary not sufficient for the possession of moral rights. But one significant difference between our accounts is that

²⁷ Feinberg, *Rights, Justice, and the Bounds of Liberty*, 154

I am neutral about the kind of moral justification needed to ground moral rights, while Sumner defends a consequentialist moral justification in extensive detail.²⁸ For Sumner, the substantive moral theory that lends justification to corresponding legally established practices is a consequentialist one. Even though Sumner's defense of consequentialism is comprehensive and penetrating, he is well aware that one might try to give an alternative moral justification of a given social practice. For instance, one might give a contractarian one, which takes the social recognition of the right to be justified if it is the product of the appropriate collective choice procedure or deliberative procedure. Or one might give a Kantian justification, a theistic justification, or some other moral justification. Insofar as no substantive moral theory has been proven to be the one true moral theory, each having its defenders and detractors, I think that it is premature to commit oneself to one particular theory. Not only does this place a heavy burden on one to defend the selected moral theory, it ultimately requires one to undermine every plausible alternative moral theory — a rather daunting task.

Accordingly, I favor a strategy that falls between these two. Following Sumner, my strategy assigns moral justification a supporting role and not an exclusive one, but following Feinberg my strategy does not defend a substantive moral theory to play the justifying role. Instead it enables us to avoid prejudging this issue of which moral theory should play the justifying role, while at the same time allowing us to set a constraint on any possible contender. Though I wish to remain neutral about which substantive moral theory can supply the requisite justification, in part because I do not wish to take on the large project of defending a general moral theory here, insofar as we are attempting to theorize about the nature of moral rights possession there is a reasonable criterion of adequacy that any proposed moral theory should satisfy. Yet I should add that although I take neutrality to be a virtue of my conceptual analysis, this is not to claim that we can avoid selecting a substantive moral theory. My concern is not so much to avoid this, but to avoid building a commitment to a particular substantive moral theory into the conceptual analysis of moral rights possession. But, as will become clear shortly, my proposed constraint is intended to offer some minimal guidance on the shape that any proposed theory should take.

Many contemporary moral and political philosophers within the liberal tradition endorse the following formal conception of what it is for an individual to have a right: an individual has a right to \emptyset if the

28 *The Moral Foundation of Rights*, ch. 6

individual has a morally justified reason to σ whose satisfaction takes priority over the satisfaction of competing moral reasons that are based on considerations concerning the promotion of the general welfare or some other impersonal value (except perhaps when the consequences of satisfying the former would be too severe). The affirmation of rights and their priority over non-rights based moral reasons springs from a commitment to the value, sanctity, or inviolability of the individual. Although Kant is not usually viewed as defending a rights-based moral theory, his conception of persons as ends in themselves who are never to be treated as a mere means but as ends only is perhaps the most familiar way of acknowledging the supreme value of individuals. By and large, liberal-minded philosophers have agreed with Kant about the supreme value of individuals, though many maintain that viewing individuals as rights bearers is the best way to reflect this commitment in the moral arena.

Of course there is considerable dispute over what a commitment to the value of individuals requires. Does it merely require not interfering with individuals in the pursuit of their ends or projects? Does it require not interfering with them unless they are harming others or failing to fulfill a clear and assignable obligation? Is requiring individuals to contribute to the welfare of others either by direct assistance or undergoing sacrifices consistent with respecting the inviolability of individuals? Though there are substantive disagreements on these issues, commitment to the value of individuals requires, at the very least, that sacrificing individuals for the sake of others to maximize some impersonal value demands a serious defense. Insofar as rights function as 'side constraints' or 'trumps' that either preclude or greatly curtail such sacrifices, it is held that rights offer individuals the most morally stringent protection. By establishing boundaries that others must not transgress, or can only transgress in very special circumstances, they accord to each rights holder a significant measure of sovereignty over his own life. This is arguably the core idea underlying liberal moral and political theory. Henceforth I shall use the term 'individualism' to denote the belief that supreme value attaches to persons being free to lead their lives such that impositions on this freedom cannot be taken lightly.²⁹

