Between given and created value

Finding new grounds for justifying human rights

Author: Rita Rubnell Spolander
Supervisor: Ulf Zackariasson
Abstract

This thesis aims at formulating a human rights justification based on the assumption that disbelief in human rights is found in communicative grounds, rather than some sort of unreasonable evil. I first identify what I believe to be a flaw in the communicative strength of existing human rights justifications in explaining why rights should be. I suggest that there is a gap between the justifications of human rights that contain metaphysical narrative, and the justifications that rely on subjective experience of rights as good. I further explain how this is a gap that political consensus and the idea of Kantian moral reason cannot seem to fill. I subsequently boil this gap down to the concept of value, since the foundation for each justification is based on a type of value. These are categorized as either given value – which applies to all attributes of value that is “given” to us independently of our actions or opinions, or created value – which applies to all attributes of value that stem from social interaction (thus action) and experience. As justifications are funneled into either of these two categories of value, it begins to look like no other type of value exist, and as a result no one looks for it. To respond to this problem, I formulate a philosophical explanation, in Robert Nozicks terms. This explanation shows that there may be other routes to apply to value than sticking to simply given or created value. My explanation utilizes the three theories of philosophical anthropology, internal metaphysical realism and Wittgensteins philosophy of language, and it is based on the result of an analysis of material consisting of human rights justification arguments by Nicholas Wolterstorff, Alasdaire MacIntyre, Martha Nussbaum and Richard Rorty. The actual philosophical explanation I formulate utilizes the metaphysics of Helen Steward to provide a given-value foundation for the primitive reactions of Stefan Eriksson, which creates value through social organization. Overall, I find that there are untried possibilities which may allow for a different type of value to act as the foundation for a human rights justification. My contribution to the field rests in the novelty of the theories used in my explanation, and the angle of the problem formulation.

Key words: value, metaphysics, philosophy of language, philosophical anthropology, conceptual schemes, primitive reactions, agency
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1 Introduction
1.1 Background

Imagine that someone (maybe Nietzsche) suggests that the human rights movement is a feeble attempt by the weaker members of the species to fend off the stronger members. How does one respond to such an idea? Unfortunately, the type of philosophical justification that deals with the general nature of human rights, and why we should care about them at all is lost in much of the human rights discourse today. This development can be somewhat sourced to the legal-positivistic direction taken during the drafting process of the Universal Declaration of Human Rights (UDHR) in 1948, and the mission to establish a “global consensus” about human rights.

Due to a wish for “fairness in a setting characterized by ideological, religious and philosophical pluralism” the UDHR drafting aimed at the sort of overlapping consensus that focuses on the common way in using/referring to human rights. The UDHR, and consequently all current international human rights law, makes quasi-foundational appeals to a Kantian notion of a human dignity and the idea that protecting human rights is the most reasonable option, however it does not delve very deep into the subject on order to avoid cultural bias.

The problem here is that despite this sacrifice of philosophical foundation, there still does not seem to be any consensus. The large majority of all countries subscribe to the human rights regime today, and have ratified the nine main charters; yet their violations of the same principles remain systematic. In certain parts of the world women are kept at a sub-citizen level of legal status, and in other places traditional cast systems invite discrimination against religious subgroups of the population. Even in the supposed head-quarters of liberal human rights, western Europe and USA, the national populations enjoy protection from their rights while systematically withholding it from foreigners.

While nations fail to uphold human rights, the same can be witnessed at the non-state and individual level as well. A prime example would be that the global slave trade is now larger

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1 (Rorty, Truth and progress): pg. 169.
2 (Reidy, 2012): pg. 2.
3 (Langlois, 2004): pg 246-256.
and more profitable than ever. Xenophobic political parties gain influence, and religious fundamentalism and nihilist hate groups manage to radicalize an increasing number of members. Somehow basic moral standards are repeatedly questioned by perfectly sane and reasonable individuals, which would suggest that the Kantian idea of an inherent moral reason is not powerful enough to explain why human rights are good. The same ability of human reason that supposedly propels the moral principle of human rights has led some individuals to completely reject it on equally reasonable grounds. To a person who might fare better in a Hobbesian “the strong survives” type of world, why should they not revert to predatory and corrupt behavior against other humans whom they have no relation to? Intrinsic human value as principle is simply not strong enough it seems, even in the face of the slightest obstacle, if it ever has been.

Even if legal and political consensus is present on paper, this is proof enough that human rights cannot simply be left on its own with the hope the people will “just start caring”. Instead it needs a sound explanation that will induce sufficient motivation, by being grounded in something unconditional.

There is a paradox here though. Since it has been suggested that humans are not perfect moral beings, a regime such as human rights also require legal implementation. Such legal implementation accordingly requires justification, but since human rights is a moral concept with a universal ambition, they require a justification above that of any single valid legal institution. They thus require a justification for both legal authority and universal inclusion, while still acknowledging a pluralist world of many cultures and traditions.

1.2 Research problem

Looking at this problem it would seem that by its very nature, a human rights regime must demand universal acknowledgement, rather than being a passive conclusion of individual moral reasoning. If not, they are neither justifiable as a global legal ambition, nor will they be a convincing morale. Rights that are not universal are simply privileges, which defeats their purpose – and rights that cannot demand acknowledgement are not valid rights when implemented.

So how is a concept such as human rights justified? The core of any justification of a moral concept, even if it holds a legal shape, is value. We base our moral ideas on what ought to be

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6 (The International Labour Organization estimates around 40.3 million modern slaves in the world today (ILO, Global Estimates of Modern Slavery: Forced Labour and Forced Marriage, Geneva, September 2017.)
after all, and thus what we consider “good”. Value may appear to be something as simple as a type of regard, but contained in the term value are several reasons for why that value exists. Clues lies in the various synonyms that can be used in place of the word value. Something could become valuable for example because of its rarity, its status, its usefulness, its cost, or its importance in a given context or culture. What I here mean by value is thus in a broad sense, which includes notions such as simple hedonic value, Aristotelian intrinsic values, Kantian subjective value, utilitarian value as well as the kind of value we agree to subscribe to as is the case with currency and social contracts. In all of these value-types, the actual value-content is still the same – something that is good.

If we look at human rights justifications, they seem to roughly fall into either a Kantian, communitarian, theological or teleological category, to borrow Per Sundmans distinctions. However, in terms of their comprised value I believe that the categories can be further reduced to only two loose types:

1. Given-value theories: Theories that justify human rights by referencing value that is independent of any opinion, desire, interest or pleasure of any individual humans – a value that is given to us. This can also be thought of as a kind of Aristotelian intrinsic value. To borrow Christine Korsgaards description; one attributes a nonrelational property of intrinsic goodness to something, in this case often the human being or one of its attributes. Value is here placed outside of subjective experience, and its objectivity is mostly driven by some sort of narrative, belief or conviction.

2. Created-value theories: Theories that justify human rights by pointing at some value that only appears for us when we interact socially. We thus create this value ourselves and it does not exist independently of our experience of it. The value lies in the functional power of human rights to grant us what is “good”. For example utilitarianism and Pragmatism.

This is a rough divide, but I find it problematic that the essential value-content of a theory can be boiled down to only two types of value, as it potentially limits the kind of justifications we can formulate for human rights. It also created a gap in the overarching justification of human rights, formed by all the various justification arguments we have. What I mean by this gap is a space between these two theories which forces one to choose between two conceptions that

7 (Korsgaard, 1986): pg. 486, 488 provides a good description of objective and subjective value.
9 (Korsgaard, 1986): pg. 486.
10 Ibid: pg. 53-54.
are both unsatisfactory, while not being exhaustive of all possibilities. I believe that this is the case because it seems as if given value theories tend to achieve authority at the expense of inclusiveness some way or the other, while created value-theories are achieve universality through sacrificing authority. This dichotomy between achieving either authority or inclusiveness seems to happen because of the inherent characteristics of either type of value, and may thus be unnecessary if a middle-ground can be found. Now one could say that this is fine and that given- and create value justifications will together create fine net, that everybody will be caught in, in terms of justification. But what about the Hobbesian individual I mentioned earlier? Or even simply a modern middle-class youth who has grown up in a time of peace and plenty thanks to the wealthy history of his home-nation, (most likely won by disregarding human rights) and who does not understand why rights of others should be respected. For someone who is not inclined to believe in some larger power that they cannot experience, a narrative about such will not be enough to inspire a sense of having to protect an “given value”. Likewise, for someone who is satisfied with a life of luxury and does not feel a particular emotional connection the people outside his family it is unlikely that he will experience the “created value” of human rights. There is thus no justification for this person, and they can justly resume their immoral activities.

Thus, it seems like my problem is twofold: That the foundation of human rights is fuzzy and unclear, as they contain no authority, and the traditional foundations are not accessible. And that our tools to solve this problem and supply human rights with these attributes, only have one arms so to speak, as they are forced into a dichotomy between relying given and created value. This creates a theoretic dead-lock and a gap in the overall coverage of human rights justification.

