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## THREE TYPES OF RIGHTS\*

Lawrence C. Becker\*\*

Philosophers argue about whether rights are claims or entitlements;<sup>1</sup> about whether or not they always entail duties for others;<sup>2</sup> about whether trees, animals, fetuses, infants, and the permanently comatose (among others) can in principle have rights;<sup>3</sup> and about whether rights are always to take priority over other moral considerations—whether they are, in Ronald Dworkin's phrase, deontological trump cards that take any trick constructed from arguments about value or virtue.<sup>4</sup>

Confusion about the general nature of rights causes, in turn, great difficulty for anyone interested in justifying a particular right claim. If rights are constraints on the principle of utility, for example, it is hard to see how they could be given a utilitarian justification; if rights are constraints on the scope of rational agreements, it is hard to see how they could be given a contractarian justification. To the extent that there is some logical bar to animals having rights, it seems difficult to justify the ascription of rights to human infants.

It is not surprising, given this disarray in the theory of rights, that so much current talk about rights begins with a set of references to the author's "intuitions"—and in fact rarely gets beyond an explication (however detailed) of the consequences of those intuitions.<sup>5</sup> If we are going to continue to put so much emphasis on rights, we need more than the explication of intuitions. We need a general theory

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\* An earlier version of this Article was read to the Duke University Philosophy Department Colloquium in December, 1977. It has since gone through several revisions, and I am grateful to my colleague H. Lamar Crosby, Jr., who has written on a related topic, and to the members of the Conference on Modern Rights Theory, arranged by the Institute for Humane Studies, for renewing my interest in the topic. This Article may be read as a set of indirect comments on the Articles in this issue by Antony Flew and Alan Gewirth.

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<sup>1</sup> See, e.g., Feinberg, *Duties, Rights, and Claims*, 3 AM. PHIL. Q. 137, 137-42 (1966). See also R. FLATHMAN, *THE PRACTICE OF RIGHTS* (1976).

<sup>2</sup> On this point, and many related ones, see Lyons, *Rights, Claimants, and Beneficiaries*, 6 AM. PHIL. Q. 173, 173-85 (1969).

<sup>3</sup> See Stone, *Should Trees Have Standing? Towards Legal Rights for Natural Objects*, 45 S. CAL. L. REV. 450 (1972), referred to in Justice Douglas' dissenting opinion in *Sierra Club v. Morton*, 405 U.S. 727 (1972). See also Feinberg, *The Rights of Animals and Unborn Generations*, in *PHILOSOPHY & ENVIRONMENTAL CRISIS* 43-68 (W. Blackstone ed. 1974).

<sup>4</sup> See R. DWORKIN, *TAKING RIGHTS SERIOUSLY* xi, 188 (1977).

<sup>5</sup> The leading example is perhaps Robert Nozick, in *ANARCHY, STATE AND UTOPIA* (1974).

of rights—the outlines of which I shall discuss in a moment.

This Article is a contribution to that project. Its benefits are at least these: it makes a modest advance in understanding the problems involved in the justification of rights; it provides a clarification (if not resolution) of the debate over whether rights are claims or entitlements; and it yields some decisive results on the question of who (or what) can in principle have a right. This is enough to justify the tedium of a piece of distinction-making.

### I. RIGHTS PER SE

I begin with a preliminary characterization of the root idea of a right—a caricature, really—designed simply to elicit the elements necessary for a general analysis of rights.<sup>6</sup>

Suppose a right is characterized as follows:

To say that A has a (legal or moral) right against B is to say that A has a (legal or moral) claim on an act or forbearance from B—meaning that, should B fail to so act or to so forbear, it would be (legally or morally) justifiable for A to use coercion to extract either the act or forbearance from B, or compensation in lieu of it.

This characterization suggests all the elements necessary for an analysis of the concept of a right as that concept is currently used. Specifically, it suggests that a complete account of a particular right (for example, a right to life) involves:

1) *The specification of the right holder(s)*—that is, what persons, beings, or things have the “claim.”

2) *The specification of the right regarnder(s)*—that is, what “other(s)” —if any—the right holder has a claim against. (Some reflection on the sorts of rights people are said to have indicates that it is not always clear that the existence of right-regarders is being asserted. Think of the putative right to health care.)

3) *The specification of the act(s) or forbearance(s)*—that is, the thing(s) the right regarnder(s) must do, or must refrain from doing; what they may do, or may not do; or in the case of “regarnderless” rights, the benefits to which the right-holders have a “claim.”

4) *The definition of the nature of the rights-relationship*—that is, the sort of claim the holder has on the regarnder; or the sort of

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<sup>6</sup> In this section I review briefly, and with some modifications, the analysis presented in my *PROPERTY RIGHTS: PHILOSOPHIC FOUNDATIONS* ch. 2 (1977).

claim the holder has on some benefit.

