

On the non-instrumental value of basic rights

Rowan Cruft

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(I) Introduction: instrumental approaches to basic rights

This paper examines the non-instrumental value of basic rights. I take ‘basic rights’ to refer to those morally justified rights that fulfil the following three conditions:

- (1) They are of paramount moral importance, where this means both (i) that they take priority over other types of right in cases of conflict, and (ii) that we must make the greatest efforts to avoid violating them.¹
- (2) They exist whether or not they are recognised, demanded, accepted, endorsed, enforced or complied with by institutions or individuals.
- (3) All persons hold these rights, and their correlative duties are binding on all persons and all institutions.

Rights that meet these three conditions sometimes get called ‘natural rights’ or ‘human rights’; by using the phrase ‘basic rights’ I signal my rejection of the assumptions that these are the rights we would necessarily hold in a pre-social state of nature, and that all these rights necessarily either should be or already are codified in international human rights law.²

¹ For interesting discussion of cases where dimensions (i) and (ii) diverge, see F. M. Kamm, *Morality, Mortality, volume II: Rights, Duties and Status* (Oxford: OUP 1996), p. 321

² Although they are common assumptions, not every theorist assumes that ‘natural’ rights must be those we would hold in a pre-social state of nature (e.g. this assumption seems to play no role in H. L. A. Hart, ‘Are There Any Natural Rights?’, *Philosophical Review* 64 (1955), 175-191) or that ‘human’

Many contemporary theorists think that basic rights in my sense, along with all other rights, are of purely instrumental value. They disagree over what the good ends are for which basic rights are a means: Fabre, Raz, Tasioulas and Waldron think that a given person's basic rights are justified because they serve that person's *important interests*; utilitarian thinkers like Brandt, Hardin or Talbott take a person's basic rights to be justified by how they serve *the aggregate interest*; Miller, Pogge and Wiggins see basic rights as justified because they protect their holders' *fundamental needs*; Dagger, Griffin, Lomasky, Nussbaum and Sen focus in different ways on how basic rights secure their holders' *freedom, capabilities or autonomy*; and Rawls takes what he calls 'human rights' to be means for achieving 'a necessary [...] standard for the decency of domestic political and social institutions'.³ Despite their differences, these

rights necessarily ought to be codified in international human rights law (see, e.g., Amartya Sen, *Development as Freedom* (Oxford: OUP 1999), p. 229). For discussion of the bewildering range of possible meanings of the phrase 'human rights', see Saladin Meckled-García and Başak Çali, 'Lost in translation: the human rights ideal and international human rights law', in their *The Legalization of Human Rights: Multidisciplinary perspectives on human rights and human rights law* (London: Routledge 2006), pp. 11-31). I use the phrase 'basic rights', defined by conditions (1)-(3), to avoid these complications.

³ The quotation is from John Rawls, *The Law of Peoples* (Cambridge, Mass.: Harvard UP 1999), p. 80. The relevant works of the theorists mentioned are Richard B. Brandt, *Morality, Utilitarianism and Rights* (Cambridge: CUP 1992), esp. Chs. 10 and 11; Richard Dagger, *Civic Virtues: Rights, Citizenship and Republican Liberalism* (Oxford: OUP 1997), esp. Part I; Cécile Fabre, *Whose Body is it Anyway?* (Oxford: OUP 2006), Ch. 1; James Griffin, 'First Steps in an Account of Human Rights', *European Journal of Philosophy* 9 (2001), 396-327; 'Discrepancies between the Best Philosophical Account of Human Rights and the International Law of Human Rights', *Proceedings of the Aristotelian Society* 101 (2001), 1-28; Russell Hardin, *Morality within the Limits of Reason* (Chicago: University of Chicago Press 1988); Loren Lomasky, *Persons, Rights and the Moral Community* (Oxford: OUP 1987), esp. Chs. 3 and 4; David Miller, *National Responsibility and Global Justice* (Oxford: OUP 2007), Ch. 7; Martha C. Nussbaum, *Frontiers of Justice: disability, nationality, species membership* (Cambridge, Mass.: Harvard UP 2006), esp. pp. 284-291; Thomas Pogge, *World Poverty and Human Rights* (Cambridge: Polity 2002), esp. pp. 54-59; Joseph Raz, *The Morality of Freedom* (Oxford: Clarendon 1986), esp. Ch. 7; Sen, 'Elements of a Theory of Human Rights', *Philosophy and Public Affairs* 32 (2004), 315-356; William J. Talbott, *Which Rights Should be Universal?* (Oxford: OUP 2005), esp. Ch. 6; John Tasioulas, 'Human Rights, Universality and the Values of Personhood: Retracing Griffin's Steps', *European Journal of Philosophy* 10 (2002), 79-100; Jeremy Waldron, *The Right to Private Property* (Oxford: OUP 1988); *Liberal Rights: Collected Papers 1981-1991* (Cambridge: CUP 1993); David Wiggins, 'Claims of Need', in his *Needs, Values, Truth: Essays in the Philosophy of Value* (Oxford: Blackwell 1987), pp. 1-58. Griffin and Lomasky supplement their autonomy-based accounts with further instrumental considerations; Nussbaum uses the concept of need to explain the central human capabilities; and Raz has recently moved towards a Rawlsian conception of human rights (see Raz, 'Human Rights without Foundations' (2007), available on-line at

theorists share the general assumption that the basic rights are justified instrumentally, as efficient means for promoting, protecting or ensuring respect for the theorist's favoured values.

The instrumental nature of these theorists' justifications for basic rights is obscured by the fact that most of the listed theorists would allow that people's *compliance with, recognition, acceptance and endorsement of* basic rights can have non-instrumental value in the following three ways.