1.3 Aim, research questions and disposition

This paper sets out from the gap between given and created value, and the dichotomy that this divide tends to create in human rights justifications. The aim with this text is to broaden the space between these two types of value and eventually fill it up with another type of value that overlaps both given and created value. To find a middle-ground and thereby also broaden the range of potential justification arguments which the value can inspire. The larger aim is to contribute to a more nuanced view of how human rights can be justified. To achieve this aim, this text formulates yet another justification for human rights, albeit a loose one, which is based on a philosophical explanation for a theoretical middle-ground between inherent- and
created value. This middle-ground is further based on a descriptive and critical analysis of a representative selection of established human rights justifications.

The contribution of this new justification to the field is to add quantity, but above all novelty, as I involve a set of theoretic accounts in my analysis that are seldom used and have probably never been combined in this way (hopefully not with reason). The ambition is not to come up with a “perfect justification” which can cover all modes of belief and experiences, or to offer any causal explanation for human rights. I do not even aspire to present this as a fully developed alternative to existing human rights justification. What I instead aspire to do is to add novelty, as I involve a set of theoretic accounts in my analysis that are seldom used and have probably never been combined in this way (hopefully not with reason). The ambition is not to come up with a “perfect justification” which can cover all modes of belief and experiences, or to offer any causal explanation for human rights. I do not even aspire to present this as a fully developed alternative to existing human rights justification. What I instead aspire to do is to offer what Robert Nozick calls a philosophical explanation. He suggests that these may help us gain more coherent understanding of something, rather than helping us gain more factual knowledge about it. They do so by pointing out how processes might have occurred, and their usefulness depends on the ways which they make us aware of possibilities we tend to overlook – and thus shows a necessity to look elsewhere. One could say that an empirical element enters, but it does not function as proof. Thus, my argument aims at the degree of “successful” that can set any skeptical challenge in an explanatory framework where the reader is not forced to become a sceptic themselves – in this case to choose between inherent and created value.

My philosophical explanation also only aims to show new grounds for justification in an anthropocentric and contemporary context. The analysis is based upon an anthropological conception of the human, and not talking into account any future human abilities that may render a global human rights regime unnecessary.

1.3.1 Research questions

The following research question aids the paper in achieving its aim:

1. In what way are current human rights justifications bound to given value and created value, and how does this create unnecessary dichotomies?
2. Can a middle-ground between inherent and created value create space for a justification that is not forced to sacrifice either of the broader categories of authority and inclusiveness?

1.3.2 Disposition

13 (Dromm, 2008)
Chapter 1 contains an introduction to the topic of discussion. The problem is explained, detailed and narrowed down. Since every aspect of this paper is basically theory, the material selection is divided into two sets which are presented under delimitation and theoretic approaches respectively.

Chapter 2 describes the theoretical approach of the study. Because of the theoretical nature of this paper the analysis, the previous research and theory-section bleeds into one another to some extent. The theory section has been made to occupy a slightly larger portion of the entire text at the expense of the remaining chapters due to space constraint.

Chapter 3 contains the descriptive and critical analysis, which is sharply divided into two parts. The first part contains the analysis of the human rights justifications from my material selection, while the second part processes the result of the previous analysis while adding the non-HR theoretic material.

Chapter 4 marks the constructive part of my essay, where the perspectives representing an extension of my theoretic approach are used as building blocks for the philosophical explanation. The findings from the previous chapter guides this analysis.

Chapter 5 contains a discussion and concluding remarks.

1.4 Delimitations: Criteria and material

1.4.1 Delimiting outset

As my paper is problem-driven the first delimitation represents the very targeted research problem, which is already settled deep into established theory. The divide between given and created value is an observation based on a separate set of background-problems based on current attitudes towards human rights. This creates a focus for analysis, as the categories of given value and created value focuses on a very specific aspect of the very large amount of existing human rights justifications out there. Since the essential value-content of a theory can be boiled down to something particular, and my aim is to formulate an explanation that makes it not so reduceable, the actual area of investigation is quite constrained. Value that is socially dependent and value that is socially independent. This forces my paper away from the broader field, and as a result I could for example only find three studies which were even remotely related to mine (see previous research).

Another important set of delimitations lie in my conceptual explanations, as the points and topics touched upon in this text are broad and abstract, with many interpretations. Among
these is a set of desirable attributes of a human rights justification which will guide my analysis. Together with my material selection they represent my main step in narrowing down this paper according to the research problem. I outline both my material selection and conceptual explanations below, in separate sections.

1.4.2 Representational material selection

I have two sets of material, for the two corresponding parts of the analysis; one descriptive/critical and one constructive. The first set contains four established human rights justifications, that have been chosen to represent the two categories of given and created value. Two approaches for each category; one at the end of the spectrum and one closer to the border of the other category; Nicholas Wolterstorff and Martha Nussbaum represents the given value theories, and Richard Rorty, along with Alasdair MacIntyre represent created value. These theorists are well-known and their spread is sufficiently covering. Since this essay is problem-oriented as opposed to material-focused, I do not try to give a complete oversight over given value and created value tradition. To achieve my aim, it is enough to represent each category with one or two well-known approaches, and this in itself becomes a delimitation. This only works if the theories in question are well-known, both as theories and as representations, but as the approaches in my selection are often referred to as representations of traits that fall into the two categories in previous research, I will assume that they are sufficiently representative of also my own distinctions. Wolterstorff’s Christian religious justification is one of Kao’s maximalist theories, and so is Nussbaum’s capabilities approach (although minimalist according to her distinction). Richard Rorty’s anti-foundationalist neopragmatic approach is mentioned is relation to created value attribute in Kao, Holt and Griffin. Macintyre’s virtue ethics is perhaps the more surprising of my included approaches, however both Holt and Rorty points out his created value qualities. MacIntyre is also a good example of a theory that relies on created value, but contains notions (is his case teleology) that suggests given qualities – thus being close to a middle-ground just like Nussbaum.

15 (Kao, 2011): pg. 44.
16 (Kao, 2011): pg. 102.
17 (Kao, 2011): pg. 176.
18 (Holt, 1997): pg 82.
19 (Griffin, 2008): 298.
Kantianism is interesting here as it is both subjective and a given value theory. Subjective since our desires are good because we desire them, not the opposite, but given in that the value stems from the attribute of our “humanity”/ability to reason, which in itself is intrinsic and valuable. I would have liked to analyze the Kantian theories more deeply, but because of the constraints in the scope of this paper I had to limit my material selection.

The seconds set of material fills the function of being building blocks in the constructive part of the analysis. Because of the theoretic nature of this essay the lines between the theoretic perspectives and the material becomes slightly blurred, and this constructive material selection could be described as an extension of my broader theoretic approach. Stefan Eriksson Ett mönster i Livets Väv represents a combination of my usage of philosophical anthropology and philosophy of language, while Helen Stewards Metaphysics for Freedom represents a combination of my usage of philosophical anthropology and metaphysics.

### 1.4.3 Conceptual explanations

**What sort of human rights do I refer to?**

The actual type of rights being justified in a justification argument can vary. Many of the recent philosophical accounts focus on human rights as a strictly moral standard of “claim rights” that exist apart from any established legal systems, and simply inform our moral evaluations. Per Sundman discusses the distinction between moral and legal rights in Human Rights, justification and Christian ethics, and concludes that while legal and moral rights differ in terms of achieving validity in justifying them, they share the same principle function of “protecting values by constraining or demanding a certain behavior”. I wish to emphasize this shared function as the legal positive character of human rights seem to be an essential part of human rights as they are constituted in human society, and thus find it regrettable that this function is not included in many approaches towards justifying human rights.

Regarding the difference between justifying moral and legal law, the human rights I am to regard in this paper demand the same kind of higher reference point as Sundman suggests validates legal law, due to the nature of my research problem. A valid institutional setting

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21 (Reidy, 2012): pg.2.
fills the same function as any other higher body that validates law does, and due to the universal ambition of human rights (contained in the category “human”) they must be considered slightly different than other moral opinions. Laws may differ in execution depending on time and place, however even moral laws are by definition laws even when the role of jury and executioner is filled by a God instead of a state or legal body. For further discussion on the relation between laws and I refer to Langlois analysis of moral law in *The Elusive Ontology of Human Rights.*

**The dichotomy between authority and inclusion: Criteria for a “good” justification**

To clarify what I mean by dichotomy between authority and inclusion, and to operationalize this concept, I will present each side of the dichotomy as a set of criteria. These criteria represent attributes of a human rights regime that are all somewhat integral to it actually being a human rights regime, and are also motivated by the problems outlined in the introductory section of this essay. Something that must be taken into consideration however, is that my material has not been selected because they adhere to these criteria. The authors of these justifications are probably absolutely content with the choices they have made. It rather “influences” the scope of these justifications.

**Authority:**

1. *Necessity:* The necessity of human rights is not just its normative nature, the “ought” of a human rights regime, but also its moral motivation. I will here again refer to Per Sundmans, in his assumption that justification of morality also coheres with moral motivation. If the human rights theory “only” justifies human rights as a choice/opinion which can be passed up for something else or nothing at all, it has not justified why human rights are necessary.

2. *Inalienability:* This attribute of a human rights regime suggests that the rights are just that – rights – and may be legally implemented, being such. This related to my discussion in the previous section, and suggests a necessity of rights being independent of the human subject, perhaps through a reference point that must be somewhat objective, and above- and the experience of an individual subject and any belief, want, commitment or feeling that a subject may possesses. For example, a higher power would be an effective transcendent or external reference point that could

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justify the inalienability of human rights. Any individual human cannot question such a power, as it is by definition higher than humanity as a whole.