5) *The definition of the conditions under which the right may be said to have been violated*—that is, the circumstances—if any—which constitute a right regarnder's culpable "failure" to act or forbear as required. (The "violation" of a right must be distinguished from mere *delay* in doing what is required, and from *non-culpable failure* to do it.)

6) *The definition of the conditions under which a violation of the right (though culpable) is nonetheless excusable.*

7) *The specification of remedies for both excused and unexcused violations of the right.*

8) *The specification of coercive measures for extracting the remedies.*

9) *The specification of the agent(s) who may extract the remedies.*

10) *The justification of the right defined by (1)-(9) above*—that is, the assembly of reasons which warrant the conclusion that the right holder(s) do in fact have such a (legal or moral) claim.

A moment's thought about these elements reveals the inadequacies of the preliminary characterization of the root idea of a right. We cannot say as it does—at least not without begging some important questions—that all rights are claims against others; or that "compensation" is to be understood in its ordinary sense (perhaps in some cases a mere apology will suffice); or that "coercion" is to be given a literal meaning (perhaps sometimes a verbal demand is as far as one may properly go); or that the right holder is the one who may apply the coercion (perhaps only a law enforcement officer may do so). Rights can evidently take a wide variety of forms—from those vague entitlements that apparently point the finger at no one in particular (because no one in particular can be said to be a right-regarnder with respect to the holder), to the full dress legal rights whose violation calls down the power of the state.

Further, reflection on these ten elements shows how misleading it may be to speak of even a full dress legal right as involving a claim on an act or forbearance from another. Hohfeld's analysis of the sorts of rights-relationships recognized in law is instructive here.<sup>7</sup> One *may* have rights in the strict sense, he said (claim rights, as I refer to them), which entail the existence of correlative duties in others. But one may also have privileges (liberty rights) which sim-

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<sup>7</sup> W. HOHFELD, *FUNDAMENTAL LEGAL CONCEPTIONS* (1919).

ply correlate with the *absence* of claim rights *in others*. And one may have powers (such as the right to make a will) which correlate with liabilities in others, or immunities (such as the right to remain silent) which correlate with *disabilities* in others. Each of these relationships is commonly referred to as a right, but it disguises a good deal to characterize all of them as "claims against someone for an act or forbearance."

In short, the ten elements mentioned above provide a convenient device for understanding the complexity of the concept of a right. The failure to understand this complexity—or perhaps, just the failure to understand it systematically—causes at least some of the confusion in the theory of rights.

## II. GENERAL THEORY OF RIGHTS

Just as I assume that the definition of a particular right (such as a right to life) requires the filling in of all ten elements mentioned above, so too I assume that a *general theory* of rights requires a general account of how each of the ten elements can *in principle* be filled in for specific sorts of rights. That is, it requires an account of who (or what) can in principle be a right-holder, or a right-regarder; it requires an account of the general nature of the rights-relationship that can obtain between holders and regarders; and so forth.

Hohfeld, as I mentioned above, has given an admirable (if somewhat incomplete) account of the general nature of rights-relationships. That is one part of a general theory of rights. What I shall do here is focus on another element necessary for a general theory: element (10) in the list—the nature of justification. Specifically, I will explore a trichotomy in the way rights are justified (or, as I shall sometimes say, in the way they are "established"). This trichotomy is independent of the "substance" of a justificatory strategy—that is, it is independent of whether one is attempting a utilitarian, contractarian, or some other justification. It is a simple distinction, but one which goes a long way toward clearing away confusion in the theory of rights.

The trichotomy to which I refer is (oversimply) this: (1) Some rights are held only derivatively, by way of the existence of duties (or other Hohfeldian rights-correlatives) in others. (2) Other rights originate, so to speak, in the right holders—and entail duties, or no-rights, or liabilities, or disabilities, in others. (3) Still other rights arise simultaneously, as it were, with their correlatives—as when rights and duties are created together by the making of a contract. I propose to call the first sort of rights *derivative rights*; the second

sort *original rights*; and the third sort *concurrent rights*. (It should be noted that the temporal language here is only a metaphor for matters of *logical* priority. It is not meant to be taken literally—that is, to refer to matters of temporal priority—or to suggest causal relationships.) First, then, derivative rights.

### III. DERIVATIVE RIGHTS

Some arguments for the existence of a right proceed by first establishing the existence of a right-correlative of some sort. For example, one may first establish that B has a *duty* to A. It then (apparently) follows that A, as the beneficiary of that duty, must “have” something—in fact, must have a claim right, if “right” is understood as the Hohfeldian correlative of “duty.” Arguments for the existence of such rights do not depend (in principle) on whether the right-holders have conscious interests, or are able to “make” claims on others, or are able to make agreements with others. The arguments depend only on whether a duty toward that (putative) right-holder exists. Such rights are *derivative*—established entirely by derivation from the (logically) prior existence of duties in others. There are analogous arguments which proceed from the prior establishment of no-rights, liabilities, and disabilities.