(a) Most would allow that for certain basic rights, the attainment of their immediate objects (where the 'immediate object' of P's right not to be tortured is *P's not being tortured* and the 'immediate object' of Q's right to education is *Q's being educated*) is non-instrumentally valuable. For example, I suspect most of the theorists mentioned would allow that individuals have a fundamental interest in or need for a primary education, whose satisfaction is not only valuable as a necessary means for the individual's attainment of happiness or further goods, but is also valuable independently of its effects. Now according to one understanding, *compliance with* someone's basic right consists not simply in people's attempting to respect the right; rather, genuine compliance consists, at least in part, in the right-holder's successfully attaining the right's immediate object. According to this account, compliance with Jo's right to a primary education partially consists in Jo's receiving a primary education – and that, I have claimed, most theorists would take to be non-instrumentally valuable.

(b) In addition, Raz notes that compliance with a given person's basic right can sometimes have further value beyond the value in securing the immediate object for the right-holder. For example, Raz argues that while the immediate object of Jo's right to freedom of expression (Jo's protected capacity to express political opinions publicly etc.) is of comparatively low value – both instrumental and perhaps non-instrumental – when considered in itself, nonetheless general compliance with the right to freedom of expression borne by all citizens is partially constitutive of an open society of great value.⁴ And this open society is arguably valuable, in part, independently of its effects.

(c) As well as *compliance*, several of the theorists listed earlier might also allow that *recognition, acceptance and endorsement* of basic rights has non-instrumental value. For instance, it is natural to read Raz as arguing that the open society (which is, arguably, partially non-instrumentally valuable) is constituted not only by general *compliance* with people's rights to freedom of expression, but also by widespread *recognition, acceptance and endorsement* of such rights.

Although the listed theorists' views allow that compliance with, recognition, acceptance and endorsement of basic rights can sometimes be non-instrumentally valuable in the three ways outlined, nonetheless all these theorists regard *basic rights themselves* – construed simply as normative requirements existing independently of people's compliance, recognition, acceptance or endorsement – as of purely

⁴ Raz, *Ethics in the Public Domain, Revised Edition* (Oxford: Clarendon 1994), pp. 54-55. Compare *The Morality of Freedom*, p. 191, note 1, for the idea that a right can be justified by an interest other than the interest in its immediate object.

instrumental value.⁵ That is, they all endorse Scanlon's view that the justification of basic rights is

backed by something like the following: (i) An empirical claim about how individuals would behave or how institutions would work, in the absence of this particular assignment of rights [...]. (ii) The claim that this result would be unacceptable. This claim will be based on valuation of consequences [...]. (iii) A further empirical claim about how the envisaged assignment of rights will produce a different outcome.⁶

For the listed theorists, basic rights are justified by their ability to 'produce a different outcome'; basic rights produce this outcome by generating compliance, recognition, acceptance and endorsement, and by motivating enforcement mechanisms that support compliance, recognition, acceptance and endorsement. This outcome is extremely valuable (both instrumentally and non-instrumentally) in terms of the satisfaction of fundamental interests, the aggregate interest, basic needs, freedoms or decency. It is the value of this outcome that – according to the theorists listed earlier – justifies the existence of the basic rights that can secure it.

By contrast, in this paper I defend the thesis that even if they failed to 'produce a different outcome', basic rights would still be valuable. That is, I argue that *basic rights themselves* are valuable independently of their effects on the world through compliance, acceptance and endorsement etc. Such effect-independent value must be non-instrumental.

⁵ Some might dispute the view that rights are conceptually distinct from acceptance of or compliance with them. For defence of the thesis that rights are conceptually distinct from their acceptance and compliance, see, e.g., George Rainbolt, *The Concept of Rights* (Dordrecht: Springer 2006), pp. 49-62, or Tasioulas, 'The Moral Reality of Human Rights', in Pogge, ed., *Freedom from Poverty as a Human Right* (Oxford: OUP 2007), pp. 75-101.

⁶ T. M. Scanlon, 'Rights, Goals and Fairness', in Waldron, ed., *Theories of Rights* (Oxford: OUP 1984), pp. 137-152 at p. 146.

(II) Reasons for thinking that basic rights are non-instrumentally valuable

Why might one think that basic rights themselves (rather than compliance with, recognition or acceptance of them) have non-instrumental value? Consider a situation in which some persons' basic rights are wholly ignored: they are violated, with no compensation or apology offered, and the rights are in no other way recognised. One near-example might be the Nazi treatment of Jewish people; another might be slave-holding societies. Let us focus on an imaginary maximally egregious case, in which *nobody* recognises the basic rights of a certain person or set of persons, nor even shows these people some lesser respect while violating their rights, and these rights will never be recognised in future. In such a situation, purely instrumental approaches would seem compelled to maintain that the violated persons' basic rights have no value, for in such a situation these basic rights are wholly unsuccessful in promoting or protecting whatever ends instrumental theorists select as basic rights' *raison d'être*. This is because, in such a situation, the violated persons' basic rights not only fail to protect their immediate objects, but as these basic rights are in this situation wholly overlooked, they also fail to do anything to serve less immediate ends (such as fairness, efficiency, utility, or their holders' broader interests, needs, capabilities or autonomy). In this egregious case, the violated persons' basic rights achieve nothing for they utterly fail to 'produce a different outcome'. Purely instrumental approaches, like those listed earlier, must imply that the violated basic rights lack all value in this egregious case. Are these approaches correct? We would, I think, judge that the violated persons' basic rights still have value in some respect in the egregious case, even though these rights are in no way recognised and so have no effect on the world.

Contra purely instrumental approaches, there is something valuable about people having basic rights even here, when they are wholly useless as instruments.