**Inclusion:**

3. *Universality scope:* The universality of human rights is its own gigantic topic that warrants its own study, however in this context the universality refers to if it actually includes all humans in its reach. Does it justify rights for everyone without leaving anyone out? If it does not, it would not be a justification for human rights, but rather privileges possessed by only some people.

4. *Accessibility:* This is in a way also a form of universality, but at the same time also the opposite – like a form of minimalism. If the justification is too integrated into- or bound to a cultural or religious narrative it is not accessible to those who are not part of this narrative. A justification that is based on any drastic assumption or belief is not very accessible either, as it will not justify anything for those who simply do not believe in the force which justifies it. The standard here is of course not accessible to everyone, but at least not bound to a specific kind of person or belief – i.e. as neutral as possible.

**1.5 Method**

**1.5.1 Idea analysis**

This text is problem-driven and not centered around the material, which is why I have chosen idea analysis as my method to achieve the aim of this paper and discuss the material literature in the most rewarding way. Ludvig Beckman describes three different types of idea analysis to use depending on the purpose of the text. Analysis to describe, explain or critique. Since this essay is primarily a philosophical discussion, I add a constructive element to the essay, which entails increasing our understanding of our own arguments and thoughts about the universe and human existence, rather than increasing our understanding of it. To make the constructive element possible I require a critical analysis together with the descriptive analysis, to provide the insight for the construction of the philosophical explanation.

I first do a generous reading of the material in order to accurately represent the intention and ideas of the authors, then I combine a descriptive and critical analysis of my material in chapter 3. The descriptive element is included in order to make clear the assumptions and
workings of each theory in my material.26 Doing a problem-driven study with a clear idea of the created and given-value categories I employ a narrow focus on the research questions, as describe by Essiasson et al. in *Metodpraktikan*.27 It is important to note however, that many of the points critiqued in the material will only be so accosted because of the specific research problem, not because any individual theory’s inherent strengths and attributes fails to live up to the standards of some “perfect justification”.

Beckman also argues that it is crucial to translate the theoretical stance into a critical tool28, and I combine my theoretic approach into a form of philosophical enquiry, which you can read about in the theory section. This methodology is used to reveal underlying assumptions about the human being which affects the overall theory. It is also helpful when looking at which kind of anthropological conceptions are useful, and which are less useful when engaging in construction of another justification.

2 Theoretical approach

2.1 Previous research

Research which regards the justification of human rights is plenty, and four of these accounts are present in the material selection. However, previous relevant research that highlights the interests gap between given-value and created-value theory are fewer, and while not an original problem the ones that do so from the same angle as this thesis are scarce. I have drawn inspiration from- and found research to relate to in the following works.

2.1.1 Robin Holt - Wittgenstein, politics and human rights

One of my theoretic choices in this paper has been to view human rights as a communicative function – an idea that came from Wittgenstein’s *Philosophical Investigations*. An author who has investigated precisely a Wittgenstenian view of human rights as a language game is Robin Holt in *Wittgenstein, politics and human rights*. His account has served at clarifying the concept of human rights as a language function for this thesis to build upon (see Theory – Wittgenstein’s thoughts about language and philosophy).

At this point he diverges from my theory however, and Holt instead uses Wittgenstein to construct an analytical tool he calls a “linguistic self”, which is the epitome of the “subject in

26 (Beckman, Grundbok i idéanalys, 2005): pg. 51-52.
28 (Beckman, Grundbok i Idéanalys, 2005): pg. 24.
its subjective world of self-consciousness” constantly interpreting sensory data. He explains how compliance with rights originates in understanding, belief, and trust in rights language. This is achieved, not by the logical strength of the argument, but rather in the eternal human quest to find the “annihilation of doubt and insecurity.” Holt thus explains human rights as being a tool to achieve just that. Holt analyses liberalism, communitarianism and pragmatism in human rights theory, and he ask these theories how human rights make sense from the perspective of this linguistic self.

I disagree with Holts reasoning as his work is at the end of the spectrum as a typical created-value theory, while mine aims at the center. He employs a chiefly communitarian, instrumentalist and anti-realist reading of Wittgensten that interprets both his linguistic self, and the language game of human rights as products of social practices, customs and cultural hegemony, which are sensitive to time and cultural context.

Holt thus sees a human rights regime as a concept that is completely created through- and tailored to social conditions, like bargaining, exchange and interests, and they only make sense when they facilitate such processes. He views any philosophical foundation of human rights as essentially “an alluring myth” that humans are drawn to because we want to remove all our worries and insecurities. His aim is to dispel these myths and instead direct our attention to the fact that people’s identities are different from one another depending on time, place and context. When we accept this fact, we can focus on where the value of human rights appears, and not what its foundation is. He is thus decidedly relativist and communitarian.

Holt invokes the concept of primitive reactions, just as I do later in chapter 4, however use Stefan Eriksson’s interpretation of this concept rather than Holts, as Eriksson (being a researcher in religious studies) is more open towards metaphysical explanations. Holt has the right method and he has the right starting point, but I do not agree at all with his conclusion.

I believe that he limits his own argument by adhering to created-value, and he thus offers no solution to my research problem. However, his use of Wittgenstein in relation to human rights is undeniably interesting and has influenced the pluralist perspective of this paper. Because of this I decided to try and see if one could depart from the same Wittgensteinian line of reasoning while landing in a metaphysical conception. His account could perhaps have been

29 (Holt, 1997): pg. 58.
30 (Holt, 1997): pg. 54.
31 (Holt, 1997): pg. 53-54. showcases his reasoning well.
33 (Holt, 1997). Pg. 54.
interchangeable with Rorty’s in the material selection, but as Rorty is more well-known I believe he better represents created value.

2.1.2 Grace Kao - Grounding human rights in a pluralist world

Grace Kao also approaches the distinction between metaphysical and anti-metaphysical groundings for human rights which she calls maximalist (Perry, Wolterstorff), and minimalistic (Rawls, Sen, Nussbaum) theories. Her study is called *Grounding human rights in a pluralist world*, and her attempt at finding a grounding for human rights is interesting as she tackles almost the same problem as my own paper, but ends up reaching a different conclusion.

My division of theories into inherent and created value is inspired by Kaos’ and I would have liked to use the same terminology to avoid confusion, but because of the slight difference where the line is drawn between the two categories, my terminology must also be different. For Kao a maximalist theory (my equivalent would be inherent-value) grounds human rights metaphysically and especially religiously, while her minimalistic theories (where my equivalent is created value) consist of theories which try to eliminate all things religious or philosophical, a notable example being consensus theory. A great example to illustrate the difference between the inherent/created value dichotomy and the maximalist/minimalist dichotomy is Martha Nussbaum. Kao names her a minimalistic, but she falls into the inherent-value category in my study, as her human value is still inherent even if her theory is secular.

The conclusion Kao reaches is that Martha Nussbaum's capability approach manages to enter a middle-ground between maximalist and minimalistic theory. However, her aim is different from the one in this paper. Kaos goal is rather to find a metaphysical grounding for human rights justification, as long as it is not tied to a religious or philosophical narrative. She also sees the need in finding an account of “who or what human beings fundamentally are and should be able to be or do” to know what constitutes inhumane treatment. In my paper philosophical anthropology is used, not to find out what constitutes as inhumane treatment, but to focus on our biological limitations. Kao is satisfied with a theory that is not religious and that has an anthropological focus, but I am not satisfied as we will see on the grounds that Nussbaum still has to make sacrifices that impacts her justification. Stemming from Kaos’ results I have included Nussbaum's capability approach in my material, but it appears as also Kao is forced to pick inherent value over a middle ground.

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2.1.3 James Griffin - On Human Rights

An approach that is quite similar to mine is James Griffins ethical naturalistic justification for human rights. I had not read it when I first drafted the analysis, however it has proven useful when processing the text by introducing naturalism and solidifying concepts like value and the intersection between metaphysics and the philosophy of language.