In principle, derivative rights can be either natural or conventional, depending on whether they come from natural or conventional rights-correlatives. I shall focus here on rights that are derivable from duties. The arguments can easily be modified, however, to deal with the rights derived from no-rights, liabilities, and disabilities.

#### A. *The Nature and Scope of Derivative Rights*

Derivative rights clearly are entitlements. That is, we would clearly be willing to use that word to describe any such right: a duty toward A entitles A to certain acts or forbearances from B; a no-right with respect to A entitles A to act in certain ways regardless of B's wishes; a liability with respect to A entitles A to alter B's rights, duties, liabilities or disabilities; and a disability with respect to A entitles A to freedom from a liability.

It is difficult to construe derivative rights as claims (of any familiar sort) that are distinct from entitlements. Anyone who has a right may claim acts or forbearances from others, of course. Or such claims may be made on behalf of the right holder. It is clear, however, that the right exists whether the claim is made or not. So the

sense in which derivative rights are claims seems equivalent to the sense in which they are entitlements: namely, in the case of claim rights, their requirement of an act or forbearance from someone (or compensation in lieu of it); in the case of liberty rights, their denial of a contravening claim in others; and so on.

Derivative rights may be held by anyone, or anything, to whom duties (or no-rights, liabilities, or disabilities) are born. The question is whether there are conceptual limits to that sort of relationship; or whether derivative rights may *in principle* be held by any object—for example, by rocks, trees, animals, human fetuses, and the permanently comatose.

1. *Duties toward and duties concerning.*—One step commonly taken toward an answer to that question is to point out that one may have duties *concerning* something or someone without actually having duties *toward* that thing or person.<sup>8</sup> For example, my duty to help Jones may actually be a duty to Jones' friend rather than Jones. (Consider: "Mr. Jones, because I owe your friend a favor and because she wants me to do this, I feel duty bound to do it—even though I think you're worthless and I certainly don't owe *you* anything.") This is a duty *concerning* Jones, but (apparently) not a duty *to* Jones. We would not want to say, in such a case, that Jones had a right against me at all. It is Jones' friend who has the right—a right that I help Jones.

So to be able to say who (or what) has a derivative right in a given case, we need to be able to say "to" whom—as opposed to "concerning" whom—the duty (or other rights-correlative) is born. Offhand, I see no way of doing this at the level of *formal* analysis. One cannot simply say that the duty is "to" the person whose interests it satisfies, or who is an essential (as opposed to accidental) beneficiary of the duty. These descriptions fit both Jones and his friend. I suspect that in each case the question will have to be settled by an analysis of the substance of the considerations that justify the duty. (For example, in this case, the duty is defined by a relationship between Jones' friend and me, not between Jones and me.)

How to handle particular cases, however, is not the problem here. What is needed is some guidance on the question of the range of *potential* right-holders. And the distinction between duties "to" and

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<sup>8</sup> See the discussion in Hart, *Are There Any Natural Rights?*, 64 PHIL. REV. 175, 180 (1955); and Lyons, *supra* note 2.

duties "concerning" may yet be of help.

Surely we can say, can we not, that anyone or anything that *could* benefit from another's performance of duty could be someone (or something) "to" whom the duty is born? That is, surely the capacity to be a "beneficiary" is sufficient to guarantee one the status of a *potential* holder of derivative rights. It may not be a necessary condition; that is, there may be other ways to become a potential right holder. And it is certainly not sufficient to establish that one *is* a right holder. If one could benefit, however, surely it is logically possible that one could be a derivative right holder. (The only evidence one can give for this assertion is, of course, the absence upon semantic analysis of a contradiction between the two propositions: (1) A could conceivably benefit from the performance of a duty; and (2) the duty could (considering only (1) above) conceivably be "to" A. I take it that there is no contradiction between the two.)

2. *Possible beneficiaries of duties.*—As it turns out, this is enough to guarantee the status of potential (derivative) right holder to virtually everything. Certainly it is true that any animate being—whether purposive or not, whether it has conscious interests or not, whether it is sentient or not—could be benefitted by the performance of a duty. The case is not so clear for inanimate objects, but it leans in that same direction. The chain of argument which establishes this proposition runs as follows:

1) People can be benefitted (or harmed) without being aware of it at the time—or indeed without ever being aware of it—in the sense that their interests can be advanced or compromised without their knowing it.

2) This is so (at least in part) because people may not actually be aware of their "true" interests—*e.g.*, those things they would want for themselves if they were perfectly rational and all-knowing; or those things they would want if they were not self-deceiving; or those things they would want if they were more reflective or introspective.