A quick riposte on behalf of purely instrumental theorists maintains that basic rights still have *latent value* in the egregious case, where this means only that in the egregious case basic rights *would be valuable if they were respected or in some way recognised*. The instrumentalist might claim that their theory does not purport to find any ‘more-than-latent’ value in, nor offer a justification for, a person’s *basic rights’ existence even when wholly and continually violated*.⁷

This strikes me as an unsatisfactory riposte for three reasons. First, there is indeed a sense in which it seems correct to say that instruments are valuable even when they are not used to achieve what they are means to achieve, and ‘latent value’ seems appropriate to describe this. For example, it seems correct to ascribe value to a never-used and never-to-be-used shovel forgotten at the back of someone’s garden shed; and this seems appropriate because the shovel would efficiently promote our ends if it was used. But it seems to me that this is not the only kind of value that we are inclined to ascribe to basic rights in the egregious case. Basic rights do have latent value in this case, but they also feel valuable in a further way, independently of their potential usefulness. It seems hasty to insist that the idea of ‘latent value’ can capture all that we value about violated basic rights in the egregious case.

I recognise that this first response simply reports my intuitions. A second response goes further: surely if one knows that something with latent value and no other kind

⁷ Versions of this point were suggested by Antony Duff and Leif Wenar.

of value will *never* be used, then one can have no reason to create, acquire or favour the existence of this thing. For example, there will be no reason to create, acquire or favour the existence of a car (unless it has some further value (perhaps aesthetic or historical)) when the world's car-fuel resources have been exhausted. In this world, it will have become impossible to realise the car's latent value. Similarly, a civil war or other situations of extreme and ongoing violence might make it impossible that a particular person's basic rights could be respected or in any other way recognised now or in future. In this situation, it would be impossible that the latent value of this person's basic rights could be realised. But it would, I think, still be rational to favour the existence of such rights for this person in this situation (if, *per impossibile*, such detached 'favouring' were an option even though nobody recognised the person's rights). Hence, I suggest, the rights must have more than latent value in this situation, unlike the car in the fuel-free world.

Thirdly, basic rights also seem to have value in worlds where they are useless because unnecessary, rather than useless because ignored.⁸ For example, consider an altruistic utopia in which each person is incredibly kind to each other person, and motivations to engage in torture, to exclude some from the political process, to ignore those who need an education, or not to assist victims of natural disasters, simply never arise. This would be analogous to a world in which we all had shovel-shaped metal hands; in such a world shovels would lack even latent value, because they would not be useful for attaining valuable ends even if they were used. Similarly, basic rights lack both instrumental and latent value in the altruistic utopia: the attainment of what instrumental theorists take to be basic rights' ends (the fulfilment of fundamental

⁸ I am grateful to Kerri Woods for drawing this example to my attention.

interests, needs, utility etc.) is in this world achieved wholly independently of the existence of basic rights, and *recognition of basic rights would not make it easier to attain these ends*. Nonetheless, it seems clear to me that basic rights are a valuable component of such a world, even though these rights are not needed in order to achieve any results – and the only option appears to be that this value is genuinely non-instrumental (rather than latent or instrumental).

(III) Explaining basic rights' non-instrumental value: the constitutive approach

In what ways are basic rights non-instrumentally valuable? It has become common to distinguish between (i) something's being non-instrumentally valuable (or valuable 'for its own sake' or 'finally valuable') and (ii) something's being intrinsically valuable (or 'valuable because of its intrinsic nature', or 'whose value supervenes on its non-relational properties'). For example, Kagan suggests that a unique work of art might be valuable for its own sake, in part because of its relational property of uniqueness; this would be a case of non-instrumental value that was not intrinsic value.⁹ My arguments in §(II) suggested that basic rights, construed as normative entities whose existence is independent of compliance with or recognition of them, have more than instrumental value. I shall attempt now to explain what this 'final' value of basic rights is. But whether it is 'intrinsic' as well as 'final' will not be my main concern.¹⁰

⁹ Shelly Kagan, 'Rethinking Intrinsic Value', in Toni Rønnow-Rasmussen and Michael J. Zimmerman (eds.), *Recent Work on Intrinsic Value* (Dordrecht: Springer 2005), pp. 97-114, at p. 102. See also Christine Korsgaard, 'Two Distinctions in Goodness', in Rønnow-Rasmussen and Zimmerman, pp. 77-96.

¹⁰ But see note 30 below.

One thesis maintains that the non-instrumental value of basic rights consists in their *expressing* or *reflecting* human worth. Kamm writes:

[T]here may be a type of good that already exists but that would not exist if it were permissible to transgress the right of one person in order to save many lives. This is the good of being someone whose worth is such that it makes him highly inviolable and also makes him someone to whom one owes nonviolation. This good does imply that certain of one's interests should not be sacrificed, but inviolability matters not merely because it instrumentally serves those interests.

[...] Inviolability is a reflection of the worth of the person. On this account, it is impermissible for me to harm the person in order to save many in the accident, because doing so is inconsistent with his having this status.¹¹

[F]undamental human rights [...] are not concerned with protecting a person's interests, but with expressing his nature as a being of a certain sort, one whose interests are worth protecting. They express the worth of the person rather than the worth of what is in the interests of that person.¹²

These ideas are attractive: it is natural to think that the reason why basic rights are valuable when wholly overlooked (in cases of egregious violation) or when wholly unnecessary (in a utopian world) is because even in these situations basic rights *express* or *reflect* our worth as human beings. We need to explore these attractive but vague ideas.

In what ways can a thing have value because it reflects or expresses something?

Reflection gives epistemic access. For example, my reflection in a mirror (even a concave or convex one) gives me some epistemic access to my appearance. It might be argued that basic rights play a similar epistemic role: when I 'see' or recognise

¹¹ Kamm, *Intricate Ethics* (Oxford: OUP 2007), pp. 253-4.

