Human Rights as Moral Rebellion and Social Construction

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This paper describes and defends a moral constructivist theory of human rights which characterizes them as an historically-evolved, socially-constructed ethico-legal paradigm designed to prevent and ameliorate systematic or institutionalized forms of oppression. After describing this theory and comparing it with alternative accounts of the nature, origins, and justifications of human rights, I argue that by grounding a common understanding of human rights within this framework, the global human rights community can better address the challenge of effectively protecting “all human rights for all” through the development of a more empirically grounded and cosmopolitan conception of human rights.

Justifying Human Rights

There continue to be significant internal divisions within the human rights community about the general philosophical justification of human rights as well as about the justification of specific norms and their interpretations. There also continues to be significant external opposition to human rights norms and standards coming from individuals and societies that regard themselves as adhering to different cultural traditions than the philosophical tradition that gave birth to the doctrine of human rights. It is important to understand the nature of these internal and external challenges to the contemporary human rights framework in order to determine precisely what is really being asked for now when people ask for a justification for human rights.

The first challenge to the contemporary idea of human rights comes from within the Western, liberal intellectual community itself and is essentially an internal challenge. This challenge is really an “in-house” argument among various different academic subcultures within the wider community of human rights scholars and Western liberal intellectuals. It is found mainly in the work of postmodernist scholars such as Richard Rorty who have questioned the traditional bases in the Western liberal tradition for believing that human rights are objective, transcultural, and transhistorical moral truths. While I think that this is an interesting challenge, and I will spend some time discussing it, I am not convinced that one needs to understand or to appreciate the philosophical nuances of this controversy in order to be an effective human rights activist, or have a well-grounded belief in human rights, to teach human rights well, or to defend the notion of human rights against various kinds of externalist challenges. This internalist challenge to the notion of human rights mainly concerns the question, “How should we (i.e., human rights scholars and Western liberal intellectuals) philosophically interpret and justify our belief in the universality and the
transcultural validity of human rights to ourselves?" I want to cast doubt on one interpretation of the presupposition that human rights stand in need of a philosophical justification, and to suggest that the belief that human rights are universal does not require any special philosophical foundation, any more than do the claims of applied sciences such as clinical medicine or civil engineering that the techniques they employ to treat diseases and to construct bridges apply everywhere. The kind of justification needed for claims of this kind is a pragmatic and conditional one, rather than an absolute justification based upon religious doctrines, metaphysical postulates, or speculative philosophical conceptions of human nature. In particular, I want to suggest that our belief in human rights does not require any special philosophical foundation of this kind to support it—a pragmatic one will do—and that human rights scholars and activists would do well to recognize this fact.1

Two other recent challenges to the idea of the universality of human rights come mainly from outside of the Western liberal tradition; these are the externalist challenges. The 1993 Vienna World Conference on Human Rights witnessed one of the most serious challenges to the idea of the universality of human rights norms and standards since the end of the Second World War. This second challenge came mainly from some authoritarian governments in the East, the so-called “Asian Block,” and from several Islamic governments in the Middle East, and mainly concerned the notion of cultural difference and the principle of domestic jurisdiction. This challenge was signaled in the text of the declaration of the Bangkok preparatory conference in which it was stated that “while human rights are universal in nature, they must be considered in the context of a dynamic and evolving process of international norm-setting, bearing in mind the significance of national and regional particularities and various historical, cultural and religious backgrounds” (Bangkok Declaration 1993: 8). This apparently benign statement alarmed some Western human rights scholars and activists because it signaled an attempt to use cultural difference as a way of bringing back the notion that human rights do not represent an important set of exceptions to principles of national sovereignty and domestic jurisdiction. It is a fundamental feature of the contemporary, Post World War II, consensus that human rights address areas of concern in which the principle of international solidarity overrules the claim of domestic jurisdiction advanced by sovereign nation states. The concern that citizens of one nation, or the democratically elected governments of those nations, might have about the human rights of citizens of other nations and the performance of foreign governments in this regard are legitimate and proper and, in particular, cannot be deflected by the target government as meddling in the internal affairs of their state. To say that national sovereignty is limited by human rights in this way, that the human rights of people living in any country are a legitimate concern of all members of the international community, is one way in which to express the claim that human rights are universal.

Reference to national and regional peculiarities was seen as a way of exempting governments from this principle and this produced a countermovement to block any attempt to qualify and to undermine the universality of human rights in this sense at Vienna.2 In the end, this challenge was deflected through the efforts of Western delegates in the official conference drafting committee, who, acting under intense pressure from many nongovernmental organizations, had the statement, “The universal nature of these rights and freedoms is beyond question,” adopted by consensus and included in the final draft of the Vienna Declaration and Programme of Action (United Nations 1993: Art. 5). This ringing declaratory affirmation, however, did not end the debate concerning the question of the authority and universality of human rights norms and standards in the face of the diversity of human cultures. While many human rights advocates bemoan this fact, at least one commentator has suggested that it may be a good thing:
While it is desirable to acknowledge the relevance of different cultural, philosophical, social, and religious factors in relation to the application and interpretation of human rights norms, many are reluctant to do so for fear that this would undermine the fundamental principle of universality. As a result, the quest for a glib formula which will dispose of the issue in a manner that is deemed acceptable to the principal geopolitical actors assumes overriding importance. Thus the outcome achieved at Vienna is considered highly satisfactory, despite the extent to which it glosses over the debate that is desperately needed if the human rights movement is to move to a more sophisticated plane. (Alston 1994: 380–381)

Part of my interest in exploring alternative justificatory strategies available for understanding human rights is to reframe the debate about universality and cultural difference in a way that will help us move onto this more sophisticated plane.

But before doing this we must recognize that there is a third challenge to the idea of universality of human rights, which is sometimes confused with the second one. It comes mainly from some private intellectuals, feminists, human rights workers, and nongovernmental organizations from the South and East who are generally friendly to the received idea of human rights, but who have been urging that the current conception of human rights norms and standards is Eurocentric in its origins and emphases, and that because of this, the currently dominant conception of human rights cannot be readily exported to or imposed upon some non-Western societies. Rather than rejecting the human rights framework, these critics are saying that it must be reformed in order to make it more sensitive to differences among cultural traditions, more focused on concerns that have heretofore been largely ignored by the individualistic liberal conception of human rights, and more amenable to actually being implemented within diverse cultures. These critics are also increasingly saying that Western governments are hypocritical about their own commitment to human rights and apply human rights standards selectively and in a political manner in order to justify policies that advance their own national interests. I regard this last set of skeptical challenges as at least partly internalist, here taking this to mean internal to the human rights community considered as a global social movement, though it is external to the dominant liberal conception of human rights, considered as a (mainly Western) intellectual subculture within the wider global human rights community. I think that it is the most important challenge to the received idea of human rights, and I also think that it cannot and ought not to be deflected simply by issuing a declaration reaffirming the universality of contemporary human rights standards.

Many Western defenders of human rights base their justification of human rights on a form of legal positivism. Jerome Shestack has noted that the traditional debate between cultural relativists and universalists has been mooting to some extent by the development of international law: “Even as theorists have continued to quibble with each other, fundamental human rights principles have become universal by virtue of their entry into international law as *jus cogens*, customary law, or by convention. In other words, the relativist argument has been overtaken by the fact that human rights have become hegemonic and therefore universal by fiat” (Shestack 1998: 233). Legal claims are generally justified by reference to the relevant statutes or court decisions, although, of course, there is a need for interpretation of these texts when applying the law to new cases. So to the extent that human rights standards are embodied in domestic laws, for instance, in the constitutions or bills of rights of states, their statutes, case law or other kinds of “black letter” law, legal positivists can claim the
justifications for human rights norms are no different in principle from the justification of other kinds of legal claims.

Human rights, however, are distinguishable from positive legal rights. Human rights, as I shall understand that term, are moral rights that are (imperfectly) embodied in a contemporary canon of international human rights law, that is, the approximately eighty international declarations, treaties, covenants, that have been adopted by the United Nations and ratified by nation states since the end of the Second World War, beginning with the Genocide Convention and the Universal Declaration of Human Rights, both of which were adopted in December 1948. International human rights law is regarded as “soft” because there is no international authority to enforce it and hence the enforcement of these legal norms depends upon their translation into the “black letter” law of various nations. But there is at least one sense of “justification” in which human rights claims can be justified by reference to the relevant portions of the canon of international human rights law. For instance, if one wishes to justify the claim that there is a human right to primary education that is compulsory and free for all, one can reference Articles 13 and 14 of the International Covenant on Economic, Social, and Cultural Rights, Articles 28 and 29 of the Convention on the Rights of the Child, and several other international and regional human rights instruments. On the other hand, if one is asked to justify the claim that there is a human right not to be discriminated against on the basis of one’s sexual orientation, then this strategy will not work, since by and large this right has not been explicitly recognized within the existing canon.