3) If awareness of an interest is not a necessary condition for having an interest, then the notion of having an interest must be connected to an "objective" as well as a "subjective" notion of people's welfare. That is, we must be able to make sense of the notion of an event being "in" a person's interest ("for" his or her welfare) without essential reference to whether or not that person actually does or ever *could* be aware of that interest.

4) Such an "objective" notion of an individual's wel-



fare—understood perhaps in terms of what the individual *would* want if he or she were aware of the relevant facts—must then be based on the observer's appreciation of what the individual would want under those counterfactual conditions.

5) It is from such an "objective" stance that we can say, as observers, that subjects are harmed or benefitted even if they are not subjectively aware of it.

6) Now: if this is true for humans—that is, if it makes sense to say that they can be benefitted or harmed whenever it is the case that, had they been aware of all the facts, and had they been reflective and rational, they *would* have wanted (or not wanted) the event—then the same must be true of any living being. Trees can be benefitted or harmed in the same way. We have an objective, or observer's, notion of their welfare—their "interests"—which is not dependent on the presence or absence of a subjective awareness of those interests by the trees themselves. We say—no more metaphorically for the tree than for the adult human being—that it can be harmed, helped, injured, damaged, destroyed, or restored to health. In neither case are we making necessary reference to consciousness, purposiveness, sentience, or subjective awareness of any kind. The language of interests may be metaphorical here—both in the case of a person's "true" interests and in the case of a tree's interests—but the language of benefit and harm is not. The language of benefit and harm is what is relevant to the question of who can be a beneficiary of a duty.<sup>9</sup>

7) Thus, any entity for which one can construct such an objective notion of welfare can be the beneficiary of a duty—and hence the holder of a derivative right.

8) I take it that this is decisive in the case of all animate beings—that is, that the construction of an objective notion of their welfare is possible. Thus, human fetuses, neonates, the catastrophically retarded, and the permanently comatose can all in principle be benefitted or harmed and can therefore hold derivative rights. A similar conclusion is true for trees, fish, sponges, carrots, and other animate beings.

9) What I take to be decisive in the case of animate beings I take to be at least suggestive in the case of inanimate entities. Interference with their equilibrium mechanisms looks very much like interference with the growth of a plant, or with the homeostatic mecha-

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<sup>9</sup> My colleague, H. Lamar Crosby, Jr., has explored a similar notion in *Reflections on the Scope of Justice* (in typescript).

nisms of an animal. Bizarre as it sounds, if an objective notion of welfare—constructed by counterfactual speculation—is possible for humans and other living beings, why not for inanimate objects as well? My hesitancy here is due more to the novelty of the proposition than to any argument I can find against it.

In general, then, the conclusion is that the class of potential derivative right-holders includes animals, fetuses, trees, the comatose, and probably even inanimate objects. This is not to say, of course, that each of these objects can hold *any* sort of derivative right. Some rights-relationships (such as powers, or liberties to act) require in principle a potentially “active” right holder—that is, one who can exercise a power or a liberty. It makes no sense to speak of the right of an inert gas to make a will. The situation is the same for some claim rights and immunities; they too may require a potentially active right-holder. (Think of the immunity right to remain silent; or the claim right to an education.) But claim rights and immunity rights *can* be purely passive relationships on the part of the right holders. (Think of the claim right to freedom from deliberate interference with one’s welfare.) This is what makes the class of potential derivative right-holders so large.

### B. *Justifying Duties*

Whether there are in fact any duties to inanimate objects (or vegetables, and rudimentary forms of animal life, for that matter) has of course not been settled here. From the fact that these things are potential right-holders, it does not follow that any of them *are* right-holders. It only follows that we cannot rule out, on purely formal grounds, all derivative rights that might be claimed for them.

I noted earlier, however, that derivative rights could in principle be either natural or conventional, depending upon whether the correlates from which they were derived were natural or conventional. I now make a few remarks on this distinction, because it has some bearing on the next sort of right to be considered: original rights.

1. *Natural duties.*—The crux of the distinction between natural and conventional duties (or rights) is clearly in the sort of considerations that justify them or “establish their existence.” That is, I know of no reason in principle why natural duties should have either a special *content* (e.g., concerning the minimum conditions necessary for survival) or a special *form* (e.g., applicability to all). Rather,

it is apparent that what is fundamental to the distinction is the thought that some duties (the natural ones) might "exist" independently of anyone's knowledge of them, or assent to them. It would thus make sense to speak of "discovering" such duties as opposed to creating them. We create duties by convention; we justify them—establish their existence—by appeal to convention. We discover, or "find," natural duties; we justify them—establish their existence—by appeal to something other than convention.