¹² *Ibid.*, p. 271. Compare Thomas Nagel's similar 'status' view in 'Personal Rights and Public Space', in his *Concealment and Exposure & Other Essays* (Oxford: OUP 2002), pp. 31-52. Compare also dignity-based approaches like that of Nickel (James W. Nickel, 'Poverty and Rights', *The Philosophical Quarterly* 55 (2005), 385-402, esp. pp. 394-395). It is worth stressing that the two quotations from Kamm do not refer to the good of *compliance with* or *recognition of* nonviolation, but refer rather to the good of the *normative requirement of nonviolation* (i.e. the right) itself.

someone's basic rights, I thereby learn about the worth of that right-holding person. But in both these scenarios (the mirror, basic rights), the epistemic role of the reflection seems purely instrumentally valuable: the mirror is simply a useful means for enabling me to learn about my appearance; and basic rights, in their epistemic role as 'reflectors', are simply useful means for enabling me to learn about human worth. Of course, basic rights have additional instrumental value as protectors of human worth (just as a mirror might also have instrumental value independently of its reflective capacities, for example when used as a shield in battle). But the value of basic rights *as reflectors* seems no more than instrumental, at least if we focus simply on reflection's epistemic role.

Can reflection involve anything more than instrumental value? Sometimes *what is reflected* might be non-instrumentally valuable (a beautiful face, say, or in the case of basic rights, their holders' great worth); but this will not imply that the reflection itself is non-instrumentally valuable. However, sometimes a reflection might be a necessary constituent in a non-instrumentally valuable whole. Consider a beautiful scene reflected in a lake: here perhaps the reflection is a necessary part of a whole that has non-instrumental aesthetic value. Some might argue that basic rights play a similar role: the thought would be that *humans plus basic rights* together form a morally satisfying or appropriate whole of which basic rights are a necessary part. This is perhaps similar to the ways that *crime plus punishment* or *virtue plus reward* seem to form morally satisfying or appropriate wholes. We might say that 'the punishment should reflect the nature of the crime', and the occurrence of this form of reflection seems non-instrumentally valuable. But I fear that 'reflection' here does little distinctive work: in the contexts outlined, 'reflecting' seems simply a metaphor

for the general notions of ‘fitting’ or ‘deserving’. And to say that basic rights are of non-instrumental value because they are *fitting* to humans, or because humans *deserve* them, is to say little beyond the bare claim that there is non-instrumental value in humans holding basic rights.

We can improve on these thoughts by considering expression. Like reflections, expressions give observers epistemic access, in this case to what the expresser feels or thinks (consider a cry expressing fear, or a linguistic utterance). And like reflections, at first glance expressions seem purely instrumentally valuable: my expression ‘the tree is over there’ seems valuable simply as a means of communicating with others by expressing my thought that the tree is over there; similarly, a cry might seem valuable simply as a means of expressing fear (whether voluntarily or not). But on second glance, this appears simplistic. While *the sounds* I emit in a particular token utterance of ‘the Earth is a planet’ might be no more than instruments, *the sentence* that I thereby utter (an abstract object identified by its linguistic form) seems to be more than simply a useful means to express a pre-existing pre-linguistic thought. Instead, this sentence shapes or, perhaps, constitutes the thought that it expresses. Similarly, it might be argued that one’s cry partially constitutes one’s fear, rather than simply expressing it: that is, perhaps without the cry the fear could not be the very type of fear it is, because the cry is part of what constitutes it as this type of fear. It is notable that if these claims are true, and if furthermore the thought or the fear were of non-instrumental value in these cases (I am not sure whether this is true; it is arguable), then the linguistic expression or the cry would have non-instrumental value as *part-constitutive* of a non-instrumentally valuable thought or emotion.¹³

¹³ Rather than adopting the ‘constitutive’ account of the non-instrumental value of expressions sketched

This line of reasoning strikes me as promising for explaining the non-instrumental value of basic rights. In my view, basic rights are not simply useful means, but are also *partially constitutive of* certain relationships (just as expressions partially constitute what they express). And the relationships that basic rights partially constitute are *non-instrumentally valuable*: I argue in §§(IV) and (V) below that they are relationships that bind all humans together in fellowship as members of a shared proto-community. Basic rights gain their non-instrumental value from their constitutive role in this non-instrumentally valuable community.¹⁴

To build support for this controversial view, we can consider the analogous constitutive role of the duties of friendship. My duties owed to my friend (duties to treat them with concern and compassion by helping them in times of distress, but also by letting them ‘make their own mistakes’ etc.) are, I propose, partially constitutive of my relationship of friendship. According to this view, the duties are not simply useful *means* to get me to behave in a friendly manner. Indeed a good friend should not need their duties of friendship in order to motivate them to care for their friend, so the duties of friendship should not operate as instruments in this way. Instead, the duties are a *constitutive part* of friendship: friendship without the relevant duties is an impossibility not because the duties are necessary to motivate appropriately friendly feelings and actions, but because the duties are simply part of what makes a

here, some theorists might instead note that the referents of certain linguistic expressions (such as ‘autonomy’ or ‘human happiness’) have non-instrumental value; having noted this, they might argue that such linguistic expressions somehow inherit their referents’ non-instrumental value. But this is implausible, and in any case basic rights are not *linguistic* expressions and so lack referents in the relevant sense.

¹⁴ This goes beyond anything Kamm claims. Her notion that basic rights *express* human worth, when coupled with my observation that expressions partly constitute what they express, suggests that basic rights partially constitute human worth. But Kamm does not draw this inference, nor flesh it out with the concept of ‘community’.

relationship a friendship. If I could feel the same friendly feelings and perform the same friendly acts as a genuine friend, but without having any duties towards my friend to do so, then this would not be genuine friendship. We can support this view by noting that when one wonders whether one is still ‘friends with’ someone whom one has not seen for years, one of the questions one asks oneself is ‘am I still under any special duties to this person?’. If the answer is ‘no’, then one will conclude that one’s relationship with the person is no longer friendship; this is because the duties are part of what constitutes friendship.