How then can one justify a claim that such-and-such is a human right when it is not already explicitly included in the canon? One might try to defend one’s claim by constructing an argument that links this proposed human right claim to established and recognized rights found in the canon, for instance, other nondiscrimination rights, equality before the law, or to liberty or privacy rights. In at least some cases, justifying new human rights claims involves showing how they can be linked to other rights that are already regarded as justified. This process of linking rights to one another has fueled the expansion of the human rights canon in the latter half of the twentieth century as more and more claims regarding what should count as a human right came to be seen as justified by showing how they could be derived from or linked to already recognized human rights. I will refer to this general justificatory strategy as the “top-down” approach.

The top-down approach can work only when there are already some human rights that one’s skeptical interlocutor regards as justified for then one can pin one’s case on that premise and construct arguments showing how other purported human rights derive from or are implied by the human rights that one’s interlocutor already accepts. Many philosophers, for example, H. L. A. Hart (1955) and Alan Gewirth (1982), have favored this kind of top-down approach to justifying human rights. Their strategy has been to first establish that there is at least one thing that is unquestionably a human right, for instance, a natural right to liberty, or generic rights to freedom and well-being, and then, having established that there is at least one universal human right they argue that other human rights derive from or are entailed by this fundamental right.

But some contemporary philosophers have argued that this kind of “top-down” justificatory strategy cannot succeed and is in any case useless in practical affairs (Rorty 1989, 1993). When we are attempting to justify human rights in the practical sense what we are really being asked to provide is a reason or set of reasons why a person or a society should adopt and attempt to adhere to the particular set of rules of practice embodied in the contemporary human rights canon, as opposed to some other set of rules of practice, for instance, one derived from religious teachings, customary or traditional practice, or even contrary policies adopted by democratically elected governments. For instance, a practical
justification for a particular human right should answer questions such as, “Why should women have an equal right to vote in Saudi Arabia?” or “Why should we assume that persons suspected of terrorism and held at Guantanamo Bay should have a right to legal counsel?” The answers to these kinds of questions will be quite specific and may involve appeals to specific historical precedents, domestic laws, similar or analogous cases and will often presuppose quite particular historical or cultural circumstances, as well as philosophical arguments linking the right in question to other rights or to important moral values, such freedom, security, and human dignity.

In fact, there is no particular reason on the face of it to assume that one can even meaningfully ask for a justification for human rights tout court. The term itself is in a collective noun covering a number of distinct sorts of things, rather like the term “furniture”—we always speak of human rights in the plural implying that there are many of them. Human rights are typically classified as civil, political, judicial, economic, social, and cultural, suggesting that each of these categories might require some kind of separate and special justification. So, even if we had in our possession a justification or the justification for believing in “human rights” tout court, or even an uncontested justification for a small set of very abstract foundational rights, we would still need to provide separate special justifications for each particular right contained in the canon, and we would still have to consider whether or not there are some rights that are contained in the canon that ought not be and whether there are some things that are human rights that are not presently part of the canon. And then, having done that, we would still have to find a way to convince the human rights skeptic to accept the human rights canon as authoritative and as justly overriding customary norms or governmental policies with which it may conflict.

These sorts of questions are of more than merely academic interest. Human rights activists are regularly faced with the need to justify their demands on behalf of victims of human rights violations against charges that the human rights standards to which they are appealing are alien to the societies to which they are being applied. It is frequently claimed that such external criticisms are culturally naive and insensitive, that they transgress the bounds of state sovereignty and domestic jurisdiction, or that they rest on a liberal assumption of the priority of individual rights over the interests of the social collectivity, and other similar objections. Faced with such challenges, human rights activists have sometimes turned to philosophers and human rights theorists for answers to these charges, yet members of the human rights community are often disappointed when they find the scholarly literature lacks of any clear consensus on how human rights are to be understood, how they are to be justified, and how, in particular, it is possible to answer charges of ethnocentrism and cultural imperialism.

By the human rights community I mean primarily those who are committed to the core ideas of human dignity, liberty, equality, nondiscrimination, religious tolerance, democracy, social and economic justice, and the other moral and legal norms and values that characterize the contemporary idea of human rights and that have been codified in the canon of international human rights law. These legal norms express the moral convictions of a particular community of belief and they make substantive, nontrivial, and often quite controversial claims about the proper ways in which to legally, economically, and politically structure civil societies and governments, claims that are in competition with other systems of belief for popular acceptance and adherence. Believers in human rights represent but one community of belief among many, and in this sociological sense, the belief in human rights is clearly not universal.

This is not, however, the same thing as saying that human rights norms and values themselves are not universal in the prescriptive normative sense, that is, that the ethical and
legal norms of human rights do not apply to or do not oblige those who do not belong to the human rights community or share the belief in human rights. It is a peculiar, but extremely important, feature of moral and legal norms that they can properly apply to and oblige moral agents even when those agents do not accept or agree to them. Moral and legal norms are said to be justified to the extent that they have this kind of peremptory normative force. So a more useful way to frame the question about the justification of human rights we are asking is: What gives the contemporary doctrine of human rights its universal moral authority? What justifies the claim that human rights have globally binding moral force?

In the recent philosophical literature there are basically five distinct approaches from which human rights theorists have tried to answer this question: (1) a religiously based approach, (2) a legal positivist or conventionalist approach, (3) a Neo-rationalist foundational approach, (4) a consequentialist approach, and (5) a pragmatic, humanistic moral constructivist approach. While each of these approaches has some merit, I shall argue that a version of the last kind of strategy, a “bottom-up” approach employing a version of moral constructivism, provides the single most satisfying and philosophically, politically, and historically adequate account of the nature, origin, and justification of human rights. This position furnishes an epistemic basis for the claim to transcultural moral authority of human rights standards, although it does so in nonabsolute and nondogmatic manner. That is, it suggests that while a belief in the universality and authority of contemporary human rights norms and standards is rationally defensible, it could still turn out to be the case that certain of our contemporary human rights standards are inappropriate or incorrect in various respects, and that the current international system for protecting human rights is incomplete or inadequate and in need of revision.

In particular, the moral constructivist view holds that our present doctrine of human rights is best understood on analogy to the notion of a scientific paradigm; that is, as a kind of socially constructed, historically evolved normative theory. Unlike descriptive scientific theories whose goals are to describe, to explain, and to predict natural or social phenomena, normative theories have as their goal the regulation of human social behavior. The contemporary doctrine of human rights is a particular kind of normative theory—an ethical-legal paradigm—whose specific goal is to identify, to proscribe, and ultimately to eliminate certain serious and unfortunately very common and widespread forms of human oppression. The key to understanding what human rights are and how, in general, they are to be justified is to see them as normative responses to experiences of oppression.

While experiences of oppression supply the experiential basis of the theory of human rights, the authority of the human rights paradigm (as a normative theory of oppression) derives essentially from the same sources as the authority of any scientific, technological, or intellectual paradigm—namely, from its ability to withstand criticism, to succeed where rival theories do not, from its continuing fruitfulness, from its ability to assimilate new ideas and adherents, and from its coherence with other domains of belief. However, like other sorts of paradigms, the human rights paradigm cannot and should not attempt to claim an absolute as opposed to a conditional authority. All human knowledge is in principle fallible and potentially subject to criticism, refinement, revision, further elaboration, and perhaps even replacement by some successor theory. The justification of our current theory of human rights depends upon an evaluation of how well this particular theory achieves its particular goals, as compared with alternative or competing normative theories having similar goals, not from some transcendental philosophical foundation. Moral constructivism thus provides a rational defense for a belief in human rights, though not one that places important theoretical and political issues concerning the scope, limitations, and conditions
of derogation of human rights “beyond question.” This kind of nonabsolute justification is, I want to argue, all the justification we can reasonably hope for, and also all the justification we really need.

But adopting a moral constructivist approach to human rights also entails a certain type of challenge and danger to our present conception. The current, weak, international consensus on human rights, has not, in fact, provided an effective means for actually thwarting oppression in many cases. Serious patterns of human rights abuse have taken place since the Universal Declaration was proclaimed, and all of the rights in it have been violated grievously, repeatedly and with impunity while the international community has (for the most part) stood passively on the sidelines and watched. Since 1948 we have witnessed the gulag, apartheid, war crimes, death squads, disappearances, torture, and ethnic cleansing and genocide in Cambodia, Bosnia, Rwanda, and Darfur. If we assess its effectiveness in objective terms then we must conclude that the current international system for protecting human rights is largely dysfunctional. We do not need more solemn United Nations declarations that are immediately disregarded. The historical project of devising and constructing effective international institutions that will actually allow all persons everywhere to enjoy all of their human rights remains the unfulfilled goal of the human rights movement. On the legal positivist’s view, the contemporary human rights framework is justified because it has been agreed to by states, but on a moral constructivist view it is justified by its ability to prevent oppression. If, in the last analysis, the documents that comprise the contemporary canon of human rights do not do this they are not worth the paper they are written on.