Recall that my proposed conceptual analysis of moral rights possession assigns moral justification a supporting but not exclusive role in grounding moral rights, and that my concern is to avoid prejudging the issue of which substantive moral theory should play the justifying role,

29 Compare this to Lomasky, *Persons, Rights, and the Moral Community*, 11.

while at the same time imposing a constraint on any possible contender. The foregoing reflection on the formal conception of what it is for an individual to have a right suggests a reasonable constraint. This conception assigns priority to the satisfaction of agent-relative claims over competing agent-neutral claims based on considerations concerning the promotion of the general welfare or some other impersonal value. And this priority assignment reflects a commitment to the value of individuals. Hence, insofar as we are attempting to theorize about the nature of moral rights possession, whatever substantive moral theory plays the justifying role must square with the value of individuals such that imposition on their freedom is not to be taken lightly. In other words, the substantive moral theory that supplies the requisite justification must promote the freedom of individuals by assigning greater weight to agent-relative claims. I shall call this the *freedom promoting constraint*. Any substantive moral theory that does not satisfy this constraint must be rejected as inadequate. Moreover, any substantive moral theory that does this better than others is to be preferred. So if we wish to take the value of individuals seriously, it behooves us to take seriously their freedom to live their own lives, to set and pursue their own ends, and to carry out their projects. Therefore, whatever substantive moral theory plays the justifying role must, at a minimum, promote the freedom of individuals — however this is ultimately understood.³⁰

It might be objected that the freedom promoting constraint does not imply any particular substantive moral theory and that this undermines the present proposal. Surely we need to know, in the end, which substantive moral theory best promotes the freedom of individuals if the moral justification component is to have any practical value. Settling upon the general constraint that the relevant moral theory promotes the freedom of individuals simply delays dealing with the difficult issue of determining which substantive moral theory best accomplishes this objective. Though I concede that we will ultimately want and need a substantive moral theory to serve the justifying role, I deny that my failure to supply one is an objection to my proposal. At most, it is a

30 The alleged failure of consequentialist moral theories to adequately promote the freedom of individuals is well documented. Commitment to goal maximization is taken to be in direct conflict with rights and, hence, is taken to place insufficient value on individuals and their freedom. Thus it would appear that a consequentialist moral theory could not play the justifying role since it could not satisfy the constraint that the freedom of individuals be promoted by assigning greater weight to their claims over claims based on goal maximizing concerns. For a commendable attempt to undermine this charge against consequentialism, see Sumner, *The Moral Foundation of Rights*, ch. 6.

request for me to offer and defend such a theory. But there are strong reasons against proposing a particular moral theory to play the justifying role. An especially strong reason against doing so is that it may turn out that more than one moral theory can play the justifying role. For instance, if several theories promote the freedom of individuals and it is not clear that any of them do the job better than each would be a genuine option. A virtue of settling for merely imposing a formal constraint on the justifying theory (even if it differs from the one that I have proposed) is that this leaves open the possibility that more than one substantive moral theory might be viable option.

VI Rights and Moral Argument

One objection to imposing a social constraint on moral rights possession is that this does not allow us to utilize moral rights as basic or foundational premises in arguments for the conclusion that something or other is morally wrong. For example, on the proposed conception of what having a moral right amounts to we cannot argue as follows:

1. Dred has a natural right to go and come as he pleases with impunity.
2. It is morally wrong to violate Dred's natural right.
3. Enslaving Dred violates his natural right.
4. Therefore, enslaving Dred is morally wrong.