My point here differs from the claim (popular among consequentialist defenders of associative duties) that genuine friendship is only *psychologically* possible if friends think about each other in the ways that duties require.¹⁵ Instead, my view maintains that the only *conceptually* possible way to be a genuine friend is for one to be subject to genuine duties owed to one’s friend. The relevant necessary constituent of friendship here is not simply *belief in* the existence of such duties, nor simply *compliance with* or *acceptance of* such duties. Rather, the duties themselves – normative entities requiring directed concern for a particular person – are a conceptually necessary constituent of friendship. Without such duties, the relationship would lack the directed normative character necessary for it to be friendship.¹⁶

¹⁵ See, e.g., Peter Railton, ‘Alienation, Consequentialism and the Demands of Morality’, *Philosophy and Public Affairs* 13 (1984), 134-171.

¹⁶ Raz seems to agree: ‘[Certain] duties are part of what makes friendship into what it is. They are constitutive of the relationship’ (*Ethics in the Public Domain*, p. 41). ‘Since friendship consists in part in such duties the existence of the duty is intrinsically valuable if the desirability of friendship itself is, as I shall assume without argument, intrinsic’ (*Morality of Freedom*, p. 212). But, despite appearances, I am unsure whether Raz’s discussion of friendship is really in agreement with mine. Raz justifies *one’s duty to compensate friends for one’s faultless harms* by claiming (1) that such compensation expresses concern for the harmed person and (2) that ‘friendship is in part the expression of concern’ (ibid.). This reasoning appears instrumental: it seems to ground the relevant duties on their value as *means* to secure the occurrence of something (the expression of concern) that is a component of

I suggest that basic rights play an analogous constitutive role. They part-constitute a valuable relationship just as the duties of friendship do. But what exactly is this relationship?

(IV) Basic rights as part-constituting a universal community of fellows

If basic rights' non-instrumental value is to be explained by their partially constituting a non-instrumentally valuable relationship – in the way that the duties of friendship do – then it is important to get clear about what the relevant relationship is. Given that basic rights are held by all individual people and are binding on all individual and communal bodies (including governments), such a relationship must be understood as universal in form, binding each individual person to each other individual person (and each communal body) independently of national or other boundaries. Possible candidates for the relevant rights-constituted non-instrumentally valuable universal relationship include the ideas of universal *friendship*, *fellowship* or *community*.

Schwarzenbach has defended the thesis that Aristotelian *civic friendship* should play a role in the modern state: this friendship involves a concern for one's fellow citizens

something intrinsically valuable (friendship). By contrast, I argue – and Raz's passages quoted at the start of this note suggest – that the duties of friendship are valuable not simply as means to the protection of constituents of friendship, but are themselves *qua* duties part-constitutive of friendship. To support this point, in justifying the relevant duties Raz should have claimed not simply that 'friendship is in part the expression of concern' but rather that 'friendship is in part [*being duty-bound to offer*] the expression of concern' or that a true 'expression of concern' *must itself be part-constituted by duties to offer compensation, rather than simply by compensatory actions and feelings*.

for their own sake.¹⁷ She suggests that this form of friendship finds expression in rights:

[B]y guaranteeing to each individual – simply on the basis of his or her humanity – a basic set of rights (including due process of law, etc.), and, further, in the repeated effort to uphold these rights and to see them realised in practice, citizens acknowledge and express their general concern and goodwill towards the interests of each particular individual in the concrete. A doctrine of individual rights, far from revealing mere conflict or indifference between citizens, may be seen to embody a fundamental regard – if not love – for the special interests of every human being.¹⁸

Some of what Schwarzenbach outlines – the ‘effort to uphold’ rights, the aim to ‘see them realised’ – concerns the way that *compliance with, acceptance and endorsement of rights* part-constitute civic friendship. In this respect Schwarzenbach’s claims seem similar to Raz’s claims (discussed under (b) and (c) in §(I)) about how compliance with and acceptance of the rights of freedom of expression and freedom of the press part-constitute an open society.¹⁹ But Schwarzenbach can be read – in her stress on the role of ‘a basic set of rights’ as themselves ‘express[ing] [citizens’] general concern’, and on how ‘a doctrine of individual rights’ itself ‘embod[ies] a fundamental regard’ – as focusing also on the role of *rights themselves*, construed as normative entities whose existence is logically independent of their recognition. If we take seriously my earlier comments about the constitutive role of expressions, then Schwarzenbach’s passage can be read as suggesting that certain rights, because they are expressions of civic friendship, themselves part-constitute such friendship.

¹⁷ Sibyl A. Schwarzenbach, ‘On Civic Friendship’, *Ethics* 107 (1996), 97-128, at pp. 99-100 and p. 114.

¹⁸ *Ibid.*, p. 114.

¹⁹ Raz, *Morality of Freedom*, pp. 253-4 and *Ethics in the Public Domain*, pp. 54-55. See also the similar claim that general *acceptance* of rights against discrimination part-constitutes ‘public culture which enables people to take pride in their identity’ (*Morality of Freedom*, p. 254). And compare Dworkin’s claims about how widespread *acceptance* of the legal rights generated by the principles one’s society has chosen for itself can help constitute one’s society as a ‘community of principle’ (Ronald Dworkin, *Law’s Empire* (London: Fontana 1986), p. 211).

Taking Schwarzenbach's cue, should we embrace a broader conception of *universal* friendship as the non-instrumentally valuable universal relationship that basic rights part-constitute? This proposal would not imply that all cases of unfriendly behaviour (such as simple rudeness to a neighbour) were themselves basic rights violations.