If human rights are to do what we hope they will do, that is, eliminate the major forms of institutionalized oppression in the world, what is needed now is not more tinkering with the philosophical “foundations,” or more exercises in norm creation without effective implementing institutions, but rather the application of the human imagination to the problem of gathering and sustaining the resources necessary to properly implement human rights. The forging of a cosmopolitan commitment to the creation of effective international institutions to protect human rights globally is the next stage in the historical human rights project. But forging a cosmopolitan commitment to human rights protection involves more than just giving lip-service to norms; it requires a serious commitment of resources for their effective and universal implementation and enforcement. Eliciting the motivation for this kind of deep commitment to the global protection of human rights continues to elude the contemporary human rights movement. What is needed in order to raise the discussion about human rights to the next level is a focus on the practical problems of building and sustaining global institutions that will effectively implement human rights within individual nations and the community of nations. The problem for the human rights movement in the twenty-first century is the problem of effectively protecting “all human rights for all.” My central thesis in this article is that this practical problem can be best addressed by grounding a common understanding of human rights within the moral constructivist perspective.

My strategy will be to first elaborate this moral constructivist view of human rights, and to clarify certain matters that might lead to misunderstandings of it. I will then compare and contrast it with the four other approaches mentioned above noting the strengths and weaknesses of each approach. In conclusion I will argue that the current human rights paradigm could benefit from a renewed and reinvigorated dialogue within the international human rights community aimed at transforming the current liberal individualist paradigm into a more robust cosmopolitan conception of human rights.
Human Rights as Normative Responses to Experiences of Oppression

In order to properly understand what human rights are, how they function in moral and political discourse, and how they are to be justified, it is important to understand that human rights have arisen as normative responses to historical experiences of oppression. It is the essential purpose and function of this special category of moral norms to prevent and to eliminate those practices and social conditions that lead to, foster, support or directly cause severe, systematic oppression, or, put positively, to promote social conditions that allow for human beings to live with their dignity, well-being, freedom, and their possibility of human flourishing intact. In particular, the contemporary canon of human rights is a normative (ethical and legal) paradigm whose roots can be traced to lived experiences of oppression. Catharine MacKinnon put the basic idea memorably when she wrote:

> In reality begins principle. The loftiest legal abstractions, however strenuously empty of social specificity on the surface, are born of social life: amid the intercourse of particular groups, in the presumptive case of the deciding classes, through the trauma of specific atrocities, at the expense of the silent and the excluded, as a victory (usually compromised, often pyrrhic) for the powerless. Law does not grow by syllogistic compulsion; it is pushed by the social logic of domination and challenge to domination, forged in the interaction of change and resistance to change. . . .Behind all law is someone’s story—someone whose blood, if you read closely, leaks through the lines. The text does not beget text; life does. (1993: 84)

Human rights norms are the result of millions of such “sad stories”—personal stories of atrocities, tortures, humiliations, brutalities, discriminations, exploitations, repressions, deprivations, marginalizations, cruelties, betrayals, abandonments, denials, neglects, crimes, abuses, and murders. The contemporary canon of human rights law is a socially constructed bulwark against just such forms of historically experienced oppression; it is a system of moral commitments and legal safeguards designed to be deployed in order to avert or to forestall some of the most serious, common, and preventable causes of human oppression that are among the most serious man-made threats to human freedom and well-being. The universal application and appeal of human rights has more to do with the fact that these norms address themselves to forms of oppression that are, tragically, very widespread across human societies and in human history, than with any abstract philosophical account of their basis and justification.

The universality and moral authority of human rights derives from the fact that they are not just a set of arbitrary, culturally relative conventions; rather the doctrine of human rights provides an implicit theory of the main forms of systematic social, political, and economic oppression that takes the form of an explicit set of legal norms designed to counteract, prevent, and ameliorate many of these kinds of threats. The abstract ideas of human dignity, equality, and freedom, and the idea of rights and correlative responsibilities that the theory proposes, are moral constructs, and the standards and norms embodied in human rights declarations, treaties, and covenants are particular hypotheses concerning preferred ways in which to prevent forms of oppression and a partial model of how to construct humane and decent governments. Despite its current prestige, the current human rights paradigm is not eternal, immutable, or infallible; it is constantly in need of extension, adjustment, and revision. However, it is currently the best theory we have of the matters that it deals with,
namely, the conditions necessary for people to lead minimally decent human lives free from serious oppression, and therefore, it does (and ought to) command a certain degree of moral and epistemic authority.

Before delving further into the details of this constructivist account of human rights, it will be useful to clarify the meaning of the term “oppression.” In ordinary language, to be oppressed is to be subjected to the unjust or cruel exercise of authority or power. Those who are oppressed are a specially powerless and vulnerable class of persons because they are subject to forces that are beyond their control that deny them the ability to protect their most basic interests. The sense of powerlessness is captured by Marilyn Frye when she writes: “The experience of oppressed people is that the living of one’s life is confined and shaped by forces and barriers which are not accidental or occasional and hence avoidable, but are systematically related to each other in such a way as to catch one between and among them and restrict and penalize motion in any direction. It is the experience of being caged in: All avenues, in every direction, are blocked or booby-trapped” (1983: 5). Three points deserve emphasis.

First, oppression relies on an assortment of different techniques or practices that together function to create a system of oppression. The systematic nature of oppression is one reason why we talk about the indivisibility, interrelatedness, and interdependence of human rights. Human rights must be multiple in order to provide an effective safeguard against systematic or institutionalized oppression, for if they are not, then oppression will be sustained by other means (Winston 2000). History is replete with examples of systems of oppression that were sustained for generations before being finally curbed or overthrown. It is in the nature of the will to power that sustains oppression to find new ways of expressing its will to dominate others, but it is also in the nature of human rights to try to identify and to proscribe each of the individual practices by which the will to oppress can prevail. One reason why the human rights canon continues to evolve is because as the powerful invent new ways to oppress others, the human rights community responds by devising new norms for thwarting them.

Secondly, those persons who are trapped by systematic oppression are essentially unable to rescue themselves from their situation. They are overpowered and overmastered by forces that are beyond their control, and while a few may manage to escape, most remain trapped in circumstances that they are unable to change or to resist. Although “oppression” is best understood as admitting of degrees, a common element is the relative powerlessness of the oppressed to alter their situation through self-help alone. This feature of oppression explains why the human rights ethos is founded on the notion of solidarity. The famous slogan of the French Revolution—“Liberty, equality, fraternity, and resistance to oppression”—calls upon bystanders to actively come to the aid of the oppressed, and to stand in solidarity (fraternity) with them against those who would continue to oppress them. Solidarity is not a transient moral sentiment like empathy; it is a social practice under which persons place themselves under a standing moral commitment to act so as to benefit others in specific identifiable ways (Sweet 2003). The global human rights community expresses this solidarity through witnessing, documentation, research, advocacy, aid, and support to victims, and working to strengthen the global human rights framework itself.

Thirdly, while there are undoubtedly individual victims of systematic oppression, such as political dissidents, for the most part, people are oppressed on account of some feature of their group identity. Women are oppressed qua women, blacks are oppressed qua blacks, Jews are oppressed qua Jews, refugees are oppressed qua refugees, and so forth. In each of these cases, the members of an oppressed group have been singled out and held down in some way because of some feature of their group identity. It is for this reason that the contemporary human rights paradigm places so much emphasis on the principle of nondiscrimination. The
value we place on the abstract idea of equality is largely the result of our awareness of the historical crimes produced by discrimination on the basis of group identity. Discrimination has been at the root of many if not most kinds of historically experienced oppression. This is also part of the reason why most contemporary accounts of human rights recognize the existence of group rights that are collective and not wholly reducible to individual rights (Crawford 1988).

Iris Marion Young has given one of the most complete philosophical accounts of the concept of group oppression, according to which, “a group is oppressed when one or more of the following conditions occurs to all or a large portion of its members: (1) the benefits of their work or energy go to others without those others reciprocally benefiting them (exploitation); (2) they are excluded from participation in major social activities, which in our society means primarily a workplace (marginalization); (3) they live and work under the authority of others, and have little work autonomy and authority over others themselves (powerlessness); (4) as a group they are stereotyped at the same time that their experience and situation is invisible in the society in general, and they have little opportunity and little audience for the expression of their experience and perspective on social events (cultural imperialism); (5) group members suffer random violence and harassment motivated by group hatred or fear” (Young 1988: 260). These features of the concept of oppression make it fairly easy to identify new instances of the phenomena but do not provide a theoretical definition in the strict sense of a set of necessary and sufficient conditions for some practice or condition being oppressive. Oppression, as I use the term, describes objective features of certain specific kinds of social relationships in which power is deployed by some so as to effectively prevent others from protecting their ultimately valuable interests. Saying that something is an ultimately valuable interest does not mean it is absolute, but it indicates that its value is not solely instrumental and is derived only from its contribution to the enjoyment of other valuable things. We learn what oppression consists of from reflecting on historical experience, and because history is open ended, so also must be our understanding of oppression. But to say that we learn about oppression from historical experience is not at all the same thing as saying that the “experience of oppression” is merely subjective. It is possible for people to feel oppressed when they are not actually oppressed, and, conversely, it is possible to be actually oppressed even though one may not realize that they are oppressed. Oppression is ultimately defined on the basis of objective power relationships among people in societies, where power is understood in the classical Weberian sense of the effective ability to achieve the objects of one’s will despite resistance.6 While there are “line-drawing” issues involved in any concept, the characteristics the phenomenon of oppression (and cognate and related concepts, such as persecution, degradation, humiliation, exploitation, repression, tyranny, subjugation, etc.) are sufficiently well delineated to make it serviceable as a basis for a moral constructivist account of human rights.