Obviously, the proposed conception of rights possession precludes us from deploying arguments of this type that appeal to natural rights as basic moral premises insofar as this conception imposes a social constraint on the possession of all rights not just conventional ones.³¹ Furthermore, this conception clearly precludes us from embracing a

31 Bentham found himself in a similar position. By rejecting the doctrine of natural rights Bentham was precluded from appealing to these rights as standards for moral criticism. But he was not troubled because, as a utilitarian, Bentham denied that there was any moral standard independent of the Greatest Happiness Principle. So although Bentham denied the existence of natural rights and held instead that all rights were the product of positive law, he was still able to maintain that morality was superior to law and to critique the law since he held a utilitarian standard of right and wrong. For a very clear statement of Bentham's predicament, see Deigh, 'Rights and the Authority of Law,' 677.

substantive moral theory according to which acts or practices are considered moral if and only if they respect natural rights and are considered immoral if and only if they violate natural rights. In other words, on this view, we cannot embrace a 'rights-based moral theory,' which essentially takes 'moral rights' to be a basic or foundational moral category.³² Anyone who is not prepared to abandon the natural rights tradition (or its modern progeny) in moral and political philosophy will not welcome this result. But for those of us who are troubled by the drawbacks of this tradition and who believe that there are viable theoretical alternatives, this result will not be the least bit troubling.

Let me emphasize that I have not tried to argue that one *cannot* embrace a rights-based moral theory. Although one might attempt to argue for the strong conclusion that such a theory is incoherent or implausible, this is not my strategy. My objective is simply to note that advocates of a rights-based moral theory can deploy arguments that appeal to moral rights as basic premises while those of us who impose a social constraint on moral rights possession cannot. Yet the crucial question is: What follows from this? Many critics of a social conception of moral rights possession hastily take this result to be sufficient to justify rejecting such a conception out of hand. But this is a serious mistake. Although imposing a social constraint on moral rights possession does indeed preclude us from deploying arguments for moral conclusions that appeal to natural rights as basic or foundational premises, it does not preclude us from appealing to moral rights altogether in moral arguments, nor does it preclude us from arguing for moral conclusions from other more basic moral premises.

Consider the following reformulation on the above argument:

1. Dred has a moral right to go and come as he pleases with impunity.
2. It is morally wrong to violate Dred's moral right.
3. Enslaving Dred violates his moral right.
4. Therefore, enslaving Dred is morally wrong.

32 For a defense and a critique of right-based moral theory, see J.L. Mackie, 'Can There Be a Right-Based Moral Theory?' and Joseph Raz, 'Right-Based Moralities,' respectively, in *Theories of Rights*, Jeremy Waldron, ed. (Oxford: Oxford University Press 1984).

The difference between this argument and the first argument is that the term 'moral right' has been substituted for the term 'natural right.' Those who reject the imposition of a social constraint on moral rights possession could interpret this argument in the exact same way as the first argument, namely as an argument that establishes a moral conclusion from premises that take certain rights to be morally basic. But those of us who do impose a social constraint on moral rights possession will deny that the appeal to moral rights in this second argument is morally basic. To be sure, we will have to bear the burden of explaining the function of appeals to moral rights in such arguments; however, this demand can be met with relative ease. For instance, one prominent proponent of imposing a social constraint on moral rights possession contends, very roughly, that a moral right exists whenever the corresponding conventional right is morally justified.³³ On this analysis, then, the requisite justification is provided not by a morally basic right but by the resources of a substantive moral theory that is not rights-based. So, for example, the claim that Dred has a moral right to go and come as he pleases with impunity is, on this view, logically equivalent to the claim that the policy of conferring upon Dred the corresponding conventional right to go and come as he pleases with impunity can be morally justified by some valid moral argument.³⁴ Hence the function of appeals to moral rights in such arguments is not to supply the requisite moral justification but to indicate or announce the existence of such a justification.

So although imposing a social constraint on moral rights possession does indeed preclude us from deploying arguments for moral conclusions that take moral rights to be basic premises, it does not preclude us

33 Sumner, *The Moral Foundation of Rights*, 148

34 The general issue addressed here is explaining how we should understand the semantics of moral rights assertions if we embrace a conception that imposes a social constraint on moral rights possession. There is very little debate among those who defend such a conception about how to interpret such assertions. The prevailing interpretation is roughly that sentences of the form 'S has a moral right to ϕ ' are to be understood, insofar as it makes any sense at all, as claiming that 'S ought to have a legal (or conventional) right to ϕ .' Compare Sumner's version with Bentham's: 'If I say that a man has a natural right to [this] coat or [this] land — all that it can mean, if it mean anything and mean true, is, that I am of [the] opinion he ought to have a political right to it: that by the appropriate services rendered on occasion to him by the appropriate functionaries of government he ought to be protected and secured in the use of it' (*Works* III, 218). This prevailing interpretation, which Feinberg refers to as the 'There ought to be a law theory of moral rights,' is challenged by Feinberg, 'In Defence of Moral Rights,' *Oxford Journal of Legal Studies* 12 (1992) 149-69, and by Ronald Dworkin, 'Model of Rules II,' in his *Taking Rights Seriously* (Cambridge: Harvard University Press 1977).