Rather, the proposal maintains that basic rights are *part* of what constitutes a universal form of friendship. This universal form of friendship would be violated by any violation of basic rights; but this form of friendship could *also* be violated in many other ways (e.g. by rudeness, or a simple lack of concern) that do not violate basic rights.

In my view, this friendship-centred approach is attractive but a little misleading. It is attractive because it highlights how the universal rights-constituted relationship embodies, as friendship does, a requirement that each party to the relationship be concerned for each other person *for his or her own sake*, rather than simply for some further end. In addition, the concept of 'friendship' seems more appropriate for characterising this universal relationship than certain rivals such as 'family' (which requires too close a personal concern, and suggests too hierarchical a structure) or 'contract' (which wrongly suggests duties that are shouldered voluntarily).

Nonetheless, friendship is misleading in this context because, *pace* Schwarzenbach and Aristotle, it is difficult to make sense of the idea of friendships between people who have never met each other and who can never meet.²⁰ Our contemporary concept of friendship is more interactional than this, involving each friend knowing and responding to the other friend, and each recognising each to know and to be

²⁰ See Sandra E. Marshall, 'The Community of Friends', in Emiliios A. Christodoulidis (ed.), *Communitarianism and Citizenship* (Aldershot: Ashgate 1999), pp. 208-219 at p. 216.

responding to the other. The universal relationship constituted by basic rights binding *everyone* together cannot meet this condition.

Instead, a better concept to illuminate the non-instrumentally valuable universal relationship that basic rights part-constitute is that of a universal *community of fellows*. We are familiar with certain non-universal fellowship communities that can survive without each fellow recognising and being able to interact directly with all the other fellows: e.g. *fellow citizens* or *fellow employees of a large business*. People live in fellowship with other citizens and co-employees even though they cannot meet or get to know them all. In addition like friendships, genuine fellowships require each person to be concerned for their fellows *for their own sake* rather than simply for further ends. Furthermore, in my view the notion of a community of fellows makes especially clear the non-maximising character of some of the normative requirements that basic rights and their correlative duties comprise.²¹ For normative requirements with this non-maximising character seem to be central to the existence of genuine fellowship. If one was allowed simply to take one's fellows' suffering as something to be minimised in aggregate, rather than as something forbidden by non-maximising rights, then one's relationship with one's fellows would not be a relationship of genuine community and they would not genuinely be one's fellows.²²

²¹ By 'non-maximising character', I mean the way that your right not to be X-ed can require me not to do X to you even if by doing X I could better minimise the incidence of X overall. For instance, your right not to be tortured can require me not to torture you even when by torturing you I could minimise the incidence of torture overall (e.g. perhaps because you are a torturer's innocent child). For defence of this 'non-maximising' characteristic as central to many rights, see my 'Rights: Beyond Interest Theory and Will Theory?', *Law and Philosophy* 23 (2004), 347-397 at pp. 353-354; compare Thomas Nagel, *The View from Nowhere* (Oxford: OUP 1986), pp. 175-180. For the claim that rights to assistance lack this non-maximising character see Kamm, *Intricate Ethics*, pp. 254-255.

²² Non-maximising requirements are perhaps also central to friendship, but to my mind such requirements seem at least as central to *communities of fellows* as they are to *friendships*.

In sum, if we think of the universal relationship that is part-constituted by basic rights as a *community of fellows*, it follows that (a) this relationship involves a requirement that its members be concerned for each other person *for that other person's own sake*, and (b) this requirement involves each person in a bilateral non-maximising normative relationship of 'owing to' and 'claim against' vis-à-vis each other person. Basic rights are, I suggest, partially constitutive of this universal human proto-community or proto-fellowship, as we might call it. Furthermore, I argue below that this community of fellows is non-instrumentally valuable. Like personal friendship, it is a good thing, independently of its effects, that the universal human proto-community exists.

(V) The non-instrumental value of the universal community of fellows

We can come to grasp the non-instrumental value of the universal community of fellows by tackling an objection suggested by Dworkin:

People cannot be made involuntary "honorary" members of a community to which they do not even "barely" belong because other members are disposed to treat them as such. I would not become a citizen of Fiji if people there decided for some reason to treat me as one of them. Nor am I the friend of a stranger sitting next to me on a plane just because he decides he is a friend of mine.²³

Building on this, a critic might claim that two people, neither of whom is disposed to treat the other as their fellow, cannot become fellows simply because they are bound together by basic rights with the appropriate directed normative structure. For even mere 'proto-' fellowship or community to exist, so the critic will claim, the fellows

²³ Dworkin, *Law's Empire*, pp. 201-202.

must have some warm feelings towards or desires concerning each other, even if they cannot all know each other. By contrast, I appear in §(IV) to have maintained that basic rights are partially constitutive of a universal proto-community that can exist even without fellow-feelings. In fact, the objector will note, my universal proto-community must be able to survive egregious violations of the basic rights that constitute it, violations that seem to express feelings of hatred. For otherwise the relationship between, for example, a Jewish person and a Nazi, would not constitute a proto-community relationship, and hence the Jewish person's basic rights would in this context lose what I have argued is the source of their non-instrumental value. Given that I claimed, in §(II) above, that basic rights retain their non-instrumental value even in cases of egregious violation, I must therefore maintain that the universal proto-community constituted by basic rights can survive their egregious violation.