Although the contemporary human rights paradigm can trace its intellectual ancestry deep into the roots of human civilization, and its core values find expression in the ethical traditions of many cultures, in fact it had its proximate origin in the experience of the Second World War and, in particular, the system of oppression developed by the Nazis. It is generally accepted that the contemporary doctrine of international human rights was developed following the Second World War and found its first expression in the UN Charter (1945) and the Universal Declaration of Human Rights (1948). The inclusion of the notion of human rights in these documents is mainly the result of popular political movements, led by nongovernmental organizations, and was not the result of governmental initiatives or academic theorizing (Burgers 1992). In order to understand the constructivist nature of the contemporary human rights canon, it is indispensable to focus attention on the legacy of the Second World War, in particular, the Holocaust, and the reflections that this experience
prompted in the minds of the drafters of the *United Nations Charter* (1945) and the Universal Declaration of Human Rights (1948). This has been the subject of extended studies by Johannes Morsink (1993; 1999).

Morsink reminds us that the *Universal Declaration* was adopted by the Third General Assembly of the United Nations on December 10, 1948—three years after the end of the Second World War. The delegates who were members of the UN Commission on Human Rights that drafted the declaration said, in their Preamble that one important reason for the declaration of rights was that “disregard and contempt for human rights [had] resulted in barbarous acts which [had] outraged the conscience of mankind…” Morsink provides a detailed analysis, article by article, of the *Declaration* in order to demonstrate his general thesis that “For each right proclaimed, they went back to the experience of the war as the epistemic justification of the particular right in question” (1993: 358). For example, Article 14 of the Universal Declaration of Human Rights provides that “everyone has the right to seek and to enjoy in other countries asylum from persecution.” Morsink argues that this right was a real battle ground within the UN Commission on Human Rights because in its original form it proposed definite limitations on the right of national sovereignty, by including the words “and to be granted” instead of “to enjoy.” The explicit inclusion of the words “to be granted [asylum]” was urged by nongovernmental organization observers from the American Federation of Labor and the World Jewish Congress, who argued that it made no sense to give people a right to escape from conditions of persecution (Art. 13), without the corollary right to be granted asylum in countries of refuge. In support of this they argued that “Many refugees of Germany had been denied this right which had resulted in the deaths of thousands.” But, the delegate from Saudi Arabia (one of the eight countries that did not vote for the Declaration) proposed that the words “and be granted” be deleted, and the British delegation proposed the substitution of the words “and to enjoy” that were construed as not creating a legal obligation of states to grant asylum, since asylum could only be enjoyed if it were granted. This was a terrible lapse of judgment on the part of the UN Commission on Human Rights, one in which “the lessons learned from the Holocaust were once again lost” (Morsink 1993: 385).7

This is just one example of several that Morsink provides: other examples are the right to marry and to found a family, the right to a nationality, and the right to be regarded as a person before the law. All of these rights were violated in an egregious way by the Third Reich, and this particular experience of oppression provided the proximate source of many of the particular rights that were proclaimed in the Universal Declaration, although, in some, cases, they also had earlier historical antecedents. As these examples illustrate, rather than attempting to deduce specific human rights from religious doctrines, some general ethical conception of human dignity, philosophical accounts of human agency or freedom, an imaginary, idealized social contract, or the abstract principles of utility, the drafters of the Universal Declaration of Human Rights sought the justification for each article in the experience of the recent war.

Each human right has its own justification; one that is discovered when that right is violated in some gross way…The philosophical lesson to draw from this investigation is simply that not God, and not Reason, and not Nature, but the experience of rebellion is the proper epistemological starting point for any defense of our belief in human rights. When a gross violation of a human right occurs, morally healthy people will be repulsed and will want to rebel in the name of the value that is being violated. That is how values are discovered and why WWII gave birth to the Universal Declaration of Human Rights” (Morsink 1993: 399).
While the particular experience of Nazism and fascism in twentieth-century Europe provided the immediate experiential basis that brought the Post-WWII doctrine of human rights into existence, the experiences that prompted these rebellions are by no means unique to Europe; they represent forms of oppression and oppressive practices that are very common in human history and very widespread across diverse societies. The spread of human rights discourse to all parts of the globe is not, then, the imposition of alien Western values to other cultures, but rather the spontaneous adoption of a Western-evolved concept that describes a universal experience of oppression and rebellion against oppression. This is the reason why using a moral constructivist approach is the best starting point for defending the belief in human rights against skeptics. It does not presuppose that they share Western philosophical or religious presuppositions, or that they are capable of following complicated trains of philosophical argument, rather, as Morsink says, “there is no better or surer way of arguing with a moral skeptic or cynic than to show them the camps and ask for a condemnation” (403).

The Social Construction of Norms

But moral condemnation of oppression is only the beginning not the end of the process by which we construct human rights. In order to understand how “moral rebellions” highlight values and how these value commitments lead to the creation of norms, it is important to recognize that there is distinct step from the act of condemning particular experiences of oppression, the moral rebellion itself, to the act of promulgating of a new moral or legal norm that is proposed as a remedy to prevent that form of oppression. I refer to the process involved in this second step as “moral abduction,” borrowing a term from the philosophical vocabulary of the nineteenth-century American philosopher Charles Sanders Peirce, who distinguished among three main types of scientific reasoning: deduction, which involves the drawing of logical inferences from general principles to particular conclusions; induction, which involves confirming a regularity in experience by observing repeated instances; and abduction, which is the form of reasoning by which we arrive at or propose new hypotheses. In the scientific case, abductive reasoning moves from observation of surprising or unexplained facts or regularities in experience to the framing of a hypothesis, which, if true, would account for or explain those observations or regularities. The general form of abductive reasoning or, as it is sometimes called, hypothesis formation, is as follows:

\[
\text{A surprising fact } C \text{ is observed. But, if } H \text{ (some hypothesis) were true, } C \text{ would be explained as a matter of course. Hence, there is reason to suspect that } H \text{ (or something like it) is true and for elaborating } H \text{ as a theory of } C.\]

There is something akin to scientific abduction operating in the moral realm involved in the process of framing new moral and legal norms. A difference between scientific and moral abduction is that in the latter case the fact C from which we begin is a social or historical fact of human experience to which we attach a value, sometimes positive but usually negative. In the case of there being a negative value attached to such facts, for instance, forms of oppression such as the enslavement or torture of human beings, the normative hypothesis N that we frame is designed not to explain why such practices exist, but to devise a rule of social conduct, an ethical or legal norm, under which such practices would be prevented or averted thereby sparing other human beings similar experiences. The general form this kind of reasoning takes is:
An outrageous and abhorrent practice (or condition) C is observed. But, if N (some moral or legal norm) was promulgated and universal compliance with it was enforced, then C (and other similar practices) would not occur. Therefore, there is reason to promulgate and to enforce compliance with a moral norm such as N.

Scientific theories and hypotheses originate in the scientific imagination, and likewise moral and ethical norms and institutions originate in the moral imagination. The concept of the moral imagination has received an important treatment by Mark Johnson (1993), who argues that traditional philosophical theories in ethics have largely, and mistakenly, ignored the role of imagination in the creation of moral norms. He also argues that most of the received literature in ethics is based on largely subconscious metaphors that provide the imaginative basis by which ordinary people, as well as moral philosophers, think about ethical questions. On a moral constructivist account, moral norms, such as the norms embodying human rights, begin by our imagining a world in which certain specific kinds of oppression and abusive practices that “shock the conscience of mankind” will no longer take place, and then devising means by which this imagined result can be realized. It is through reasoning of this general form, imaginative abductions from experiences of injustice and oppression that many moral and legal norms are first propounded. This mode of normative reasoning has sometimes been called the “via negativa” since it begins with what we wish to prohibit or to outlaw. Edmund Cahn has developed a view of the origin of legal norms in which he argues that justice “means the active process of remedying or preventing what would arouse the sense of injustice” (1949: 13–14).