from appealing to moral rights altogether in moral arguments. But when we do use moral rights in moral arguments it will always be an abbreviated way of indicating that a 'deeper' moral justification can be given for the validity of some way of acting or being treated. Even if one ultimately disagrees with this explanation of the semantics of moral rights assertions, the fact remains that merely supplying it suffices to show that rights externalists can explain the role of moral rights in moral arguments. From this vantage point, then, to deny that rights are morally basic is to deny that they can serve as premises in the deeper argument morally justifying a way of acting or being treated. For the deeper moral justification we must look beyond rights in search of a substantive moral theory that does not regard moral rights as being morally basic.

Perhaps some critics will insist that the genius underlying the natural rights tradition going back to Locke and extending to contemporary appeals to human rights is precisely to postulate a class of rights as morally basic that can be used in a deep moral justification for the validity of some way of acting or being treated, or can be used to argue that some social practice or institution is morally wrong regardless of whether it has been recognized by conventional practices, legal or otherwise. But be that as it may, rights externalists can grant this point — understood as a point about what actually motivates some to postulate the existence of natural rights — while insisting that the crucial question is: What follows from the fact that natural rights are postulated for this reason? Surely one cannot infer from the utility of postulating the existence of a class of rights that are morally basic to the conclusion that such rights exist or that individuals actually possess these rights. While I do not mean to beg any questions against theism, this argument is certainly no more effective than inferring from the utility of postulating the existence of a Supreme Being who gives humanity the moral law to the conclusion that such a Supreme Being exists. Both of these arguments are suspect insofar as they infer from the usefulness of their posits to their actual existence. Although belief in natural rights and belief in a Supreme Being could be motivated by an attempt to provide moral resources for a deeper justification of our moral beliefs, this consideration does not constitute an evidentiary basis either for the existence of natural rights or for the existence of a Supreme Being.

The foregoing observation notwithstanding, some critics may contend that looking beyond rights in search of a substantive moral theory that does not regard moral rights as morally basic would be futile since moral rights are the *only* way to establish the moral validity of ways of acting or being treated. But this is clearly false. In addition to appealing to a Supreme Being (as I do in the foregoing example), which takes the existence of a Supreme Deity, who gives the moral law, to be morally basic, one can embrace other substantive moral theories that do not take

moral rights to be morally basic. Any of the following principles would supply the resources for such a moral theory: principles having to do with the maximization of some impersonal value such as happiness (utilitarianism); principles derived from the hypothetical consent of ideally situated agents or principles derived from the rationally motivated consent of actual agents (versions of contractarianism); principles having to do with respect for the dignity of persons (Kantianism); principles having to do with living virtuously (virtue ethics). Obviously, these do not exhaust the available options. And while substantive moral theories built upon these or other non-rights based foundations must be assessed (and will undoubtedly have their own shortcomings) until we have reason to think otherwise they certainly constitute substantive alternatives to rights-based moral theory. I suppose that if one could convincingly argue that all substantive non-rights based moral theories could be reduced to a rights-based moral theory then the claim regarding the futility of looking beyond rights in search of a substantive moral theory could be salvaged. But whether such an argument can be given remains to be seen.