But the objector will say that this makes my universal proto-community very different from ordinary communities or fellowships. Surely, the objector will claim, German Jewish people in the 1940s were not in community or fellowship with Nazis (barring a few exceptions)? If I persist in insisting that they were in 'community' or 'fellowship' together but only in a special sense that can coexist with hatred and egregious violation, then the objector will charge that my claim for the explanatory power of this special community or fellowship looks empty. The objector will say that on close inspection the special notions of 'community' and 'fellowship' that I use turn out to refer to no more than *the existence of basic rights* (for such community or fellowship persists wherever basic rights exist, even in cases of egregious violation). This would make vacuous my claim that we can explain basic rights' non-instrumental value by noting their constitutive role in a special form of community or

fellowship. This claim would emerge as simply an alternative way of saying that we can explain basic rights' non-instrumental value by noting that they constitute basic rights.²⁴

To respond to this objection, we need to paint a picture of the universal proto-community that basic rights part-constitute – a community binding together all people including the violator and victim – in a way that reveals this proto-community to be more than simply a new technical synonym for basic rights.²⁵ In painting this picture, we shall also illustrate the non-instrumental value of the proto-community.

Developing this response to the objector has three aspects. First, we should note that the universal proto-community that I outlined in §(IV) is not as different from ordinary communities as the objector suggests, even if universal proto-community can survive violations of the basic rights that part-constitute it. For many communities (and indeed some friendships) survive horrendous violations by their members – and they survive as valuable communities, with even the violator still a member.²⁶ In addition (as the examples of co-citizens and co-employees illustrate) I share some ordinary valuable communities with people with whom I have no interactions or shared goals. Similarly, like the universal proto-community, people find themselves in many ordinary valuable communities whether they want to or not, and are not allowed to exit these communities (consider certain national or familial communities).

²⁴ Compare the similar objection I raised to the claim that basic rights' non-instrumental value can be explained by the fact that basic rights are *fitting* for humans, or humans *deserve* these rights (p. [11] above).

²⁵ An alternative response to the objection maintains that when fellow-feelings are absent, basic rights have merely *latent* non-instrumental value, where this means that they *would* be a component of a form of non-instrumentally valuable universal fellowship *if* the appropriate feelings existed. For reasons against such a 'latent' approach – reasons that apply as much to human rights having latent *non-instrumental* as latent instrumental value – see §(II).

²⁶ See, e.g., Duff's claims about the convicted criminal as a member of the community (R. A. Duff, *Punishment, Communication and Community* (Oxford: Oxford University Press, 2001)).

The first aspect of my response notes these similarities between my special notion of universal proto-community and our understanding of many of our ordinary valuable communities.

Secondly, we should also note that the universal proto-community is a much richer concept than, and a different concept from, our concept of basic rights. For instance, the universal proto-community, while constituted by basic rights, is also constituted by other normative requirements, such as a requirement that each person think of other human beings as fellows who share in their common humanity (where this includes, e.g., recognising other humans as beings with their own perspective, with whom one can argue and reason, and who are capable of loving and being loved). And while the warm feelings of personal friendship are not necessary, a requirement for respectful, sympathetic and polite emotional responses is another normative constituent of the universal proto-community. When people fail to offer such sympathetic or polite responses, or fail to think of others as fellow humans, they do not thereby violate basic rights; but they nonetheless fail to respond appropriately to the universal proto-community within which they live. So basic rights represent just one among a range of normative requirements that together form components of the universal proto-community.

Thirdly, we should note that there is no need to maintain that, even in contexts of egregious violation, the universal proto-community has a bare normative existence entirely independent of people's fellow-feelings. This would mark a major difference between the universal proto-community and all other communities: if the universal proto-community existed independently of people's thoughts and feelings, then the

universal proto-community would be very different from other forms of community, all of which are based around some form of fellow-feeling. Yet to respond to Dworkin's objection we do not need to maintain that the universal proto-community that is part-constituted by basic rights exists entirely independently of people's fellow-feeling. Perhaps in a world with *no* fellow-feelings, in which all people had become 'mere machines' to each other, then basic rights – if they still existed – would lack non-instrumental value because the proto-community of fellowship among humans would not exist. But our world, even when it involves systematic and widespread egregious violation (as under the Nazis, or in slave-holding societies or totalitarian regimes), also necessarily involves people who have some fellow-feelings towards some other humans. For most people such felt responses to some of our species are unavoidable, and this is reflected in the way that many common concepts – e.g. of love, pity, recognition, respect, sharing a joke, reprimanding – can only be understood and appropriately deployed by those who have fellow-feelings towards those humans to which the concepts are applied.²⁷ These unavoidable feelings constitute a basic moral sensibility involving directed concern for others that is a necessary part of the psychology of most humans. And when a person holds these feelings towards only a sub-set of all humans (as seems to occur in slave-holding or Nazi societies), they form a basis from which wider feelings of universal fellowship can grow.²⁸

Such ever-present feelings mean that the proto-community of humankind is never *purely* normatively constituted: relevant feelings and actions will always also help constitute this community, even if they are rare and of restricted scope. In this way,

²⁷ For elaboration and defence of this claim, see Raimond Gaita, *A Common Humanity*, Second Edition (London: Routledge, 2000), pp. 266-270.

²⁸ See Gaita's discussion of Orwell's account of the fellow-feeling generated by seeing a fascist soldier running holding up his trousers (ibid., pp. 48-49).

the proto-community of humankind is akin to many bounded communities: many such communities – e.g. those of fellow citizens or fellow employees – are partially normatively constituted and also partially constituted by the feelings and actions of their members, but can survive fairly extensive violations that show that a significant number of their members lack the relevant fellow-feelings or hold such feelings only with excessively restricted scope. I would suggest that a community of fellows can sometimes survive even if the majority of its members lack most of the necessary feelings, so long as they have partial feelings (e.g. a sympathetic response to the hurt of at least some people) that, when appropriately developed, could grow into the feelings of those living in a morally mature fellowship. I propose that enough people have enough feelings that could grow into those required for fully mature universal fellowship, for the proto-community of humankind to bind together even those engaged in and those suffering egregious violation.