Ethical and legal norms belong within the general category of what Jacques Ellul has called human techniques. Techniques in general can be defined as, “the ensemble of practices by which one uses available resources in order to achieve valued ends” (Ellul 1964: 18). Human techniques are those in which “man himself becomes the object of the technique” (22), that is, in which technique is applied to alter or to control human conduct in society. Ethical and legal norms are human techniques in precisely this sense; they are normative hypotheses about ways by which to effectuate valued changes in human social behavior. In all such cases, the relationship between the experienced wrong, the source of a moral rebellion, and the norm that is designed to prevent it is analogous to the relationship between observation and hypothesis in science: The ethical norm (moral hypothesis) “goes beyond” the original observation in a way that generalizes to new, unobserved cases and posits the existence of a new category or concept, a new value, law, right, or duty. Rights and duties are thus moral constructs, analogous to the theoretical constructs used in science to model, to predict, and to explain natural phenomena. In science observation is “theory-laden” in that what we observe is influenced by the categories found in our theories, while in the moral domain, the observation or experience of something as “wrong” is “value-laden” in that moral rebellion brings into play our existing tables of moral values, our moral intuition or conscience, and the functioning of our intuitive moral sense. To characterize a particular experience as “oppressive” is both to describe it and to attach a value to it, and these two aspects cannot be wholly disentangled.9

Particular ethical or legal norms are the products of reflection and imagination applied to such intuitive appraisals of moral experience. The particular norms that are proposed and promulgated, however, represent an imaginative selection from among an indefinite universe of possible alternative norms that might have been proposed and, as such, are always to some extent hypothetical and provisional; there is, in other words, no guarantee that the norm selected is uniquely capable of functioning as a response to a particular
form of oppression or that it will work in the way intended. Moreover, like treatments and therapies in medicine, the adoption of particular normative standards involves “trade-offs” and “costs” that may sometimes be prohibitive. However, like hypotheses in medicine or science generally, proposed moral and legal norms gain credibility to the extent that they are able to survive criticism, to attract new adherents, to connect to other bodies of belief, and to compete successfully with other, often contrary, norms, in serving the functions they are intended to serve.

In the case of those specific ethical and legal norms that we call human rights, whose primary function is to prevent standard forms of human oppression, the individual norms comprising the system (i.e., the system or canon of human rights), have been tested, and to some degree proven, in the laboratory of history. This is particularly true of the older and more entrenched rights, those that most centrally define the concepts of human dignity, equality, and freedom, or the “core” of the human rights paradigm. In the case of these older rights, various societies have adopted and implemented the protections that these rights propose, and, by and large, doing so has created social practices and conditions in which people are spared certain kinds of oppression to which they might otherwise have been subject. In other words, moral hypotheses gain credibility and epistemic authority in much the same way that scientific hypotheses do—by demonstrating that they work.

However, I would caution against uncritically accepting the view that human rights “work” in all cases. In fact, there is much evidence that human rights have not worked, or not worked in all cases, for instance, in preventing genocide, modern forms of slavery, ethnic cleansing, torture, discrimination, and many other specific abuses during the post-WWII period. Human rights advocates need to look carefully at the reasons for these failures. It is not enough to say, the abuses would not have happened if the relevant norms had been followed; one needs to understand the deeper reasons why the norms are often ignored or flouted. Urging the need to undertake these kinds of analyses is part of the project of the brand of moral constructivism I favor, one that strives to create a more empirically grounded form of ethics, one in which, one “looks at the psychology which has contributed to this set of man-made disasters. What are the limitations of the moral resources? How can we start to overcome these limitations? Which parts of our psychology are dangerous? How far can they be chained or contained? What countervailing tendencies can we develop” (Glover 1999: 43)? Until the human rights movement begins doing this kind of deeper psychological and sociological analysis of the causes of oppression, it is not likely to be successful in its mission to eradicate human rights abuses.

The part of the constructive process that involves the imaginative creation of new ethical or legal norms is only the beginning of what are normally protracted processes of social legitimation and implementation—the social construction of ethical or legal regimes. The general notion of social constructivism holds that the entire infrastructure of human civilization—our large-scale material artifacts such as cities, dams, power grids, our social and political institutions such as our courts, and schools and legislatures, our arts and cultures, and our particular forms of knowledge and understanding, including science—is the product of purposeful socially organized creative activity. This thesis is quite evidently true with respect to the material culture of human society, but it is no less correct as a characterization of its social and intellectual infrastructure. In particular, for moral constructivists, the moral and legal organization of society is also a social construction, one that has been developed over many centuries largely as a response to social practices and conditions that people have found intolerable or undesirable and against which they have rebelled. The particular part of the moral culture that we call “human rights” addresses the most heinous crimes and grievous wrongs that have been committed by people against other people and
proposes the regime of human rights as a remedy to prevent such crimes from recurring in human history.

The human rights regime has evolved over the past three centuries largely because of political pressure brought by various global social movements, e.g., the abolition of slavery movement, the women’s movement, the movement for decolonization, and other historical struggles that have expressed the demands of oppressed people for social recognition and protection against the forces and conditions that have oppressed them (Lauren 2003). John Dewey had it right when he wrote that “Liberty in the concrete signifies release from the impact of particular oppressive forces,” and that “the conception of liberty is always relative to forces that at a given time and place are increasingly felt to be oppressive” (Campbell 1995: 167). While earlier ages succumbed to the temptation to ground the authority of the social duties that are derived from human rights on God (Pre-Modern), or on some conception of human nature or reason (Modern), the Post-Modern outlook holds that human rights and their associated duties are products of the human moral imagination made actual in the world through human intention and action in order to achieve the goal of human emancipation from oppression. They are no less real for their being constructed than is Manhattan, but they are more indispensable for civilized living than are many of the other social technologies on which we rely every day.

In general, particular proposed human rights norms evolve from “manifesto rights” to secure social entitlements only after complex and often protracted processes of conflict, negotiation, and social legitimation. Human rights are socially constructed through political struggle. In order to understand the social construction of rights, it is useful to distinguish several stages or phases that rights pass through on their way from mere moral aspirations to secure, legally guaranteed entitlements or fully developed and effectively implemented rights:

1. An abhorrent practice P is experienced or observed.
2. A (usually small) group within the society rebels morally against P.
3. A moral (or legal) norm N is proposed, which, were it promulgated and enforced, would tend to prevent or ameliorate the occurrence of P.
4. A social consensus is sought around N that, if successful, serves to legitimize P as a valid moral claim.
5. N is refined, formalized, and incorporated into the existing canon of law (for instance as an internationally recognized human right or as a provision of a domestic law).
6. Institutional mechanisms M for implementing, fulfilling, and enforcing N are developed and deployed.
7. Systems for monitoring compliance with N and for redressing failures to comply with N are installed and continuously improved.10

The current international human rights regime consisting of a set of legal norms without effective institutional means for their implementation is precariously poised between stages five and six. Rights at this stage are sometimes derisively referred to as “paper rights.” The present human rights canon is rather like the blueprint for a half-completed building: the blueprint records the international community’s agreement on which interests, goods, and capacities are most essential to the struggle against oppression and to the preservation of human dignity, and says, in effect, that secure rights to these things ought to be implemented by each nation in its domestic laws and effective mechanisms for their enforcement should be maintained by each society and by the international community as a whole. However, neither the canon itself, nor for that matter, the current international or regional intergovernmental systems to which it is linked, are themselves able to provide these
implementing mechanisms, so the task of actually implementing rights is largely left to national governments. While some governments have done an admirable job of implementing the internationally accepted rights framework, many others have not, leaving billions of persons without effective protection for their human rights. Since the task of monitoring compliance with internationally recognized human rights norms has not, by and large, been effectively discharged by governments nor by intergovernmental bodies, it has been taken up by nongovernmental human rights organizations, which have adopted the stage seven function of monitoring as a means of promoting better implementation.

A great deal of confusion about human rights can be avoided by bearing in mind that the term human rights can be meaningfully used to refer to moral or legal norms at each of these various stages of development. We could, for instance, speak of black South Africans as having a human right to democratic participation in the government of their own country, even though they did not actually enjoy or have the opportunity to exercise that right until April 1994. This is the primary, and very important, use of the rhetoric of human rights to assert that there are morally justified claims that persons are not at present able to assert or to enjoy as rights because either their own governments do not recognize these as rights or because no effective national implementation institutions exist to protect their human rights. However, even in societies in which a certain right, say the right not to be unjustly killed, is legally recognized, and in which there are social institutions designed to protect people’s rights to life by means of police forces, courts, prisons, and so forth, there are often violations of this right in particular cases. Because there is nowhere complete compliance with any recognized right, it is possible to consider all rights as aspirational to some degree in that the institutional mechanisms for securing social compliance with rights can always be improved.11

In the late twentieth century the moral construct of human rights moved from the moral imagination to a set of core moral convictions that has come to be embodied in institutional facts that are widely regarded as having vital importance. John Searle talks about institutional facts as the result of the collective imposition of “status functions” by means of what he calls “We intentions.” The notion that all human beings have certain rights is perhaps the most important status function created during the Modern period:

Prior to the European Enlightenment the concept of rights had application only within some institutional structure—property rights, marital rights, droit de seigneur, etc. But somehow the idea came to be collectively accepted that one might have a status-function solely by virtue of being a human being, that the X term was “human” and the Y term was “possessor of inalienable rights.” It is no accident that the collective acceptance of this move was aided by the idea of divine authority: “they are endowed by their Creator with certain unalienable rights, that among these are Life, Liberty, and the pursuit of Happiness.” The idea of human rights has survived the decline of religious belief, and has even become internationalized. The Helsinki Declaration on Human Rights is frequently appealed to, with varying degrees of effectiveness, against dictatorial regimes. Lately there has even been a movement for the recognition of animal rights. Both human and animal rights are cases of the imposition of status-function through collective intentionality. (Searle 1995: 93)

Searle develops the notions of status functions and collective intentionality in order to account for social realities within the overall framework of a scientific ontology that takes for granted that there is a natural world that has intrinsic features that are not relative to human
observers. For instance, it is objectively true that “This object is piece of glass.” However, it is only through the imposition of a status function that we can also say “This object is a paperweight.” Unlike intrinsic facts, the facts that arise through the imposition of status functions are always observer-relative because they depend essentially upon the imposition of a particular function or intention upon brute things. For Searle status functions are never intrinsic to things, (even natural objects, like a stone that might be used as a paperweight); functions “are assigned to things relative to the interests of users and observers” (1995: 13). This is especially clear with respect to entities whose function is to symbolize, to represent, or to stand for (i.e., to mean) something other than themselves. Collective intentions underlie the use of language, and all shared social meanings. Searle argues that collective intentions are not reducible to individual intentions but are rather “We intentions,” i.e., intentions that “We” (collectively) assign a certain status function or “meaning” Y to a certain object X.