More plausibly, some critics may contend that looking beyond rights in search of a substantive moral theory that does not regard moral rights as morally basic would be wasted effort since moral rights are not the only but the *best* way to justify our moral beliefs. In other words, defenders of natural rights could assert that if natural rights existed (leaving this question open to be settled by other means) they would be the best way to justify our moral beliefs, or to argue for the moral validity of ways of acting or being treated. The explanation for this point goes roughly as follows. A rights-based moral theory would be best suited for these normative purposes because the natural or moral rights that are taken to be morally basic according to this theory are suitably independent of existing social practices to serve as appropriate moral norms. Indeed, it seems obvious that the moral force of moral rights — that which makes it possible for them to serve as moral justifiers — is precisely the fact that they are suitably independent of existing social practices to serve our normative purposes. In circumstances where subjects have not been afforded institutional respect, where ways of acting and ways of being treated have not been recognized, maintained, and enforced by the relevant governmental authorities, we are most apt to talk about violations of natural, human, or moral rights. And this is because their existence is not tied to the activities of social actors, which makes them fit for critical use in these circumstances.

Without being overly enamored by the rhetorical force of this appeal, defenders of imposing a social constraint on moral rights possession can certainly grant the point that natural rights are indeed suitably independent of existing social practices and the activities of social actors to

serve as moral justifiers, indeed this will be true by hypothesis. Furthermore, they can even grant that the same must be true of all potential moral justifiers. In other words, any substantive moral theory must be such that the norms it takes to be morally basic must be suitably independent of existing social practices to serve as moral justifiers or to serve as normative standards, especially in circumstances where social practices do not reflect how things ought to be from the moral point of view. Yet even if we grant these points the problem is that the natural rights defender has failed to show that moral rights are 'best' suited to serve as normative standards. In other words, they have not shown that of all the possible substantive moral theories that we have to choose from a rights-based moral theory is superior insofar as its morally basic posits are the best ones. Presumably, what makes basic moral rights suitable is that they are appropriately independent of existing social practices. But by this standard any moral norm that is appropriately independent of existing practices would also be suitable. While this may rule out some substantive moral theories on the grounds that its morally basic posits are not suitably independent of social practices or the activities of social actors to serve as appropriate normative standards, it certainly does not rule out all of them. For instance, principles having to do with maximizing general utility appear to be suitably independent of social practices to be fit to serve as appropriate normative standards. Perhaps one might propose that basic moral rights are superior in that they would be 'most' independent of social practices or the activities of social actors. But in addition to doubts about whether this point can be convincingly argued for, it leaves open the possibility that if another moral posit was even more independent than rights then this posit would be a more superior normative standard. But then one wonders whether a Supreme Being whose commands constitute the moral law would best fit this description thereby making a divine command moral theory the frontrunner for the title of 'superior moral theory.'

A last-ditch effort to salvage the case against imposing a social constraint on moral rights possession by attending to the impact that this has on the role of rights in moral argument takes the form of an apparent dilemma. If non-rights-based moral norms (the existence of which rights externalists appear to be committed to insofar as they assign moral justification a role in grounding rights) are to serve as moral justifiers or as bases for normative criticism, then they must be suitably independent of the social practices or the activities of social actors as well. If we deny that there are moral norms that are suitably independent of practices then it is unclear how moral justification or moral criticism can proceed on our view. But if we contend that there are such norms (ones that are suitably independent of practices but do not regard moral rights as morally basic) then it is unclear why we are reluctant to regard moral

rights as morally basic and not these other moral norms as well. In other words, it is not clear why our skepticism about basic moral rights does not ultimately force us to be skeptics about other moral norms in particular, or even morality in general, insofar as some norms must be regarded as rock bottom morally basic to serve as moral justifiers or as normative standards.

While it may turn out in the final analysis, after all of the available substantive moral theories along with their various basic moral posits have been scrutinized, that a sweeping skeptical conclusion about all of them and morality in general is warranted, I myself have not done the work to make a case for this conclusion. Furthermore I do not see why we are forced to a sweeping skepticism about morality in general by refusing to regard moral rights as morally basic, anymore than those who refuse to regard the commands of a Supreme Being as morally basic are forced to a sweeping skepticism about morality in general. Hence the reasoning underlying this criticism entails that all moral and political philosophers who are either atheist or agnostic would also be forced to be skeptics about morality in general. Perhaps the main reason why this criticism is pressed in the first place is that the critics fail to appreciate that one could believe that a particular substantive moral theory, which regards particular posits a moral basic, has on balance what are taken to be serious shortcomings that warrant rejecting it without simultaneously believing that all substantive moral theories have shortcomings that warrant rejecting them out of hand.