Griffin focuses on the biological aspects of the human being through something he calls an ethnocentric justification of human rights – comparable to my philosophical anthropological perspective. He introduces this as a contrast to a less ethnocentric justification, which is his term for the overlapping consensus-approach. In this manner Griffin calls for an “expansive naturalism” according to which human rights can be explained as a “natural” feature of humanity.35 The difference between Griffins expansive naturalism and standard reductive naturalism is that the former does not contain such rigid boundaries of around what is natural/factual.36 Expansive naturalism is fuzzier, and Griffin makes it incorporate human interests – thus bridging the fact-value divide.37 Human interests can be natural and thus “factual, which makes human rights (as a value-laden interest) somewhat neutral and objective. The natural human interests Griffin speaks of are notions such as “wanting to avoid pain” or to “to live an accomplished life”.38

The feature of human rights tradition Griffin wants to return to is finding the value that justifies human rights in some inherent natural feature of the human being.39 This goal is also quite similar to the aim of my own study. However, he takes a slightly different route to get there and as I will explain, his results do not quite meet my own criteria either. I neither justifies both legal implementation nor universality, even though they could be said to represent a fairly neutral value option to other given value theories. Griffin argues that the interests associated with being thinking and reflective organisms are natural to us, which means that human beings’ value what is normal to them. For example, because I am capable of leading an autonomous life, valuing autonomy is natural to me, and because I am capable of feeling fulfillment, the value of accomplishment is natural to my being. Griffin’s ethical

35 (Griffin, 2008): pg. 36.
36 (Griffin, 2008): pg. 124.
37 Ibid.
38 (Griffin, 2008): pg. 119-120.
39 (Griffin, 2008): pg. 33-37.
naturalism thus focuses on natural capacities which both explain and create value by forming interests.\textsuperscript{40}

To justify rights as objective, rather than subjective Griffin uses Wittgenstein notion of a “shared form of life” as a necessary condition for humans to understand each other. He claims that there are all sorts of ways in which we see and understand each other that points towards a shared set of beliefs and values, and a form of life.\textsuperscript{41} Sharing a form of life leads to the conclusion that one’s standards for evaluating one’s life can no longer be seen as entirely subjectively generated, and for example the “leading of a fulfilled life” will change according to which society the person lives in.\textsuperscript{42} Griffin goes on to define a set of biologically based- and rationally based interests, which together form “prudential values”, as he calls them, which all humans are able to “sense” through their shared form of life.

I find this use of Wittgensteins form of life interesting and I use it also in this paper through my usage of Stefan Eriksson as part of my constructive material selection. I have decided to place the focus on the communicative aspect of human rights as a language, like Holt does, rather than the other way around. So, while Griffin uses ‘shared forms of life’ in the sense that it gives us knowledge about specific human individual “goods” (given because they are already embedded in our language which implies that they are natural), the main difference between our approaches is that Griffin relies on only given value as he implies that human rights are universally justifiable because we share a form of life based on universal interests. I would argue that this does not quite achieve universal inclusion and my research problem suggests that we need a justification that works despite all humans not sharing a form of life.

\textbf{2.2 Three theoretic tools}

I have reasoned that in order to achieve the aim of striking new theoretical ground through philosophical explanation, one may need a theoretical tool more akin to a golf club than a set of pincers. I have therefore chosen to assemble the three fields of philosophical anthropology, philosophy of language, and metaphysics, and I utilize them as a combined lens to scrutinize the material selection of established human rights justifications. I combine these theories based on previous research with the aim of producing a perspective that overlaps those theoretic positionings which are traditionally paired with either given or created value.

\textsuperscript{40} (Griffin, 2008); pg. 35-36.
\textsuperscript{41} (Griffin, 2008); pg. 113.
\textsuperscript{42} (Griffin, 2008); pg. 114.
Together they also become building blocks in the constructive task of formulating a justification based on the findings of my analysis of the material.

The reason why I call on metaphysics is to analyze- and to overlap with some kind of given value, and thereby to achieve the element of authority. I use philosophical anthropology to turn focus back towards the tangible, and what we actually know about ourselves as biological human beings, rather than what we do not know. This is to maintain a neutral point of view devoid of any belief-based narratives, in order to achieve the element of inclusiveness. These choices are also following the suggestion from Kao’s previous research that any theory that wishes to set foot in the metaphysical must subscribe to ethical realism and provide an anthropological account of the human being.43

Philosophy of language is instead used to nuance the view of human rights as a function and as an entity. It is also a good match to philosophical anthropology and metaphysics through the concept of conceptual schemes, which is why philosophy of language is here employed to act as an adhesive between the metaphysical and the anthropological. It is also added as a tool to better understand, criticize, and overlap with the created-value theories in material. I will explain how below, as I introduce my chosen specific perspectives of Hilary Putnams internal realism, Ulf Zackariassons take on philosophical anthropology, as well as Wittgensteins language analogies.

### 2.3 Metaphysics

Metaphysics and human rights have traditionally gone hand in hand, as metaphysics have been used to explain why the “good” of human rights is also “true”. Natural law for example, is a teleological metaphysical explanation which explains how moral is rooted in human nature.

In my study I utilize a metaphysical perspective that is minimalist, and positioned almost in between realism and anti-realism while trying to move away from precisely this categorization of reality. This perspective is a combination of Hillary Putnams’ theory of internal realism and something similar to James Griffins expansive naturalism. My minimalist metaphysics makes use of the anti-realist concept of conceptual schemes, and basically regard the metaphysical as that which is independent of those conceptual schemes - but affects us nevertheless. So, if what we regard as physical are those forces which we can explain using

[43] {Kao, 2011}
our conceptual schemes, then the metaphysical are those that our frame of perception does not allow us to explain. The allows for a historically and culturally sensitive perspective as the line between what is physical and what is metaphysical can changes according to the changes in our conceptual schemes. Thus, it depends on when or where we are – and what we perceive as physical today may just as well have been metaphysical occurrences a few centuries ago.

Great examples of this are natural or cultural disaster. Unforeseen large-scale catastrophes like solar storms, changing magnetics poles, large meteors, unforeseen effects of climate change etc. These are the sort of events that can end entire human populations; threats so large that we are simply powerless before them. For a human population only a few hundred years ago such a threat could have been a simple influenza epidemic, strong economic recession, or a smaller typhoon. Another thousand years back a human population could completely succumb to a slightly colder winter than normal. Because these forces where not within their conceptual schemes, humans would surrender before unseen Gods, pray to them and ultimately perish in the absence of plain luck.

To this category of metaphysics, I add Putnams internal realism, as he calls it, which involves the notion that just because we cannot perceive an external reality does not mean that it cannot exist. There is no truth other than that it is true that we are affected by things. He thus accepts both that we can know things and the we cannot know everything. To completely deny realism would be to explain peoples most basic common experiences of atoms and electrons which make up their conceptual schemes by forming chair and tables etc. as simply individual experiences. But to champion realism would be to grant us the ability of attaining absolute knowledge about the world. While the realist asserts that “the world makes up the mind”, the anti-realist responds that “the world doesn’t speak. Only we do”.44

However, Putnam instead suggests that maybe both we and the world speak, in The Many Faces of Realism when he states that “the mind and the world make up the mind and the world”.45 According to the internal realist view there are no facts, objects, or properties independent of our conceptual schemes (to talk of them "is to talk of nothing"46); but, given a conceptual scheme, the facts are not chosen but found, or not found, as might be the case. This line of reasoning at least acknowledges our shared experiences that affects our lives, without actually stating anything about facts or properties that are independent of our

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46 Ibid: pg. 36.
conceptual schemes. Just that independent things can affect us. As Griffin states, “this raises the possibility that the embeddedness of our concepts in the human point of view is so deep and inescapable that it makes no sense to speak of a belief-independent reality”.  

I use Putnams perspective on metaphysics as I think it represents a good middle ground between realism and anti-realism, and captures the air of “bridging” that this thesis is aiming towards.

The decisions taken above are not your standard interpretation of metaphysics, but rather a corner of it. Typically, metaphysics regard explanations for the things and phenomenon we can and cannot perceive in the universe. Laws that govern laws, in a way. The word “metaphysical” also refers to the abstract and supernatural (although its original meaning was only an indication of shelf placement). There is a disdain towards metaphysics in the created-value oriented theoretic field, which is characterized by the conceptual relativism and constructivism of the post-metaphysical academic movement. Some would say that because my aim is a theory that stands between inherent and created-value (and is not reliant on belief or any other realism with a big R), I have already failed by employing metaphysical terms. It makes sense if one, as for example Robin Holt seems to do, sees metaphysics in an analytical philosophical way – for example as various absolute truths available to us a priori. Or nonsensical narratives and speculations about an “objective world” that we can never truly see or experience, since we cannot achieve a Gods-eye-view and step out of the language through which we describe the world.

However, there might be alternative ways to divide the line between what is objective reality and what is not. To achieve a more neutral and less drastic realism that will still achieve the transcendentalism required for an absolute grounding and universal scope, I will first make use of a minimalist interpretation of metaphysics, and then make use of Hillary Putnams equally minimalist account of realism, in which he actually does find conceptual relativism compatible with realism. It may be more accurate to refer to this minimalist metaphysical perspective as a smaller category of the spectrum of metaphysics, rather than a theory. However, I do believe that this “loophole” of sorts will provide we will the constructive tools required to achieve the aim of this paper.

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47 (Griffin, 2008): pg. 122.
48 (Sullivan & van Inwagen, 2014)
49 (Rorty, Philosophy and the mirror of nature, 1979)
2.4 Philosophical anthropology

Philosophical anthropology differs from normal anthropology in that it focuses on the social and biological human being, but especially how it is represented in our ideas and theories. Ulf Zackariasson describes philosophical anthropology as an interpretative activity where we delineate anthropological data and set it in a context where it makes sense.51 Who are considered human, and what anthropological assumption does the theory need for it to make sense? Both Kao and Griffin make use of an anthropological character in their philosophical theories and I do the same as I believe that they were on the right track in their attempts to find a neutral/non-religious, but still grounded justification for human rights. Naturalism is not a “neutral” perspective, however to utilize the data we can collect through our senses can arguably said to be “more neutral” than religion.