The idea of collective or “We” intentions provides an answer to those human rights skeptics like Alasdair MacIntyre (1981) who have argued that human rights are fictions, like fairies and unicorns. He is half right: Human rights are indeed social constructs, but they are constructs like “time zones” that arise from collective intentionality through the imposition of the moral status function “holder of inalienable rights” upon natural persons. Money, times zones, national borders, and other institutional facts exist because of collective intentions, but they are not less real because they originate in this way. Moreover, the question of how social constructs originate is distinct from the question of why they are justified. Time zones were first introduced in order to rationalize railroad schedules in nineteenth-century America. While that was their original purpose, they have since come to be universalized and have come to have many other uses. Human rights were first introduced in order to defend people against tyranny but have been developed to address other forms of oppression. If human rights function as a system of social techniques that can be deployed to avert or to forestall some of the most common forms of human oppression, then the justification for each particular norm, as well as for the entire system of socially constructed, internationally recognized human rights norms and standards, is that, to the extent that these norms are promulgated, socially accepted, and general compliance with them is enforced, they do, in fact, function to eliminate, to prevent, or to ameliorate the particular types of human oppression they are designed to defeat. That they do so, at least to some degree in the cases in which they have been seriously implemented, is the real basis of their authority and justification.

So, to summarize, I have argued that a moral constructivist account of human rights that sees them primarily as normative responses to experience of oppression provides a perspective that allows us to account for both the specificity of the norms contained in the current canon as well as a rational defense of their universality. It also helps us to settle questions about which human rights belong in the canon and which do not, for instance, why there are special categories of rights. This account also helps us make sense of the historically progressive character of the human rights idea, while not excluding the notion that human rights are justified in part by their relationships to other sorts of goods and human interests and to ultimate values. The answer to the question the skeptic raises about the universal moral authority of human rights is that human rights are not just a set of arbitrary, culturally relative conventions; rather they represent a normative theory of the organization of social relations in human societies designed to prevent systematic oppression. It is not an ideal theory, nor does it work perfectly, but it is currently the best theory we have and therefore does (and should) command a certain degree of moral authority. While the idea of human rights is a historically contingent creation, it is not a dead relic of past theorizing, but a progressive intellectual tradition being fostered and
spread by a worldwide social movement. To say that human rights are universal is in part to make a claim about the direction the future development of the human rights paradigm ought to take: It should become more inclusive and more representative of the hopes and aspirations of all peoples, the rights it proclaims should become more effectively fulfilled in more nations, and violations of human rights in some countries should more often be halted by the community of nations through effective international institutions. This has been the general direction of the development of the human rights paradigm over the past few centuries, and, despite many setbacks and disappointments, it remains the best hope we have for eliminating serious forms of systematic oppression from human history.

Caveats, Comparisons, and Conclusions

It is at this point in essays of this kind that the author typically sallies forth to explain why his or her theory is superior to all others in providing a justification for human rights. However, from a strictly pragmatic point of view, it may not matter much how particular individuals justify a belief in human rights to themselves in light of their own philosophical or theological beliefs. It is certainly possible that my account is compatible with many of these others views and simply provides another perspective through which to look at the issue. My way of thinking about human rights is likely to appeal to liberal, secular, humanist intellectuals but will probably be found to be unsatisfying to persons with deeply seated religious beliefs. I do not wish to claim that this account of human rights has an exclusive claim to legitimacy. I do, however, wish to argue that, compared to some other views, it has a better chance of becoming the basis of a cosmopolitan consensus on human rights because one can accept it without carrying a lot of philosophical, religious, or cultural baggage, and because, more than some other views, it allows us to grasp the challenges we now face at the beginning of the twenty-first century in advancing the historical project of constructing an effective bulwark against oppression.

Many readers will no doubt have decided that my constructivist account yields too much ground to moral relativists and cultural exceptionalists. The perceived need to answer moral relativists, exceptionalists and radical skeptics is perhaps the main reason why many people continue to search for justifications for human rights within various religious and philosophical traditions that might provide them with some kind of transcendental authority. It is curious, however, that other fields of human endeavor do not seem to elicit this same anxiety. Why don’t people demand to know the ultimate justification for modern medicine? For the creative arts? For science? In each of these cases particular epistemic communities pursue worthwhile goals that serve to advance some ultimate human value—health, beauty, knowledge—but not many people feel that the legitimacy of these enterprises is placed at risk because its practitioners are unable to supply a transcendental justification. Why then should we demand one for human rights? Is ridding the world of torture and cruelty any less worthy a goal than ridding it of tuberculosis or polio?

Michael Freeman has sagely observed that “The difficulty facing human rights theorists is that they have three options: 1) to favor foundationalism and seek to derive human rights from God or a God-substitute; 2) to accept the anti-foundationalist case and expose the concept of human rights to the vagaries of contingency; or 3) to find a third way” (Freeman 1994: 498). While I believe that moral constructivism does constitute a viable third approach to justifying human rights, I do not wish to claim that my approach is the only important or viable strategy for justifying human rights claims. Like James W. Nickel, and several other contemporary human rights scholars, I favor a pluralistic or “many-legged approach” to
justifying human rights under which each “right has multiple justifications, [so] the failure of one will be less likely to call the right’s justification into doubt” (Nickel 2005: 391). My theory is “explanatorily promiscuous” and does not attempt to exclude other forms of explanation or justification for human rights; in particular, it is not inconsistent with my view to hold that most human rights receive their justifications from a variety of sources, and both “top-down” and “bottom-up” justifications combine to provide support for particular human rights norms and claims.12 The human rights canon as a whole, on this view, is justified holistically by the consilience of the various particular human rights norms that constitute it and by their forming a system of norms that, when effectively implemented, serves to protect people against most common forms of oppression.13 Human rights have multiple anchors as well as multiple interdependencies, and this is why they can stand on their own without the need for a philosophical or a religious foundation.

Nevertheless, some contemporary philosophers in the rationalist tradition have continued to search for a rational “foundation” for the belief in human rights. The most impressive of these theories is the one developed by Alan Gewirth (1978; 1982). According to his account, the belief we have in human rights is rationally grounded in fundamental facts about human moral agency. All moral norms address the context of action in which moral agents purposefully attempt to further their most important interests, either their own or those of other persons. But, according to Gewirth, all purposive action presupposes the agent’s freedom and well-being, because without these conditions he or she would not be able to act with any chance of success. Thus, Gewirth concludes that each person, qua moral agent, must regard his or her own freedom and well-being as necessary goods because they are conditions that characterize the generic requirements of all successful action. But how does thinking of freedom and well-being as “necessary goods” of successful action lead to there being human rights to these goods? Gewirth argues that the transition from “goods” to “rights” is accomplished when the prospective moral agent, by means of an act of will, transforms the necessary goods of freedom and well-being into prudential prescriptions having normative necessity for beings with lives of purposeful agency, that is, when he lays claim to freedom and well-being as rights. All moral agents must take this step, “Since the agent regards as necessary goods the freedom and well-being that constitute the generic features of his successful action, he logically must also hold that he has rights to these generic features, and he implicitly makes a corresponding rights claim,” and “any moral agent who denies that he has rights to freedom and well-being contradicts himself” (1978: 63). Gewirth calls this move from prudential claims to universal moral rights the Principle of Generic Consistency: “Act in accordance with the generic rights of your recipients as well as yourself” (1978: 135).

One of Gewirth’s leading critics, Alasdair MacIntyre, has argued that Gewirth’s argument confuses desires for freedom and well-being with rights to them. He points out that claiming something as a “right” requires the prior existence of socially established rules under which claims that other members of society are obliged to respect one’s freedom and well-being are legitimated: “The existence of particular types of social institutions or practice is a necessary condition for the notion of a claim to the possession of a right being an intelligible type of human performance” (1981: 67). MacIntyre likens the act of claiming rights without the appropriate social institutions to “presenting a check for payment in a social order that lacked the institution of money.” In other words, what is missing from Gewirth’s account is the idea of collective intentions that create social realities.