VII The Role of Ontological Considerations

By advocating the thesis that moral rights are a species of unnatural rights I have rejected the view that subjects possess moral rights merely in virtue of their natures. In other words, I have denied that the status of being a moral rightholder is grounded by ontological considerations, ones having to do with what kind of subject that one is. But this dismissal of ontology (as the ground of moral rights) appears to raise at least two problems.

The first problem arises insofar as I assign justification by a substantive moral theory an essential role in my account of moral rights possession. Even though I have not settled upon a specific moral theory to play the justifying role, the problem is that so-called ontological considerations will factor into the application of moral principles underlying any substantive moral theory. For any theory that we choose presumptions will be made about the nature of subjects that fall under the protection of its basic moral principles. A moral theory will demarcate the population of subjects according to their possessing or failing to possess some property

deemed morally crucial, such as the minimum rationality requisite to be an autonomous being (Kantianism), or the ability to feel pain (utilitarianism), and assign moral status to those subjects that possess this property and refrain from assigning moral status to those subjects that do not possess this property. Thus it appears that insofar as I assign normative theories a role in grounding moral rights possession I cannot eschew ontological considerations. So not only is the contrast between grounding moral rights in the very nature of the subjects that possess them and grounding them in general moral principles misleading — as if the latter approach eschews ontological considerations whereas the former does not — it might be objected that insofar as rights externalism also makes recourse to ontological considerations any shortcomings of rights internalism will also carry over to rights externalism.

This objection is simply an invitation to say something about the role that ontological considerations will play on an externalist account. But first let me redirect this objection to a rival account. Earlier I pointed out that there were several ways one could flesh out the view that certain rights exist independently of social practices. Following moral validity theorists one could say that a subject possesses such a right if and only if it possess a claim validated by a substantive moral theory. Following rights internalists one could say that a subject possesses such a right if and only if it possesses a particular right-endowing property. If the foregoing objection has force, then it will obviously apply to moral validity theorists as well. In response to this objection, however, moral validity theorists might concede that ontological considerations play a role but distinguish between playing a *direct* role and an *indirect* one. They can rightly point out that such considerations play a direct role for the rights internalist who holds that ‘if I have moral rights it is something about me; it is because I am constituted in a certain way.’ Yet these considerations play an indirect role on their account. According to moral validity theorists, ‘if I have moral rights it because I have a claim that can be justified by general moral principles.’ To be sure, these principles will be applied in light of commitments about who or what falls within the scope of the principles. Whether one embraces consequentialism, contractarianism, theism, or Kantianism, presumptions will be made about who or what is included in the scope of these moral theories, and this will require an appeal to ontological considerations. Nevertheless, moral validity theorists will insist that it is the fact that the claim can be rationally derived from the principles, not the fact that the subject possesses a particular property, that grounds the moral right on their view.

Following moral validity theorists, rights externalists also assign moral justification by general moral principles a role in accounting for what possessing moral rights amounts to. So if ontological considera-

tions play any role at all in grounding moral rights, it will be an indirect role. A major difference between these approaches, however, is that rights externalists do not assign these principles an exclusive role in grounding moral rights. A social constraint must also be satisfied so that a subject cannot be taken to possess a right if this constraint is not met and cannot be taken to possess a moral right if the justification requirement is not met. But this does not entail that ontological considerations have no role at all to play. Rather, it suggests that if they play any role at all it is not a constitutive role (they do not ground moral rights possession) instead it is a practical role, they serve as considerations for or against instantiating the social constraint that is essential for the possession of a right. This is a more precise explanation of the indirect role of ontological considerations. So, for example, the fact that a subject possesses the minimum rationality requisite to be an autonomous being or a sentient being does not logically entail that the subject possesses certain moral rights. Yet these considerations can be reasons in favor of affording it institutional respect, that is, for bringing it about that ways of treating subjects possessing these properties are socially recognized, maintained, and enforced. Of course ontological considerations are not the only reasons that one could give but they must certainly be included among the reasons that one could give. I hope that this gesture suffices to indicate the proper role of ontological considerations on my account.