There are many things that we do not know about human beings, and when theorizing there are endless assumptions we can make about our own spiritual/moral/mental abilities and shortcomings. It thus seems easier to focus on what we actually do know about ourselves as a biological organism instead. And as it is easier to ascertain what we cannot do than what we can, I focus on limitations rather than capabilities. Grace Kao actually advocated such a focus, which she calls “species-specific physical limitations, vulnerabilities, and psychosocial needs”52, but in the end she still talks about capabilities rather than limitations.

An interesting approach towards philosophical anthropology (or a natural historic perspective as it was called) was introduced and used by Ludwig Wittgenstein in *Philosophical Investigations* (§6, §28-32). Here he points at those aspects that are so natural, and represent such a given phenomenon in regards to being a human, that we do not pay attention to them. Wittgenstein see this as a sort of therapeutic method in philosophical thinking. A reminder of the way things actually are, so that we can more accurately recognize and study the things that we consciously create. This Wittgensteinian perspective goes well together with the philosophy of language-oriented perspective of human rights as a form of language (or communication) that I explain in the next section. As Stefan Eriksson explains in his section about philosophical anthropology in *Ett monster i livets väv*; if we see communication as something static – conveying information to one another - we will not be able to see the

51 (Zackariasson, Forces by Which We Live: Religion and Religious Experience from the Perspective of a Pragmatic Philosophical Anthropology, 2002): pg. 42.
52 (Kao, 2011): pg. 121.
natural history that has formed the way we use this communicative property. As language is a result of our natural development, and is an anthropological phenomenon Wittgenstein suggests anthropology as the way to study it.

Using an anthropological approach by focusing on human nature does not pass scrutiny from critics however. There are risks from trying to find absolute truths that entails both backtracking progresses made in the post-modern field, and also making space for social movements which discourages critical thought. To avoid this, I try to keep an awareness of the plasticity of the human being, but above all I maintain that the study only regards the human being as it is in the now – with the means to assemble and process the data available to us now. By taking epistemological contextualism into account I hope to also account for the progresses made in the post-modern fields.

The application of philosophical anthropology is called anthropological enquiry. It functions as a critical tool in my analysis as it enables me to scrutinize the anthropological assumptions that are necessary for the justification to make sense. These anthropological assumptions may reveal which flaws prevents them from attain my criteria.

### 2.5 Philosophy of language

Epistemic contextualism is a good instrument to overcome imperialist tendencies and tempo/eurocentrism as it allows for a high degree of inclusivity common to created-value theories. Ludvig Wittgenstein’s philosophy of language is a suitable rendition of this instrument since his shared language can be thought of both as assuming the shape of human rights, or as an indicator of shared forms of life, in the same way Holt and Griffin does in their respective created- and given value theories.

Ludwig Wittgenstein describes language as a broad and creative tool box in *Philosophical Investigations*, where each tool has different functions and purposes, which can change over time and place. He states that these functions and purposes can be filled by provisionally using other tools, as long as that tool has leverage within the shared understanding between the communicator and the intended receiver of the communication. Every linguistic interaction is thus a measurement in shared understanding, and for a language to work as a communicative channel for many people it has to follow a set of rules. Wittgenstein calls this concept a language-game and list several different instances of language games; making a

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53 (Eriksson): ch. 5.
joke, riddles, giving orders, thanking, presenting facts, etc. The reason why they are “games” is because they contain no other meaning than what we assign them, and have no connection to absolute truths about the world. They work only because our shared practices make them work. For example, for an order to be an order we all have to conform to the rule that orders are directives that other people are supposed to follow. This does not happen consciously of course, but by sharing conceptual schemes and developing common practices as a result of this.

This is the first concept that I make use of, as I set out from the perspective that human rights is such a language-game. I additionally apply a pragmatic reading of this notion, which adds the idea that language, and specific language-games, are tools that are continuously created and altered when trying to solve practical problems. For example, the act of referring to the sky as blue may stem the need to talk about whether as it has great impact on our lives, or to distinguish between colors. Human rights language is thus here seen as a communicative framework driven by a need to communicate in specifically the pragmatic way I described above, to solve a practical problem or achieve a certain kind of action.

An interesting aspect here is Wittgenstein’s supposition that language-games can have no connection to any absolute truth. This notion is leaning deeply towards the created-value side of human rights justification and this line of thinking is mostly used to support anti-realist, coherentist and metaphysically pluralist theories. This is precisely why I will use it along with metaphysics in order to achieve an overlap.

The second concept I borrow from Wittgenstein is tightly linked to the first and Wittgenstein calls it “form of life”. A “form of life” could be called simply a “frame of reference” that is shared by many people, and it depends on culture, historical and geographical context, and many other factors. According to Wittgenstein it is this worldly frame of reference which enables language to function at all. Without them we would not be able to communicate as things can exist in one context but be incomprehensible in another. This notion related to the pragmatic concept of interpretative frameworks and very similar to what Putnam (see previous section about metaphysics) calls conceptual schemes. I would like to mash together all three as they communicate the same principle idea about how we interpret sensory data and relate to it in our lives, but I will stick with the term conceptual scheme hereafter.

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55 Ibid: pg. 11-12.
To view human rights as a language game would thus be to highlight its function as a communicative tool to solve a practical problem in a world filled with different conceptual schemes, and apply to broader human understanding. Either through a consensus approach which would leave room for the human rights language to mean different things in each conceptual scheme, in a relativistic manner, as long as there can be consensus to start implementing measures. Or through a universalistic moral approach which would seek to share *the same* interpretation of human rights language. Wittgenstein leaves the door open for both interpretations as he suggests that while forms of life (or conceptual schemes) are contingent, there must also be an overarching human experience which enables us to interpret languages.

Language-games and forms of life are concepts that have actually been used in previous human rights research, notably by Robin Holts (see previous research section) who also views human rights as a language-game. To describe human rights as a language game one could say that the human rights regime has several functions, such as its moral function as an indicator of what is right, its political function as a directive of what should be done, and its legal function as an enforcement mechanism. However, the communicative function of human rights instead considers its narrative as a tool to solve practical needs and to communicate around something that not just one person can perceive (or it would be unnecessary to communicate about it). As I refer to human rights in their legal rendition, I extend this function into a language game as well.

### 3 Descriptive and critical analysis

#### 3.1 Disposition of analysis

The analysis is hereby split into two parts. The first part (this chapter) contains the descriptive and critical analysis of the established human rights justifications in my material. The critical element employs my criteria of inalienability, universal inclusion, neutrality and necessity. I begin with the created-value theories found in Richard Rorty and Alasdair MacIntyre, and continue on to the given-value examples found in Nicholas Wolterstorff and Martha Nussbaum. The second part of the analysis is found in the next chapter and consist of a constructive task that uses the more novel theoretic perspectives of Helen Steward and Stefan Eriksson. It utilizes the findings and results of the analysis this chapter. In the first part I

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57 [Donnelly, Universal human rights in theory and practice, 1989]
measure the justification against my criteria for a desirable human rights justification. This hopefully leads towards a clearly defined gap between inherent- and created value and what difficulties it poses for the attainment of my criteria.

3.2 Created value: Richard Rorty

3.2.1 Rorty’s post-philosophical sentimental stories

First and foremost, Richard Rorty’s justification of human rights is built on the premise that there is no way to gain knowledge of any objective reality that is independent of our historical and cultural context. Thus, human rights cannot contain any form of given value, since we cannot gain knowledge of any fact/power that can validate it. He holds a form of epistemic contextualism that is, just like Robin Holt’s, influenced by Wittgenstein’s philosophy of language as a constructivist perspective for how our world is constituted. He argues that understanding the world and achieving knowledge about it requires means of doing so. This can be mathematics, scientific study, language, culture and so on. But those means are also completely tied to our perspective, and we can never achieve an objective view to verify whether anything is neutral, in a neutral way. Thus, the only way we can know the world is through the means we know the world, and because of this, our experience of the world will forever be limited.

In doing so, Rorty “gives up” the idea of finding any foundations to our belief in human rights. Instead Rorty argues that morality originates in our hearts rather than our minds and he holds that this makes any rational defense for human rights redundant. He specifically bases his justification on the emotional experience of human beings, and he views moral as a sort of sentimental education, through which we become more inclined to feel emotionally connected to one another. Human rights are thus sentimental stories that form one overarching human rights “culture”, among other alternative “cultures”, and this is the created value on which his justification rests. He exemplifies this with the various atrocities that the Serbs committed against the Muslims during the Bosnian war, and that it would not have helped to remind the perpetrators of such violations of facts, such as the victims being rational agents, or that they

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58 (Rorty, Truth and progress): pg. 171.
59 (Rorty, Philosophy and the mirror of nature., 1979): pg. 165-173.
are clever and learned. Because Rorty thinks of human rights in terms of a culture, his justification does not attempt to justify a set of legal rights, and his aim is quite different than mine. He is a pragmatist and he thus focuses rather on what works than what is true. But I repeat that in order to conceptualize the space between given and created value I try his theory against my criteria anyway.

3.2.2 Authority

When facing critique of human rights from bigoted movements, Rortys justification would simply call their claims nonsense and “bad”, but without being able to argue that they are wrong. I will argue that this is the main reason why Rorty fails to live up to my set of criteria by him neither explaining why rights are good, nor justifying a legal implementation.