What is that "something other"? The answer is in large measure determined by the initial characterization of the distinction between the natural and the conventional. For present purposes, I shall regard as "natural" any duty that can be justified without reference to an agreement or aim to create *that particular duty*. (This may be a more expansive definition than some would favor, but I think it is a harmless expansion.)

Such natural duties (*i.e.*, justifications for duties) are of at least three sorts. First, a duty is a natural one if its existence is entailed by the existence of duties *per se*. For example:

- 1) If there are some duties whose existence cannot be disputed (*e.g.*, some conventional duties); and
- 2) If any such duties, regardless of their content, entail a further duty X; then
- 3) That further duty X is a natural one. It is natural because it is not itself the product of a specific convention aimed at creating that particular duty, but rather the product of the *form* of all such activity. The existence of such a duty is contingent on the existence of convention, but it is not itself conventional. (H. L. A. Hart has offered an analogous argument for the existence of a natural right to liberty.)<sup>10</sup>

Second, the existence of a natural duty may be established by reference to the conditions necessary for the realization of social or individual goals. For example:

- (1) If some goal Y is (morally) justifiable; and
- (2) If the existence of a duty X is necessary<sup>11</sup> for the realization of the goal Y; and

<sup>10</sup> Hart, *supra* note 8.

<sup>11</sup> Similar, but weaker, arguments *may* be constructable from the premise that the imposition of a duty X is simply the *best* (most effective) means for realizing a justifiable goal, but I shall avoid that complication here—and in the next argument below. I assume that if a duty X is only one of several equally effective means, the argument as it stands would not go through.

- (3) If there are no (sufficient) reasons for thinking that the existence of the duty X is unjustifiable; then
- (4) The existence of duty X is justifiable—in the sense that there are good reasons for having it (its necessity for the realization of a morally justifiable goal), and no countervailing reasons for not having it.

A duty so established may plausibly be called a natural one because it does not arise from an aim to create that particular duty, but rather raises as a consequence of other activities and circumstances. The existence of such duties is contingent on the existence of justifiable goals for whose realization they are necessary, and upon the absence of countervailing reasons. The duties may thus range from impermanence in the extreme to permanence, depending on the universality and/or stability of the goals involved and other relevant circumstances. For example, one supposes that survival goals among normally formed human beings are relatively universal and stable, and that any natural duties derived from such goals (such as the prohibition of murder) would be likely to have similar characteristics. On the other hand, some of the "duties of friendship" may be as fleeting as the whims of one's friends and/or one's freedom from something better to do.

The third way in which a natural duty may be justified is by reference to the requirements of justifiable social institutions. Human parents, for example, may be said to have duties to their children in part because the institution of the family requires them. In general:

- (1) If an institution is (morally) justifiable as it is defined; and,
- (2) If—although its definition does not itself entail the existence of a duty X—that duty is necessary to the continued viability of the institution; and
- (3) If there are no (sufficient) reasons for thinking that the existence of the duty X is unjustifiable; then
- (4) The existence of duty X is justifiable in the sense that there are good reasons for having it (its necessity for the viability of a justifiable institution), and no countervailing reasons for not having it.

A duty so established may also be called a natural one. It too does not arise from an aim to create that particular duty. Its existence may be contingent upon the existence of institutions established by convention, but it is not itself a conventional duty.

2. *Conventional duties.*—Given what has been said about natural duties, conventional ones may be defined as duties that are the (justifiable) products of activities aimed specifically at creating those duties.

Some conventional duties emerge gradually from customary behavior by the growth of a consensus that what is customary should be obligatory. Others emerge from a consensus unrelated to existing customs (for example, from a consensus generated by revolutionaries or reformers). Still others arise from regularized legislative or contractual processes.

The justification of particular conventional duties may take roughly the same form as that for natural duties:

- (1) If the consensus exists (or if people have explicitly agreed) that B has a duty X; and
- (2) If there are no reasons sufficient for thinking that that duty for B is unjustifiable; then
- (3) That duty is justifiable in the sense that there is good reason for B's having it (people want B to have it), and no counter-vailing reasons for B's not having it.

Conventional duties include, but are not limited to, contractual duties.

Similar arguments can be made for other Hohfeldian categories. A no-right, or a liability, or a disability may in principle be regarded as either natural or conventional, and if its existence is established *first*, and used to argue for the existence of the corresponding liberty, power, or immunity, then one has an argument for a different sort of (natural or conventional) derivative right.

#### IV. ORIGINAL RIGHTS

I turn now to the second sort of right in the trichotomy—the rights I have called *original rights*. The basic idea is simple: Many arguments about rights are not about derivative rights at all. That is, they do not attempt to establish a duty or other correlative first and then derive a right from it. Rather, they attempt to establish the right-holder's claim or entitlement first, and then to derive the appropriate correlative from that.