The second problem is that one might contend that grounding rights in ontological considerations may ultimately be more attractive than I have acknowledged. So even if rights externalism was successful at eschewing ontological considerations altogether, this would arguably make it less attractive than an account that does not eschew such considerations. Earlier in my discussion of the political justification for imposing a social constraint on moral rights possession I underscored the fact that this leaves us with an account of moral rightholder status as something within our power to change. But does this presume that rights internalism is less attractive insofar as it does not represent moral rightholder status as within our power to change? If so, rights internalists will certainly disagree. Indeed they might argue that this is a virtue of their account. By grounding moral rights in ontology we insure that this valuable status is not subject to the contingencies of changing and changeable social practices. In response to those who would withhold institutional respect from women because they are not men or blacks because they are not white, rights internalists can simply respond that because women and blacks are certain kinds of beings (human, rational, project pursuers, or what have you) they are 'deserving of such respect.' One might conclude that it is precisely because rights internalists ground rights in ontological considerations, something beyond our power to change, that they are able to make this argument.

Let me reply briefly by first noting that the issue is not about which beings are 'deserving of respect.' Rather it is an issue about which beings are objects of respect or moral rightholders, and rights externalists propose that there is an ineliminable social dimension involved in accounting for this. Secondly, as I have already argued at length in the previous section, a moral argument that takes moral rights to be basic is neither the only nor the best way to establish moral conclusions about how one ought to be treated or whether one ought to be respected. So while I grant that ontological considerations can play a role in arguments about how one *deserves* to be treated or arguments about whether one ought to be afforded institutional respect, I deny that the class of beings that deserve such respect is coextensive with the class of beings that have been afforded such respect. Perhaps a morally perfect world in which all and only those beings deserving of respect are respected would give us all that we can wish for, but in our morally imperfect world this is certainly more than we can reasonably expect.

VIII Conclusion

Beginning with the assumption that all *bona fide* rights are products of certain social practices, I have advanced an account of the source of moral rights with two main components: a social component that takes being afforded institutional respect to be a necessary condition for moral rights possession, and a moral component that takes the moral justification of socially established ways of acting or being treated by a substantive moral theory, which satisfies the freedom promoting constraint, to mark the difference between legal and moral rights possession. The upshot of this account is that moral rights possession is a social and a moral fact, not an ontological one and not merely a moral one. The social constraint renders the possession of moral rights a social reality. The moral justification constraint enables us to ground moral rights in social practices without losing the title of being 'moral' rights. And as for the role of rights in moral arguments, I have argued that arguments that take rights to be morally basic are neither the only nor clearly the best way to establish moral conclusions.

It is fitting to conclude this discussion by reconsidering the testimony with which this paper began. In taking himself to be without the rights of man while he was a slave, Benjamin Miller was not failing to recognize that he had certain rights in virtue of his nature as a man, a human being, a rational agent, a project pursuer, a child of God, or whatever. Instead, he was accurately summing up the harsh social reality of his predicament as a slave, namely the reality of not being able to go and come as he pleased with impunity, the reality of not being free to eat and sleep

when he wished, the reality of not being able to marry and raise children, the reality of not being able to sell his labor for a wage, the reality of not being able to set and pursue ends or projects, the reality of not being able to own property, to speak his mind, to learn to read and write, or to worship God. In sum, Benjamin Miller was urging us to see that from his vantage point, the point of view of the oppressed, the reality of possessing rights does not cover any other reality except the social reality of being able to act in certain ways with relative impunity. And the reality of possessing moral rights, in particular, covers this reality as well as the moral reality that being able act in certain ways with relative impunity is justified by moral principles that promote individual freedom. Seeing the matter from this critical perspective reveals that social activism and struggle are not only essential to securing and maintaining our status as legal rightholders but as moral rightholders as well.³⁵

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