To summarise, my response to the objection inspired by Dworkin claims (1) that the idea of a special universal proto-community or proto-fellowship shares many features with our ordinary concepts of community or fellowship, which allow that communities or fellowships can survive violations by their members, (2) that basic rights are not the only normative requirements that part-constitute the universal proto-community, and (3) that the universal proto-community involves enough fellow-feelings, even if they are partial and under-developed, for it to qualify as a genuine proto-community (in contrast to the purported ‘friendship’ between me and Dworkin’s ‘stranger sitting next to me on a plane’ for whom I lack the feelings necessary for personal friendship). Points (1)-(3) show that the universal proto-

community is more than simply a new technical synonym for basic rights.²⁹ They also make clear that the universal proto-community of fellows is non-instrumentally valuable. The wide range of normative requirements that constitute this proto-community (requirements focused around demands that people be recognised as fellow humans) and the unavoidable fellow-feelings (e.g. of pity or love) that also constitute this proto-community are clearly of non-instrumental value, even if the requirements are not always respected and the feelings are inappropriately partial and restricted. The world is a better place for their existence, independently of their effects.³⁰

(VI) Supplementing basic rights' non-instrumental value: a mixed approach

Unlike the concepts of personal friendship, family or citizenship, which entail duties with fairly clear and determinate contents (such as the duty to listen to a friend in need, the familial duty to assist one's elderly parent, or the civic duty to participate in political debate), I fear we do not have a sufficiently clear pre-theoretical grasp of the

²⁹ See this charge on p. [20] above.

³⁰ Three issues deserve mention at this point. First, I have argued that basic rights have non-instrumental value as partially constitutive of a non-instrumentally valuable universal proto-community. Is this proto-community also *intrinsically* valuable? Does the community-constituting role of basic rights make them *intrinsically* valuable too? I suspect the answer to the first question is 'yes', because the intrinsic nature of this proto-community, as involving, e.g., directed duties binding on all, is the source of its value as an end. Secondly, I suggest that our relationship to *non-human animals* is a further form of non-instrumentally (and, probably, intrinsically) valuable proto-community, characterised by animal rights that are both instrumentally and non-instrumentally valuable. For an attractive instrumental approach to animal rights, see Nussbaum, *Frontiers of Justice*, Ch. 6; I would supplement this with a non-instrumentalist thesis parallel to but different from my community-constituting view of basic rights. The principal difference is that our proto-community with animals rarely involves reciprocal duties: typically humans owe duties to animals, but animals do not bear such normative 'owing to' relationships to humans. Thirdly, we should also use the constitutive approach sketched in §(IV) to account for the value of the rights and duties that constitute such relationships as the family (which is partially non-instrumentally valuable) and the institution of property (which, I have argued elsewhere, is largely instrumentally valuable (see my 'Against Individualistic Justifications of Property Rights', *Utilitas* 18 (2006), 154-172).

concept of the *universal proto-community of humankind* for us to know, without contestable elaboration, which particular basic rights and correlative duties are necessary for this form of community to exist. Instead, the concept of the proto-community of humankind simply tells us that people must be bound together by some network of rights and duties that connects each person with each other person in ‘owed to’ normative relationships that embody the mutual respect of fellowship. The idea provides *some* constraint on the content of basic rights: a basic right to attack others whenever one wished would be incompatible with the proto-community of humankind. But beyond such constraints, the idea of the proto-community of humankind leaves under-determined whether, for example, basic rights should be predominantly non-interference rights, or should also include assistance rights that place heavy demands on all individuals, or whether basic rights should include property rights and rights to political participation, or should have a different content.³¹

In response to this concern, we should note that my arguments so far have allowed that basic rights are instrumentally valuable in many ways, in addition to possessing non-instrumental value. We can now add that while the non-instrumental value of the proto-community of humankind generates strong reasons for the existence of some universal network of basic rights, further reasons grounded in basic rights’ instrumental value determine what the precise content of these rights should be. Thus the instrumental value of basic rights, as protectors of particular interests, needs or aspects of autonomy, still plays an important role in my picture: it determines which particular (among the many possible) universal-community-constituting rights are

³¹ For a related discussion of the difficulty that ‘pure’ non-instrumental theories encounter when trying to specify the content of particular rights, see Leif Wenar, ‘The Value of Rights’, in M. O’Rourke, ed., *Law and Social Justice* (Cambridge, Mass.: MIT Press 2005), pp. 179-209.

justified. This ‘mixed’ approach strikes me as plausible: I do not seek to deny that basic rights have instrumental value; I simply propose that basic rights also have non-instrumental value. Their *instrumental* value can play the central role in determining the rights’ precise content.

(VII) Conclusion

The picture sketched in this paper depicts basic rights as both non-instrumentally and instrumentally valuable, their non-instrumental value inhering in their role as binding each person to each other person in a network of directed normative relationships that – together with other normative requirements and unavoidable fellow-feelings – constitutes the proto-community or proto-fellowship of humankind, their instrumental value inhering in their role as protectors of particular important interests or needs of their holders (a role that determines their precise content).

I have focused primarily on explaining basic rights’ non-instrumental value, because this aspect of basic rights’ value has been overlooked.³² Recognising this is essential to a full understanding of the justification of basic rights. We should end by noting that even if the proto-community-constituting account developed in §§(IV) and (V) is

³² Recall §(I)’s discussion of the prevalence of the instrumental approach.

rejected, still my arguments in §(II) have established that basic rights have non-instrumental value – the question then will be to explain its nature and source.³³

³³ Many of the ideas in this paper developed in discussions at the Universities of Catania, Edinburgh, Glasgow, London, Sheffield and Stirling. I am grateful to all who participated in these discussions, and to the UK's Arts and Humanities Research Council for funding research leave to develop this work.