The motive for finding such rights is not hard to see. There is, after all, something unsatisfying about saying that a child's right to life comes only from the prior existence of duties in others; that there is nothing about a child which "reaches out," as it were, and makes a claim on others—a claim which itself constitutes a right

from which others' duties are then derived. If there are derivative rights (*e.g.*, rights entailed by duties), are there not also derivative duties? Are there not duties whose existence is established by inference from the existence of rights?

The temptation to say "Of course" to such questions is strong. The notion of a right that rests on—is established by reference to—others' duties seems too weak to express the force of a person's right to life, for example. Surely that right must *originate* somehow "with" or "in" the person.

The difficulty of saying just how such an original right could be established, however, is notorious. Some people hold that one must find some "morally relevant characteristics" of the putative right-holder that yield the right.<sup>12</sup> If this is the strategy adopted it is clear that one must find a characteristic that is not dependent upon a right-making "bargain" between the parties. Original rights are not contractual rights.

#### A. *Conventional Rights*

Some original rights, however, may be conventional. That is, an original right might emerge from a consensus in much the way a conventional duty does. It might emerge from custom, as customary behavior gradually achieves the status of an entitlement for which there is no countervailing moral argument. It may emerge from a consensus about entitlements provoked by reformers or revolutionaries. Or it may come through regularized legislative processes, including the legislative acts of judges and executives. (Again, as in the case of customary behavior, such rights are only established when there is no countervailing moral argument to be found.)

The difference, then, between a conventional *derivative* right and a conventional *original* right is the priority given to the justification of the right rather than its correlative. Of course, this priority *may* be purely "temporal"—in which case the warrant for saying that the right is *either* derivative or original disappears. (The rights and duties thus established are best thought of as concurrent ones, which I discuss below.) The priority may, however, be logical as well. That is, it may be that the concern to establish the right-

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<sup>12</sup> See Michael Tooley's discussion in *Abortion and Infanticide*, 2 PHIL. AND PUB. AFF. 37 (1972), amended and expanded in *THE RIGHTS AND WRONGS OF ABORTION* 52-84 (M. Cohen ed. 1974). See also Robert Nozick's remarks on the moral basis of rights in *ANARCHY, STATE AND UTOPIA* 28-35 (1974), criticized by Samuel Scheffler in *Natural Rights, Equality, and the Minimal State*, 6 CAN. J. OF PHIL. 59 (1976).

admittedly many things which (given the proper setting) count as exercising a power: for example, the explicit, conscious, overt claiming of a right; or expressions of a preference. It seems clear, however, that, by definition, if an entity is incapable of purposive activity *per se*, it could not exercise a power-right.

To the extent that claims of right (as original rights) rest upon power-rights, then, they require that holders have the capacity for purposive activity. Further, they require that some such activity, which can reasonably be construed as the exercise of a power, be performed by the right-holder. There is reason to think that many animals or human infants can meet these conditions: They can in principle have at least derivative powers, or even conventional, original ones; and they can do things which, were they done by humans in the same context, would unquestionably count as the exercise of a power. The question of whether animals or infants have natural, original rights by way of claiming them is thus reduced to whether they have the corresponding power-rights.

#### D. *Status Rights*

There is still something unsatisfying in this account. It is often insisted that people's rights to life or liberty, for example, do not depend on their exercise of any power, but come simply from their status as human beings. (The same sort of insistence is then occasionally extended to other species.) This sort of right—a natural, original, *status right*—is difficult to justify, however.

*Consider:* It is easy enough (in principle) to establish *derivative* status rights, natural or conventional. All one has to do is establish the relevant correlative duties—duties that yield rights to all members of that group. And it is easy enough to establish the relevant correlative duties. It is also easy enough to establish *original* status rights by appeal to convention: If we *agree* that humans have some right simply by virtue of their status as humans, and there are good reasons for so agreeing and no countervailing ones to be found, then surely humans have that right.

What we are looking for here, however, is a status right that does not derive from prior duties in others, and that does not depend on convention. We have to find grounds for an argument of the form:

- (1) There are good reasons for holding that all A's, simply by virtue of their status as A's, have right R (from which the rights-correlatives of others derive).

(2) The fact (if it is a fact) that people (no matter how many) refuse to agree that A's have right R is irrelevant to whether or not A's have that right.

(3) There are no countervailing reasons to (1).

(4) Therefore, A's have right R.

In outline, this is no less concrete than the accounts given above for derivative rights and conventional, original ones. In those earlier cases, however, it was easy to see that the set of rights so defined was not in principle empty. One could imagine the sorts of considerations that would establish such rights.

In the case of the argument form just given, however, it is not easy to see how premises (1) and (2) could be established. What sorts of reasons could there be to support a natural, original, status right? A common suggestion is to explore certain characteristics possessed by "persons" (*i.e.*, individuals who have a self-concept and are purposive).<sup>13</sup> I shall therefore focus on that suggestion, to illustrate the justification of status rights.