Necessity

In denying an inherent moral knowledge, Rorty is right in that there is no point in leaning back and waiting for that transcendental and inherent human nature to suddenly grab hold of us and make our inalienable human rights a reality. We need to do so ourselves. However, in leaving that up to human individuals to “figure out” that human rights culture is better than any competing culture by experiencing it “the right way” (for example by hearing a suitable sentimental story), he both holds us to very high expectations, and makes his justification require extra steps in order to achieve the necessity criterion.

To explain this more closely Rorty’s justification falls short of the necessity criterion based on his assumption that humans are not capable of moral knowledge, and the fact that he does not meet up this claim by providing an element which would show why human rights is something worth pursuing in his justification. This element could be anything, for example Griffins set of interests like avoiding pain, but Rorty does not want make any such statements. Instead he goes about this from a pragmatist’s perspective and argues that it is good because it works. This is “enough” to achieve the necessity criteria if the justification is only aimed at oneself, however the necessity criteria found here considers the ability to generally inspire moral motivation. This becomes apparent when Rorty, in Truth and Progress, pictures talking about human nature as an argument between Platon (defender of inalienable rights) and Nietzsche (cynical believer that we are ruthless animals) and claims that one of our most important intellectual advances has been moving past this argument. This reveals the

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64 (Rorty, Truth and progress): pg. 169.
anthropological assumptions that humans are not such that they are ruled by forces that they can know about themselves, and that humans are truly capable of moving past the illustrative argument between Platon and Nietzsche. However, in light of the seemingly steady gaining of popularity and undeniable persistent relevance of various forms of essentialist and chauvinist movements, one must assume that we still care about truths regarding human nature.

**Inalienability**

Rorty supports the legal implementation of rights based on a “culture of truth” rather than a nature of truth.65 This truth is based on a common legal and political standard, and strikes as similar to Donnelly’s consensus-approach. It is valid because we agree. However, just as is described in the introduction on this paper there does not seem to be any consensus, and if there is no consensus the normative aspect becomes relevant again. A justification for why rights are inalienable becomes necessary, but Rorty’s justification does not provide this as it relies on subjective experience. According to Rorty’s justification it is as if the group of people who experience things differently must simply be denied any influence because they are wrong in the eyes of the majority. Religious experience is a good example of this. It would be wrong to deny these experiences, even though they are subjective in nature, and say that they are “wrong” because the majority experiences the world differently. These experiences are no less true, even if the majority experiences things differently – just like a person can experience cold and will need to put on a sweater even though everybody else in the room feels comfortable. If that was the case, then all belief would be wrong until it is verified by the experiences of the large majority in a positivistic manner. It seems as if an external reference point or natural truth such as the one’s provided by given-value theories are necessary to achieve inalienability.

**3.2.3 Inclusivity**

*Universality in reach*

Rortys pragmatic human conception is one of a constantly interpreting sensory data in order to solve practical problems, and he describes the human individual as a “flexible, protean and self-shaping animal”.66 There is thus no transcendental or overarching trait which all humans will share despite contextual differences, and likewise there is no specific attribute which

65 (Rorty, Philosophy and the mirror of nature. 1979): pg. 175
66 (Rorty, Truth and progress): pg. 170.
separates humans from animals, and bestows them with value either. Rorty avoids a common flaw to achieving universality as neither a common moral knowledge, rationality or even dignity that all humans manages to possess, often leaving out the absolute weakest in society in various ways. Rorty holds that we simply have a hard time explaining what exactly in humans is different from animals, and whenever we try to do so it often leads to exclusion and inhumane treatment of some groups.

Rorty may not state what makes up a human, but he uses his theory of sentimentality to provide an explanation for how humans come to view other humans as similar to themselves through extending our range of empathy. This meets my criterion of universality in reach without clashing with for example the criterion of accessibility, as it recognizes the fact that humans are generally capable of distinguishing that for example children, elderly and disabled are humans without needing a set of criteria.

**Accessibility**

As Rorty disregards the validity of any philosophical foundation for human rights, and argues that that human rights only come into existence through narratives, he leaves the justification, realization and all other aspects of human rights to the cultural sphere. Rorty thus cements human rights into the realm of language and understanding, which paired with his pluralist epistemology, opens up space for cultural relativism, which he admits himself to subscribe to. This must mean that he also ties the concept of human rights culture to geographical, historical and thus cultural contexts, and conversely, that human rights culture is a western European/North American idea. Rorty claims that he endorses this “western” culture of human rights, and that this is because of his own upbringing in western culture. In one section he also specifically speaks about influencing young people from other cultures with the “western” idea of human rights. To dress human rights culture in western clothes and talk about a specifically “western” human rights culture would be to imply that the rendition becomes such that only western people will “understand it”, given Rorty’s contextual epistemological perspective. By claiming that “human rights culture” in general is a western concept would be to alienate most other cultural perceptions who believe that something

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67 (Rorty, Truth and progress): pg. 168.
68 (Rorty, Truth and progress): pg. 167-169.
70 (Rorty, Truth and progress): pg. 170.
72 (Rorty, Human Rights, Rationality and Sentimentality, 1998): pg. 184-185
similar exists in their culture, which it evidently does.\textsuperscript{74} Rorty also claims that “human rights culture”, although culturally and historically dependent, is morally superior alternative other cultures,\textsuperscript{75} while at the same time stating that this moral superiority does not reference any transcendental, or common moral knowledge.\textsuperscript{76} If it does not reference any general knowledge of what is morally superior, I can only assume that he references his own, culturally influenced experience. In \textit{Human Rights, Rationality and Sentimentality} he continues on to state that “[philosopher like us] see our task as a matter of making our own culture – the human rights culture – more self-conscious and more powerful, rather than of demonstrating its superiority to other cultures by an appeal to something transcultural.”\textsuperscript{77} By claiming that human rights culture is both western and superior while not providing any explanation to back this up he makes his justification not meet the accessibility criterion, however the epistemological language focus of Rorty’s justification does respect the plurality of humanity by itself.

\textbf{3.3 Created value: Alasdair MacIntyre}

\textbf{3.3.1 MacIntyres contextual virtue-ethics}

In \textit{After Virtue}, Alasdaire MacIntyre argues that the enlightenment has failed in terms of justifying human rights.\textsuperscript{78} He criticizes the concept of rights through the idea of their supposed function based on the exact lack of foundation problematized in this paper. “[Human Rights] purport to provide us with an objective and impersonal criterion, but they do not. And for this reason alone, there would have to be a gap between their purported meaning and the uses to which they are actually put.”\textsuperscript{79} Instead he sees the human rights regime as an empty attempt to secularize the Christian conception of moral law during the enlightenment, which had to find new significance after having lost their sacred status as divine law when religious power waned in the west.\textsuperscript{80}

His human rights theory strips the human being of all its given value in order to offer a new given value explanation in which rights make sense without having to assume anything theological or teleological. He finds that he cannot, and thus settles for a justification of what

\begin{itemize}
\item \textsuperscript{74} (Sluga, 2011): pg. 122-123.
\item \textsuperscript{75} (Rorty, Human Rights, Rationality and Sentimentality, 1998): 116.
\item \textsuperscript{77} (Rorty, Human Rights, Rationality and Sentimentality, 1998): 117.
\item \textsuperscript{78} (MacIntyre, After Virtue, 2008): pg. 82.
\item \textsuperscript{79} (MacIntyre, 2008): pg. 70.
\item \textsuperscript{80} (MacIntyre, 2008): pg. 62.
\end{itemize}
I would call created value human rights, although not as a legal regime. What he finds instead is the value of virtues. These virtues only appear through social practices, which is why his theory is a created-value theory, however evidently this created value solution differs entirely from Rortys’. MacIntyre garners value from idea of communities as a meaning-giving entity which creates roles for individuals to fill and thereby inspiring virtue. He focuses on the goal and “good” of each individual and society (much like the telos of Christianity).

MacIntyre consequently disregards the idea of the complete autonomy of the individual and critiques liberalism for robbing the individual of meaning and good to strive for. To be exact, liberalism has robbed the individual of a narrative quest within a community which creates value and meaning. This idea is central in MacIntyres justification the idea of “good-life” is deeply bound to these narratives (i.e. traditions, cultural habits, etc.), within different cultures and societies. For this reason, MacIntyres human rights are contextual, but he does not want to call himself communitarian as he does not find any value specifically in communities – just because they are communities. Instead MacIntyre’s moral content appears through the interacting social roles in those communities (an example of his is the “Public School Headmaster in England, or the Professor in Germany”). This centers around the concept of individual narratives becoming part of an “interlocking set of narratives” and the “good”/ought, or the created value in MacIntyres human rights, is found in the center-point of the individual and common narrative. Like Rorty, MacIntyre also suggests storytelling but rather to inspire quest, and an idea of roles and characters in different cultures.

MacIntyres’ renouncing of a legal human rights regime is enough to tell us that his justification tries to achieve something entirely different from my own. However, I nevertheless believe that there are interesting and potentially valuable insights to be found in his justification for this paper as well.