But MacIntyre’s objection trades on the ambiguity inherent in the term “human rights” under which it can be used to refer to normative claims at different stages of development. As I argued earlier, rights are social constructs that arise through the imposition of status
functions or “We-intentions” on natural persons. In particular, they are symbolic instruments for expressing moral rebellions against particular forms of oppression. MacIntyre is correct that rights claims, when they are made at stages after which they have already been socially legitimized, presuppose social institutions in which such claims are recognized as valid and institutions to implement them exist. However, according to the constructivist model discussed earlier, we can still speak of human rights as “manifesto rights” even when the requisite social institutions of recognition and fulfillment do not yet exist. We need to do this because demands for human rights, at this stage, are demands for the social recognition that certain moral claims ought to be legitimized and for adopting requisite legal rules and creating social institutions for their effective enforcement and fulfillment. People demand that certain moral claims be recognized as human rights precisely because social recognition and effective implementation institutions are needed in order to actually protect persons from systematic oppression. However, not all “manifesto rights” are eventually accepted or legitimated. Sometimes intuitions about which specific practices should be regarded as oppressive are contested, for instance, forms of corporal punishment such as caning, or high levels of taxation to support a welfare state. This is why proposed rights must be subjected to a political process in which a social consensus is gathered that can support a particular right becoming legitimized and incorporated into law. Ideally such processes should be carried out by means of deliberative democracy, and when they are, the democratic nature of the process of legitimation adds justificatory weight to the right over and above its ability to prevent particular forms of oppression.

The real problem with Gewirth’s theory, as with any purely top-down approach, arises when we try to argue from a philosophical commitment to quite general and abstract moral values like freedom and well-being to the various quite specific legal norms contained within the contemporary human rights canon. Take for instance Article 15 of the Universal Declaration of Human Rights that provides, “(1) Everyone has a right to a nationality. (2) No one shall be arbitrarily deprived of his nationality nor denied the right to change his nationality.” It is hardly possible that this long-accepted human right could be characterized as a “natural right” because it presupposes the existence of territorial nation states. Human beings managed to live for millennia without being citizens of nation states. Moreover, what sort of argument proves that having a nationality is a necessary condition of human freedom and well-being? From the top-down perspective under which all human rights must somehow be derived from the “foundation rights” to freedom and well-being, unless one can come up with such an argument, it is questionable whether or not Article 15 expresses a “real” human right.

But a moral constructivist account provides a different and much more plausible analysis of the origin of this right. Again following Morsink’s account of the drafting of the Universal Declaration of Human Rights, the particular oppressive practices of the Third Reich helps explain why the drafters included an article on this particular right:

The Nazis began the extermination of millions of people by stripping them of their nationality. After the Kristallnacht of November 9, 1938, in which the German government encouraged the killing of Jews and the destruction of their property, the very Jews who had been the victims were blamed for the damage. The 1935 Nuremberg Laws had already robbed them of civil rights like being able to marry someone of Nordic blood. Now, being blamed for, among other things, the downturn of the German economy, they were also stripped of their citizenship. . . . When Adolph Eichmann took over the Bureau of Jewish
Affairs in October 1940, “it handled,” he said, “withdrawal of nationality and citizenship and the confiscation of property.” Eichmann reports that “the legal experts drew up the necessary legislation for making the victims stateless, which was important on two counts: it made it impossible for any country to inquire into their fate, and it enabled that state in which they were resident to confiscate their property.” (Morsink 1999: 80)

It is evident that withdrawal of citizenship functioned in this case as part of a system of oppression; denying the Jews of Europe their citizenship rights was a technique of oppression that facilitated the confiscation of their property and eventually their murder. Morsink comments that “To be without a nationality or not be a citizen of any country at all is to stand naked in the world of international affairs. It is to be alone as a person, without protection against the aggression of states, an unequal battle which the individual is bound to lose” (1999: 80). As so it is with other categories of “stateless persons” today; they stand naked in the world of international affairs, except for the fact that there is now a solemn international covenant, the Convention Relating to the Status of Stateless Persons, containing forty-two articles that set out in precise fashion the obligations of states, and the limits of these obligations, with regard to their treatment. The existence of this convention owes its origin to particular historical systems of oppression, and the legal norms contained in it derive their justification from the value they might have in preventing stateless persons from again becoming victims of similar forms of oppression.

The period following the Second World War was indeed a golden age for human rights in terms of norm creation and legitimation. There are more than eighty separate declarations, treaties, and conventions dealing with various human rights issues, and there is a growing body of international and regional case law detailing issues concerning the interpretation and enforcement of these legal norms. The dramatic surge in the development of the human rights paradigm during the latter half of the twentieth century has led a number of contemporary rights theorists to rest their case for the universal moral authority of human rights on the facts that there is now a “virtually universal” consensus on them and there is now a canon of international human rights law that codifies this consensus. Accounts of this kind have a number of important strengths, as compared to natural law, Neo-Rationalist and other approaches. My constructivist account of human rights incorporates certain aspects of conventionalism, for instance, in the stages characterized by gathering a social consensus in favor of a particular norm, and in working towards its legal codification and social legitimation, I acknowledge that agreements among contracting parties are necessary steps by which new norms are legitimized and claims made under them justified in the legal positivist sense. But conventionalist accounts that derive the moral authority of human rights solely from their being agreed to suffer from a number of defects.

A prominent defender of the conventionalist approach to human rights is Jack Donnelly (1989), but, as Michael Freeman has argued, Donnelly’s approach has three critical weaknesses:

First, Donnelly concedes that the cultural-relativist objection to universal human rights is “logically impeccable.” Second, he moves from consensus to moral obligation on the communitarian ground that the moral beliefs of large majorities are binding on dissenting minorities. This is inconsistent with the view usually held by human rights theorists, and accepted by Donnelly, that individuals and minorities are not necessarily obliged to conform to the values of majorities…. The third weakness of Donnelly’s argument lies in the
qualifications he appends to his claim about consensus. Human rights are “almost” universally accepted, “at least in word,” or “as ideal standards.” International human rights law is “widely” accepted as “more or less” binding. The concept of a universal moral community is “at least [an] inspirational commitment. A strong commitment to human rights is almost universally proclaimed “even when practice throws that commitment into question.” In response to the argument that consensus exists only on a limited set of “basic” rights, Donnelly does not reaffirm the supposed wider consensus, but expresses his disappointment at the extent of contemporary human rights violations. Consequently, the practical consensus on human rights is “often very shallow—merely verbal.” (Freeman 1994: 493–493)

Where conventionalists and legal positivists go wrong is that they fail to distinguish between human rights as an ideal ethical theory of resistance to oppression, and the particular embodiment of this underlying ethical theory in various legal instruments and contemporary political institutions. The embodiment of the human rights ethos in contemporary international law has largely been the result of political compromises made by sovereign state parties to various human rights conventions and declarations. While it is remarkable that so many nations have been able to agree to the extent they have, the result of these agreements, the contemporary canon of international human rights and humanitarian law, is still inadequate in many respects as the expression of the underlying human rights ethos, particularly as regards institutional arrangements for implementation and enforcement. This is the fundamental reason why it is insufficient to argue that human rights are justified to the extent they are supported by a contemporary international consensus. For conventionalists and legal positivists, any set of norms or arrangements that can garner international agreement will automatically be justified whether or not they are actually effective in preventing oppression. They confuse the social legitimation of human rights norms with their moral justification. If human rights are justified only by the existing weak consensus on international human rights, then there are no independent grounds for criticizing the existing legal norms and institutional mechanisms. The only platform legal positivism provides for criticizing the behavior of states is that of being able to say that those states that have ratified the instruments are not living up to their agreements. While this is certainly progress over what went before, since it eliminates the potential appeal to the doctrine of nulla crimen sine lege (No crimes without law), it cannot provide grounds for mounting an effective moral critique of the current human rights system itself. What states have presently agreed to is clearly inadequate if the goal is that no human beings suffer oppression. On the moral constructivist account the overall justification for our present human rights framework is doubtful precisely because the present international human rights regime is inadequate to the task of securing this end.