1. *Personal rights*.—Self-consciousness—that is, being conscious of oneself as distinct from other things and other persons—necessarily involves a "sense" of physical and psychological boundaries. If my body is distinguishable from its surroundings, it necessarily has physical boundaries. To the extent I am conscious of it as distinct, I am conscious of boundaries. Further, if my consciousness is normally inaccessible to others except by inference from my behavior (verbal or otherwise), spatial (boundary) metaphors for this fact are appropriate. My consciousness of myself as an entity necessarily includes, then, consciousness of physical boundaries and consciousness of the "separateness" of my consciousness itself. Further, persons invariably "manage" these boundaries—by making a distinction between trespass and visit, as it were, and acting accordingly.

Human persons are also purposive. They have projects that they strive to achieve—even if these projects are not fully self-conscious; even if they are self-annihilating. And they resist interference with these projects.

All the behavior just mentioned—the boundary-keeping, the resistance to interference with projects—can be part of the process of claiming rights, of course. But it is their dispositional aspect—the

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<sup>13</sup> By far the most detailed and systematic attempt to work out such a position is Alan Gewirth's. See his *REASON AND MORALITY* (1978) and his article included in this symposium.



fact that human persons as we know them always stand ready to make such demands—that seems to provide an opening for an argument for status rights. The argument proceeds as follows:

If boundary-keeping and resistance to interference are necessary consequences of becoming a person (*i.e.*, developing a self-concept and becoming consciously purposive), and if such persons exist, and if they want to continue to exist, it is reasonable to place the burden of proof on anyone who proposes to trespass personal boundaries, or interfere with a person's purposive behavior. If such trespassing or interference cannot be justified, the way is open for a further argument to establish personal *rights* to liberty. That argument would have to show that there are good reasons to recognize entitlements in persons to freedom from trespass (of their personal boundaries) and freedom from interference with their purposive conduct.<sup>14</sup>

Now the problem with concluding that status rights are original rather than derivative (or concurrent) is just this: While it is true that their justification begins with a reference to the characteristics of the putative right-holder and then shifts the burden of proof to others to show that they do not have the correlative duty (or no-right, liability, or disability), the same logical form can be used to justify duties first. In short, while the justification of such rights depends on characteristics of the right-holder, there is apparently no more reason to think that those characteristics lead (logically) to original rights than to derivative ones. If this is so for personal (status) rights, it would seem to hold for any attempt to argue for a natural, original, status right.

I think this is wrong, for the following reasons. Arguments that make primary reference to the putative duty-bearer's roles, interests, and goals (even though they also involve essential reference to the right-holder's status, interests, or whatever), seem clearly directed—as a matter of logical form—to establishing the duty first. It is not just a matter of indifference which one is established first, for the whole point is to secure the ascription of a duty (or other right-correlative) even if no particular right-holder can be identified with certainty. Similarly in the case of original rights: the point of those arguments is to justify the entitlement of the holder—whether or not a particular class of right-regarders can be specified. Of course it *can* be a matter of (logical) indifference as to which comes

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<sup>14</sup> I have argued for the soundness of the general form of such arguments in *ON JUSTIFYING MORAL JUDGMENTS* (1973).

first (and in those cases, I would classify the rights as concurrent ones, as I do below). But it *need* not be a matter of indifference.

This opens the door, *in principle*, for the justification of status rights for virtually anything. Rights requiring the capacity for action (*e.g.*, powers or liberties) are of course restricted to entities with those capacities. "Passive" rights (*e.g.*, some sorts of claim rights and immunities), however, are not so restricted.

#### E. *Interests*

A final word about interests is in order. Some have urged (either implicitly or explicitly) that a being's capacity to have interests is a necessary condition of its having rights.<sup>15</sup> For reasons which should by now be clear, I think such an assertion is seriously misleading at best.

### V. CONCURRENT RIGHTS

I turn now to the final part of the trichotomy—concurrent rights. The basic idea is simple enough: There are times when it is odd to think of either a right or its correlative as being antecedent to the other—when it appears that A's rights and B's corresponding duties (or other correlatives) arise concurrently. *Example*: Suppose a third party drafts a document that, if accepted by A and B, would create a right in A and a duty in B. The document is presented to A and B and they say, simultaneously, "I accept." B now has a duty toward A, and A has a right against B. But the right is neither derived from nor antecedent to the duty. It arises *concurrently* with the duty.

The establishment of such rights can be achieved by a straightforward application of the justificatory strategies outlined in the preceding pages. It seems clear that, in principle, there could be both natural and conventional rights of this sort.