3.3.2 Authority

Necessity

In After Virtue MacIntyre criticizes what he calls the individualistic fallacy of sourcing moral knowledge to the human individual. This is conveyed through his critique of ethical

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81 Ibid: 219, all of chapter 3.
82 (MacIntyre, 2008): pg. 30-31.
83 (MacIntyre, After Virtue, 2008): pg. 218.
84 (MacIntyre, After Virtue, 2008): pg. 218-219
emotivism (a theory which claims that ethics only contain emotional attitudes, and no prepositions), and he believes that the idea that the moral standard we hold others to is fueled by emotionally spurred subjective opinions, is harmful. This is the opposite of Rortys created-value justification, and unlike Rorty’s approach, MacIntyre also places his good above individual opinion, since his theory lingers on the border of communitarianism, and since he disregards the autonomous epistemological power of the individual. He also holds that the good only appears in conjunction with traditions and social narratives in a larger society, which at least places the value in something that does not exclusively depend on individual experience of it, and accordingly motivates the necessity of implementing human rights in different societies.85 His reasoning not so subtly reveals the anthropological assumption that we do not know ourselves what is good in life, and how we should achieve it, but that we can attain this knowledge by attending to communities.86 While this is not a justification of human rights per se MacIntyre thus lives up to the criterion of necessity by referencing a “good” and a knowledge that we must act to take part of.

Inalienability

MacIntyre presents a valid critique of both the secular and religious given value-theories, and the source of their inalienability, claiming that if you remove them there is nothing left. His justification thus disregards the entire concept of legal human rights as “moral fiction”. This is because the virtue of justice that was once grounded in the teleological order, connected to the Christian God, used to state what is right, but is not supplied by the secular liberal tradition that presents human rights. As the fundamental function of an inalienable or legal regime is to hold all its subjects under the same standard and the same rules, MacIntyre argues that human rights, as moral rules, are no longer valid as they do not have a God that deliver those rules.87 Some founders of the UDHR would probably argue that the source of human rights is not just a liberal secular tradition 88, while other post-imperialist spokespersons would agree with him.89 However, sticking with MacIntyres argumentation the legal rules that rights are actually actualized as, are simply a distillation of norms and traditions from a certain type of historical context and thus lack justification on a universal scale. MacIntyre thus gives up on the criterion on inalienability, and he believes that such

85 (MacIntyre, After Virtue, 2008): pg. xiv-xv.
86 (MacIntyre, After Virtue, 2008): pg. 52.
87 (MacIntyre, After Virtue, 2008): pg. 31.
88 (Sluga, 2011):pg. 119.
89 (Sluga, 2011): pg. 115.
rights cannot be features of universal common conditions and presents the likeness of “presenting a check for payment in a social order which lacked the institution of money”. 90

I want to distinguish another difference between Rorty’s version of rights here from MacIntyre’s, as Rorty calls rights generalizations of culturally influenced moral intuitions which do not possess universal foundation, MacIntyre calls them very specific cultural rules. For my purposes I would say that Rorty’s view of rights as generalizations of positive and negative obligations that people want, is a more useful view than MacIntyre’s, even if both fail the criteria of inalienability. MacIntyre also highlights the temporality of norms such as human rights by making the likeness of rights to Polynesian taboos which became outdated over time, as the historic reason for those taboos became lost. He asks “Why should we think about our modern uses of good, right, and obligatory in any different way from that in which we think about late eighteenth-century Polynesian uses of taboo?”. 91 Rorty’s suggestion that rights are generalizations would be a good answer to this critique, and that comparing for example a right to not be tortured to a Ploynesian taboo is a bit far-fetched. I agree that his point that rights cannot be timeless and without context is valid, but this paper is not trying to justify timeless and totally absolute rights either. Only that there may be grounds for rights that are universal and inalienable, even if they must be updated or altered, in between inherent- and created value.

3.3.3 Inclusivity

Universality in reach

Does MacIntyre manage to include all humans in his human rights justification? He states that “rules only come into existence at particular historical periods under particular social circumstances. They are in no way universal features of the human condition”. 92 His moral laws that are the basic justification for human rights are thus different in different societies, which makes them member-derivative. I believe that he might have achieved also an element of universality though, if he had based his value on the narrative of an overarching human community, or a general sense of human community, rather than specific cultures. Of course, such a narrative would be much more diffuse and lack the clear, aesthetically rich traditions of the kind MacIntyre probably refers to when he speaks of traditions. However, this also applies

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90 (Macintyre, After Virtue, 2008): pg. 67.
92 (Macintyre, After Virtue, 2008): pg. 67.
to MacIntyre’s concept of practices. These are similar to Rorty’s shared practices, however MacIntyres places much more weight to them as the path to achieving one’s purpose. For him engaging in practices, such as playing chess, is a virtue which eventually may lead towards the very artificial Aristotelian polis.93

MacIntyre actually makes direct anthropological assumption here by stating that human nature does not indicate anything and is static. However, he argues, our nature changes and we could become capable of our intended roles if we started engaging in practices and exercising virtue.94 While Rorty only aim to justify human rights for smaller tight-knit communities, as it is in these communities that practices take place, one could argue that humanity has many common cross-border traditions such as democratic forums, enjoying athletic and otherwise incredible feats, decorations for elaborate celebration, story-telling, etc., especially in times of globalization. Highlighting global practices is not a large step from highlighting local practices, and it would be a very interesting path towards achieving universality while avoiding his own criticism that rights are not historically evident, as the global practices have only appeared recently through globalization.

He says that “it would of course be a little odd that there should be such rights attaching to human beings simply qua human beings in light of the fact […] that there is no expression in any ancient or medieval language correctly translated by our expression ‘a right’ until near the close of the middle ages”.95 It seems odd though, that humans would describe functions the same way throughout history. A right in itself is quite a complex social function, and trying to find traces of it in pre-medieval history is like trying to find traces of mortgage-loans and hedge-fund investment.

In later works MacIntyre actually also stresses the importance of biology, and even employs an anthropological focus similar to that of James Griffin and my own, in which the vulnerability of the biological human individual is emphasized. MacIntyre opens Dependent rational animals by stating that “It is most often to others that we owe our survival, let alone our flourishing.”96 This may of course still refer to communities, but the biological focus on existential vulnerability transcends culture. This is a change of his theoretical positioning, but I still want to mention it as it adds to his reasoning in After virtue. Yet, despite his new-gained

93 (MacIntyre, After Virtue, 2008): pg. 191.
94 (MacIntyre, After Virtue, 2008) pg: 52.
95 (MacIntyre, After Virtue, 2008): pg. 69.
96 (MacIntyre, Dependent Rational Animals: Why human beings need the virtues, 1999): pg. 1.
insight of the value of anthropology and subsequent development of his original Aristotelian virtue ethics; he never explores the possibility of a universalistic argument.

However, in the end MacIntyre does not need a biological focus or global practices to achieve universality in scope, as it is virtue that propels the individual towards its moral ends, or telos, and supplies his justification with value. Even though these virtues are contextually created, and traditions and cultural narratives still play a big part in forming these given ends, each individual has a role to play and their own narrative in society. This is where MacIntyre’s statement that he is not a communitarian becomes important. What unites humanity here, and achieves universality in scope is the narratability of each humans’ lives – including those who may not be considered humans by other theories. This means that MacIntyre lives up to the universality criterion, but that the concept of telos may clash with the criterion of accessibility in a way that my other two suggestions would not.

**Accessibility**

As MacIntyre himself holds; “[moral] traditions cannot exist in a vacuum of so-called neutrality, mindless of the past”. MacIntyre salvages the pluralist nature of humanity well by emphasizing historical flows influenced by culture as the source for moral ideas. He critiques the current shape of the human rights regime for not being universal as they have risen from a unique cultural context. He also claims that it is virtually impossible to present a justification that is accessible on a universal scale since there cannot be any common human good, since virtues only appear in communities.

The grounds on which MacIntyre holds that a universal human rights regime is impossible to justify, are actually quite accessible in the loose usage I employ in this text. One could state that MacIntyre displays certain Marxist tendencies in his anthropological assumptions as he disregards the actual meaning of the individuality of the human being in relation to the larger community (especially considering MacIntyres past membership in various Marxist organizations). However, that statement must be seen as sufficiently neutral considering that a lone individual certainly would not be able to possess any of the social roles or take part in any of the narratives which create the value that fuels MacIntyres argument, without a society to take part in. That humans are social beings, for example, represent a “human universal” in

97 (MacIntyre, After Virtue, 2008): pg. 115.
anthropology and assuming that social practices take place and contain meaning for the human is uncontroversial.

Another interesting maneuver by MacIntyre, in relation to the accessibility of his justification is acknowledging the normative conception of “intelligence” and applies it to a class perspective. Since MacIntyre’s human uses their rationality to achieve a goal/a “good” through “thoughtful consideration of how to achieve such an end through virtues”\footnote{(MacIntyre, After Virtue, 2008): pg. 155.}, they are capable of being intelligent not matter whether they are uneducated farmers our urban elites. This is more inclusive than for example a Kantian perspective that is more elitist through its more normative and general conception of moral insight. Macintyre still does not live up the criterion of accessibility though, since his concept of Telos would appear to be too belief-based. The simple social roles are neutral, but that each individual has a predestined goal is a bit much.