But if traditional approaches to justifying human rights have been inadequate, what reason is there to think that a “moral constructivist” approach will turn out to be any more successful? While moral constructivism may be “metaphysically lighter” than religiously based theories of rights or traditional natural law theory, it does not carry the same gravitas and may continue to strike some people as a kind of humanistic relativism. If one cannot give a precise definition of “oppression” how will adopting a theory based on this notion help resolve debates about what should count as a human right? And if the real problem we face is not that of norm creation and legitimation, but the problem of securing effective implementation of generally accepted norms, how will shifting to a moral constructivist understanding of human rights help us advance this project?
By reframing human rights as normative responses to oppression the moral constructivist approach redirects our attention to answering the fundamental question of why we are not able to achieve better compliance with existing human rights norms. As a ethical-legal paradigm the research program associated with this way of thinking about human rights endeavors to develop explanations of the root causes of oppressive practices, that is, to engage in a more empirical form of ethics that goes beyond merely classifying and cataloging various kinds of human rights abuses, to understanding why such practices exist and persist. The kinds of explanations can be various and can implicate broader political, economic, and sociological factors than those normally found in human rights discourse. For instance, Marxist theorists have argued that the root causes of oppression are to be found in the nature of the capitalist economic system itself and, in particular, in the way in which economic and political elites employ repression as a means to perpetuate systematic exploitation of the working class and to enforce existing patterns of power and privilege. Feminist theories have argued that the kinds of human rights violations most commonly affecting women and girls are due to deeply entrenched forms of patriarchy. Sociobiologists and evolutionary psychologists have theorized that ethnic and sectarian conflicts are deeply rooted in a biologically predisposed “in-group” versus “out-group” moral orientation. I mention these kinds of hypotheses not in order to endorse them but only as examples of the kinds of questions that a research program based on a moral constructivist understanding of human rights might lead us to investigate. Because moral constructivism is explanatorily promiscuous, it allows us to explore a wide range of different kinds of theories to help us understand and to explain why oppression exists and to give us clues as to how to more effectively end it. In doing so it can help put an end to sterile debates about the nature of human rights and to move the discussion within the human rights community onto a set of more practical, empirically answerable questions about what works and what does not work in terms of securing effective compliance with human rights norms. It also directs our attention to the task of creating more effective implementation mechanisms and institutions at the local, national, and international levels.

The world-wide human rights community needs to enter into a frank discussion of why the present system fails, and what we need to do to create a cosmopolitan enforcement system that works better than the one we presently have. This discussion needs to focus on topics such as impediments and incentives to compliance (not adherence) to human rights norms and standards, institution-building, resource reallocation, and other quite practical topics. It needs to be rooted in the social realities of different countries and their cultures. And it needs to strive towards continuous improvement of human rights performance using both domestic means and international cooperation. In order to meet this challenge, the discussion must move beyond the search for philosophical or theological justifications, and beyond centralized processes of norm-creation and political legitimation. The present challenge is to address the problems of implementation and enforcement in practical terms, and to address the problem of constructing global institutions for the protection of “all human rights for all.” In order to do this, we need a common understanding of human rights, and this is best achieved through a moral constructivist view of human rights that sees them primarily as human institutions designed to thwart systematic oppression.

Notes
1. A pragmatic, as opposed to a philosophical, justification for human rights also has the advantage of being intelligible to the proverbial “man on the street” who wants to know why Westerners feel that they have the right to impose “their values” on other people. This kind of wider challenge
is also internalist in that those who pose it generally accept the liberal value of tolerance and respect for diversity of religious, cultural, and political opinion but wonder why human rights norms are thought to be universal.

2. In fact, this phrase does appear in the Vienna final document in the following context: "All human rights are universal, indivisible and inter-dependent and inter-related. The international community must treat human rights globally in a fair and equal manner, on the same footing, and with the same emphasis. While the significance of national and regional particularities and various historical, cultural and religious backgrounds must be borne in mind, it is the duty of states, regardless of their political, economic and cultural systems, to promote and protect all human rights and fundamental freedoms" (Vienna Declaration, Part II, paragraph 3).

3. We commonly use the term “human rights” as a collective noun to refer to a network or system of particular and specific norms such as are found in the Universal Declaration of Human Rights, the International Bill of Rights, the various regional human rights conventions, and the dozens of separate international human rights declarations, treaties, and covenants. I refer to all of these documents collectively as the contemporary canon of human rights.

4. The issue concerning the equal treatment of homosexuals was not on the radar screen of the UN Human Rights Committee in 1948 when it drafted the Universal Declaration of Human Rights. But the contemporary human rights movement, by and large, now recognizes this category of rights and many arguments have been constructed as to why the rights of gay, bisexual, and transgendered persons to equal treatment should be regarded as legitimate ethical claims, even though it is difficult find a direct textual basis for them within the human rights canon. A number of countries have now formally recognized this right in their national laws, for instance Canada and South Africa, and the European Union has added sexual orientation to the prohibited grounds for discrimination in Article 21 of the Charter of Fundamental Rights of the European Union.

5. I purposefully employ the overused term “paradigm” because I want to emphasize the socio-logical and institutional aspects of the contemporary human rights movement. When Thomas Kuhn introduced the idea of scientific revolutions consisting of the replacement of one scientific paradigm with another, he was intending the term paradigm to be understood in two different senses: “One the one hand, it stands for the entire constellation of beliefs, values, techniques, and so on shared by members of a given community. On the other, it denotes one sort of element in that constellation, the concrete puzzle-solutions which, employed as models or examples, can replace explicit rules as a basis for the solution of the remaining puzzles of normal science” (Kuhn 1970: 175). Human rights are an ethical-legal paradigm in that they represent a constellation of shared values, beliefs, and commitments to institutional arrangements among members of the global human rights movement, and also, in the second sense, because “rights” are the principal solution deployed by this community in order to solve the problem of preventing oppression. In fact, Kuhn himself compares scientific revolutions to political ones and argues that “Like the choice between competing political institutions, that between competing paradigms proves to be a choice between incompatible modes of community life. . . . When paradigms enter, as they must, into a debate about paradigm choice, their role is necessarily circular. Each group uses its own paradigm to argue in that paradigm’s defense” (94). If this is correct, then we should also expect this to be the case when human rights norms impinge on traditional forms of community practice in various cultures, and, of course, it is.

6. My moral constructivist account of human rights views persons as relational and interdependent rather than as independent autonomous social atoms. In this respect it departs from traditional liberal theories of justice and more resembles the ethics of care (Held 2006).

7. This example also illustrates one of the important reasons why a legal conventionalist account of human rights is incorrect. The documents contained in the contemporary canon of international human rights are the product of negotiations among delegates representing sovereign governments, and in many cases the texts adopted in such negotiations depart significantly from what might be regarded as an ideal moral account of the human rights in question. Thus, one cannot
simply assume that the legal embodiment of a norm is an adequate normative defense against the forms of oppression it is supposed to prevent.

8. I borrow the term “moral rebellion” from Albert Camus (1956).

9. This is not only a feature of theories in the moral domain but applies generally to other kinds of values. When we call something a “disease” we also describe it and attach a value to it, so too when we call a particular manufacturing process “inefficient.” The logical positivist account of meaning under which it was thought possible to sharply separate statements of fact from statements of value turns out to be wrong.

10. This model is an elaboration of a similar account of the emergence of human rights norms offered by Ann Marie Clark who distinguishes four main phases in the process of constructing new norms: 1) Fact-finding, 2) Consensus Building, 3) Principled Norm Construction, and 4) Norm Application. She illustrates this model of standard setting by means of a detailed account of the development of the UN Convention Against Torture (Clark 2001).

11. This kind of account is what Thomas Pogge has characterized as an “institutional” (as opposed to an interactional) conception of human rights. In Pogge’s characterization, “An institutional conception postulates certain fundamental principles of social justice. These apply to institutional schemes and are thus second order principles: standards for assessing the ground rules and practices that regulate human interactions. An interactional conception, by contrast, postulates certain fundamental principles of ethics. These principles, like institutional ground rules, are first-order in that they apply directly to the conduct of persons and groups” (Pogge 1992: 50)

Universal human rights, on this view, reflect the idea of moral cosmopolitanism, that is “that every human being has a global stature as an ultimate unit of moral concern,” but assigns direct responsibility for protecting human rights not to individuals but rather to institutional schemes. The concept of a human rights regime, in my view, includes not only the legal codification of norms but the institutional schemes for implementing and enforcing them.

12. While moral constructivist views in general are consistent with a variety of “top-down” accounts, my particular preferred “top-down theory” is a version of rule consequentialism similar to that found in J. S. Mill’s discussion of the relationship between justice and utility in which Mill says that “When we call anything a person’s right, we mean that he has a valid claim on society to protect him in the possession of it, either by the force of law or by that of education and opinion”(Mill [1863] 1971: 50). My main quarrel with rule utilitarianism concerns the theory of the good. Human rights have as their goal eliminating particular kinds of systematic oppression, but this good is but a particular (albeit very important) good among many other valuable goods. Different kinds of valuable goods have different means by which they are protected by society and their enjoyment secured. If one combines pluralism about ultimate values or interests with a rule consequentialist view of norms, and a theory about the institutional regimes that are designed to implement them, one gets something like my constructivist account.

13. Consilience is the property of some scientific theories to be supported by a number of independent and distinct lines of evidence or reasoning. It is an important notion in science because the presence of consilience gives theories the “ring of truth” (Wilson 1998). One can, I believe, extend this concept to the normative realm and speak of moral and legal norms as anchored by means of the multiple independent values they promote or protect.

14. By “cosmopolitan” I mean a system that treats the entire planet as a single nation and all human beings as its citizens. The current system created by the United Nations is based on the assumption of a world order consisting of sovereign independent territorial nation states that are supposed to cooperate to enforce internationally recognized human rights and humanitarian norms but, generally speaking, do not effectively do so.

References