It is, however, sometimes difficult to resist the thought that *all* rights are at bottom concurrent ones. If each right has a correlative—if, in fact, the existence of a right logically *entails* the existence of a correlative duty, or no-right, or liability, or disability—then it may appear that all rights and their correlatives are concurrent ones. The only significant difference between concurrent rights and derivative and original ones seems then to be one of emphasis. Which element in the dyad is the focus of attention?

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<sup>15</sup> See text and references in Feinberg, *supra* note 3.

Which element gets the initial justificatory argument (leaving the other to be derived from it)? Couldn't the attention and justificatory strategy always *in principle* be focused concurrently on both elements?

To see that this is not so, consider: In the case of original rights, the focus of attention (and the initial justificatory argument) are *necessarily* on the right holder because the right holder's characteristics are primarily responsible for generating the right-relationship. And in the standard offer and acceptance analysis of the making of a contract, the right-relationship emerges in stages: A has the power (right) to make an offer to B; A makes the offer, creating in B a power to accept and thus create a contract. B's power to accept, when exercised, creates the duties and rights mentioned in the contract. Here we may have all three sorts of rights: A's power-right to make an offer to B may be an original one. A's exercise of the power is what creates B's power (right) to accept. B's power-right is in that sense derivative from A's power-right. And B's acceptance creates concurrent rights and duties in A and B. The distinctions among the three sorts of rights are thus more than merely rhetorical or heuristic.

Of course the distinctions *can* be merely incidental matters of emphasis. In the case of conventional or natural rights where the justificatory arguments rest as much on the character and status of the duty-bearers as it does on the character and status of the right holders (and vice-versa), the focus on one or the other *may* have only a rhetorical or heuristic justification. But that should not be allowed to obscure the fact that there are cases in which the distinctions are formal rather than rhetorical.

## VI. CONCLUSIONS

The point of this article has been to clear away some of the confusion about the concept of a right. No normative conclusions have been established directly, but there are some logical consequences of relevance to normative discussions.

### A. *Animals' Rights*

For one thing it is clear that there is no formal obstacle to establishing a wide variety of rights for non-human animals. They can, of course, in principle have (both natural and conventional) derivative rights. To the extent that an animal can have interests, or make

claims, or has a self-concept and is purposive, (natural) original rights are possible. In fact, the only serious formal limitation on the whole class of those non-human animals now known to us is the same as one of the limitations on human infants (and some incompetent adults): They cannot have those conventional rights in which the right-holder must make an explicit agreement to accept a specified rights-relationship (*e.g.*, an agreement to the terms of a contract). They cannot have such rights because they cannot make such agreements.

There are, of course, severe formal limitations on the rights that can be held as one goes down the evolutionary ladder. Dogs may be able to make (some sorts of) claims. But can oysters? Chimpanzees may be persons, but are bees? Regardless of the priority to be assigned to human rights, then, there are at least some rights that normal adults of our species can hold which normal adults of other species cannot hold. And at the lowest end of the scale, it is probably fair to say that the only rights those animals (like sponges or clams) actually have are certain sorts of derivative rights.

#### B. *Trees, Rocks and Fresh Water Streams*

Non-animal elements of the environment probably can have some sorts of derivative and concurrent rights, too. Thus, if there is a legal question as to whether trees can be right-holders, and if derivative rights are enough to give *humans* legal standing, then the burden of proof is surely on anyone who wishes to deny that trees can have standing. But again the range of types of rights available is severely limited. I see no way that it could include natural, original rights, for example.

#### C. *Zygotes, Embryos, Fetuses and Infants*

The rights available in principle to human beings increase as biological development proceeds. Zygotes do not make claims or have a self-concept. (At least we have no reason to think so, and many reasons to think not.) They can, however, have derivative or concurrent rights of the same sorts available to trees and shellfish.

As development proceeds, the fetus appears to be able to make some of the same sorts of responses which, if made by an adult animal of another species, we would be tempted to call a claim. Natural, original, claims to rights are thus not out of the question at this stage and certainly they are available to the newborn. Personal rights must, of course, wait until later.

D. *The Permanently Comatose*

Whole brain death, as defined by the Harvard panel,<sup>16</sup> entails the loss of personal rights, as the term is used in this Article. It also entails the loss of claim-making capacity and the capacity to make agreements. Claims and agreements made *prior* to brain death, however, may have yielded rights which remain in force. And the comatose may have some sorts of derivative and concurrent rights as well.

No doubt the point need not be belabored any longer. The differences between derivative, original, and concurrent rights are not illusory. And the awareness of this trichotomy is a significant help in clearing away some confusions both about the justification of rights and the range of entities that can be right-holders.

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<sup>16</sup> Report of the Harvard Medical School ad hoc Committee on the Definition of Brain Death, reprinted in H. BEECHER, RESEARCH AND THE INDIVIDUAL 311-19 (1970).