3.4 Inherent value: Nicholas Wolterstorff

3.4.1 Wolterstorff’s natural law

Nicholas Wolterstorff justifies human rights by referencing classic Christian natural law and inherent human value. Christian moral tradition presented the concept of a common justice, or moral law, which was “natural” and thus unaffected by social practices. This whole idea stemmed from their anthropological conception of the human as being created in the image of God. Wolterstorff states in \textit{Justice: Rights and Wrongs} that all humans possess value that stems from a natural “worth of beings of their sort”\footnote{(Wolterstorff, 2008): pg. 10-11.}. The value-content of human rights according to natural law thus aspires a universal ambition in this way. The defining aspect of the natural rights view, however, is that it envisions the value of human beings is precisely natural; as opposed to being socially created. This view thus grants humans value regardless of the existence of a society to create human rights institutions, social practices that infer a necessity of rights, or even other humans to appreciate human value.

Wolterstorff’s view of the good life is the flourishing life, which may sound similar to Nussbaum’s capabilities, and he describes it as “the life that is both lived well and goes well”\footnote{(Wolterstorff, 2008): pg. 145.}. Wolterstorff argues that this good life is the desires of God for humanity.\footnote{(Wolterstorff, 2008): pg. 236.}
the day, within a Christian society, the grounding of human rights in a faith-based larger metaphysical entity achieved all criteria of necessity, inalienability, universality in reach, and accessibility. Since Christianity was somewhat perceived as a hard truth in medieval western Europe, one could even say that it achieved a sort of “neutral grounding” as the interpretative narrative about reality was strong and the rules which applied to God were seen as neutral. It is a belief though, and one may simply believe in something else (or nothing at all). It was and is certainly not a minimalist account either, as it is tied to an elaborate cultural narrative as well, which surely alienates people of other creeds. Indeed, Wolterstorffs ambition is only to form an argument that can be accepted by fellow Christians.

Wolterstorff examines and rejects the human dignity- and capacity approaches as good theories of given value rights. They fail because they cannot include all human beings in the “worth having rights” category. They will either temporarily, progressively or by certain amounts lack whatever it is that would make them worthy of rights. Instead Wolterstorff argues that rights are grounded in our relationship to God. Wolterstorff’s God loves us, not because of some capacity nor because of any dignity we might have. This love is neither essential nor intrinsic and for Wolterstorff only this love can ground our claims to inherent human rights.103

Wolterstorff’s explanatory model is based on belief which makes it unsatisfactory for this text, however his critique of the other transcendental arguments is valid. If a person has Alzheimers and fails to live up to the same mental capacity as the rest of us. Is this person still valuable enough to include in human rights? Would they even classify as human? If you view this in light of lateral law then the human species is easily identified. You cannot stop being or fail to become human, nor can you suddenly loose part of your belonging to a certain species.

3.4.2 Authority

Necessity

Wolterstorff easily clears the necessity criterion as Gods love is absolute and unconditional. The very essence of such a force contains enough moral motivation. One may argue that Christian tradition, similarly to Rorty’s sentimental stories, relies heavily on emotion, and emphasizes attributes such as “love”, “self-sacrifice”, “duty” and “virtue”, rather than “rights”  

103 (Wolterstorff, 2008): pg. 10.
enshrined in law. However, this is the law of an external authority that is being referenced, and following Wolterstorff’s reasoning God and justice is deeply intertwined.\textsuperscript{104} The moral motivation of Wolterstorff’s theory is also largely strengthened by “the good life” being characterized by “divine desire”, meaning that God themselves’ desires determine the good of an individual’s life\textsuperscript{105}.

If attaining the good life through human rights (powered by natural law) is a divine desire, then there can be no question that it is also necessary and motivated. The way Wolterstorff achieves this criterion so effortlessly through referencing an independent transcendental authority is very effective, especially compared to the struggles of Rorty’s justification in this aspect. MacIntyre achieved this criterion thorough applying to telos, which is also fundamentally belief-based, abut I believe that it be possible to utilize this type of approach towards necessity if the external authority its individual goal/good was something equally existential and inevitable, albeit more neutral.

\textit{Inalienability}

Wolterstorff critiques the idea that rights \textit{must} be socially conferred simply based on the premise that a human outside society “stripped of all social status, […] prior to any communal relationships” would thus possess no rights.\textsuperscript{106} He claims that trying to imagine the human being as an asocial isolated and purely neutral existence is redundant, as what is important is rather what grants humans their rights. This, as we know, is a very relevant observation considering that human beings are innately social organisms.

I find the concept that right may actually be socially granted in combination with Wolterstorff’s statement interesting. If rights are socially granted but humans are inherently social, then the rights must be both inherent and social. Even so, Wolterstorff concludes that it is given value that must still be present in humans, beyond social organization on the grounds of the grandness of his God. By applying to an external authority, the inalienability criterion is also easily achieved on the grounds of the principles of the validity of legal implementation I mentioned in the conceptual explanation section of this essay. Wolterstorff’s God is a power-wielding authority, and thus a law in its name would necessarily exert power on all humans without fail. This criterion is the one Wolterstorff achieves most clearly.

\textsuperscript{104} (Wolterstorff, 2008): pg. x.
\textsuperscript{105} (Wolterstorff, 2008): pg. 236.
\textsuperscript{106} (Wolterstorff, 2008): pg.: 32-33.
An interesting notion may be that Wolterstorff actually turns towards scripture in order to validate the legal aspect of human rights, as Jesus was a bringer of justice. He shows why the notion of love does not replace the notion of justice in the new testament through the passage “Jesus appeals to our worth as human beings to explain [...] the sick person’s worth as a human being”.\textsuperscript{107}

3.4.3 Inclusivity

Universality in reach

The foundation for the value-content, or the “ought” of a human rights regime is found in God’s love, and more specifically love by-attachment, rather than love in virtue of how wonderful human beings are to deserve that love.\textsuperscript{108} The bond humans share with God is unique and thus only humans are applicable to receive rights. This shows that the natural rights view grants humans’ value; not because they somehow “deserve” value, but that they possess some sort of quality. Wolterstorff states that “if God loves, in the mode of attachment, each and every human being equally and permanently, then natural human rights given in the worth bestowed on human beings by that love”.\textsuperscript{109} This means that natural rights conception of the human being is such that its “given” value-content cannot be determined by some ability or criteria that humans must meet to be called humans, (such as reason or agency). There are humans who lack such abilities who are still undoubled humans that we recognize as such, and Wolterstorff’s God loves all humans regardless of ability.

Accessibility

Christian moral tradition presented the concept of a common justice, or moral law, which is “natural” and thus unaffected by social practices. It presents it as such, but Wolterstorff’s Christian moral have a hard time dealing with human rights in terms of my accessibility criterion. In a global, multicultural and interconnected world characterized by legal-positivism and post-metaphysical views, the natural rights concept may not meet the criteria of accessibility, but it still has many valuable themes and ideas to offer. I could end this section here, but instead I want to discuss the potentially universally acceptable nature of religious justification. This universally acceptable potential is not found in the specific narrative, such as tales about Jesus Christ, Siddharta Gaudama or Muhammad ibn ‘Abdullâh, or in various

\textsuperscript{107} (Wolterstorff, 2008): 131.
\textsuperscript{108} Ibid: pg. 189-90.
\textsuperscript{109} (Wolterstorff, 2008): pg. 360.
excerpt of the sacred texts. It may rather be found in the creation of narrative explanations and elaborate aesthetic celebration and worship of certain fundamental and existential aspects of life.

If there are any grounds to find a transcendental factor which could be accessible and universal it is here, as all cultures on earth exhibit this. According to my interpretation of metaphysical theory this would be the creation of a language game based on individual religious experiences. Our reactions towards our religious experiences are similar which should imply that they are the same kind of experiences, even though they may not be exactly the same. Just like every experience of pain is not the same but we still recognize that this is a general part of the human experience to feel pain. A universal minimal assertion of religious experiences would be enough to achieve neutrality and accessibility.

Instead Wolterstorff holds that the definition of justice as inherent value only works when grounded in theism. 

3.5 Inherent value: Martha Nussbaum

3.5.1 Nussbaum’s human dignity

Martha Nussbaum’s capabilities approach is both secular and relies on given value, with the value being the dignity that is unique and exclusive to humans. While Grace Kao found something like a middle-ground between maximalist and minimalist theory in her approach it does not quite meet all my criteria as it is reliant on an inexplicable characteristic. This is so as each individual possesses an inherent human dignity, and according to Nussbaum this dignity is the product of a set of capabilities that all humans possess. These capabilities are in turn “something inherent in the person that exerts a claim that it should be developed”.

Since her value is based on humanity as something special and unique, her approach generates a need to define exactly what a human is in a way that the other approaches do not have to do. The result is essentially an essentialist list of capabilities that are unique to humans and universal in their rank, which she bases on empirical facts. Her aim to achieve some sort of neutrality or accessibility by turning towards the empirical is similar to what I am trying to do here, and according to this statement her anthropological conception of the human being should thus also be based on an empiricist view.

110 (Wolterstorff, 2008): x.
It starts off from the question: “What is [a person] actually able to do and to be?”\textsuperscript{112} Her answer is that all humans can- and should flourish. Unlike MacIntyre who’s telos-like narrative goals which were both individually and socially based, Nussbaums’ capabilities are entirely individually based. She emphasizes that humans are autonomous beings with agency, and the list is applicable on everyone and not dependent on context and culture. Her capabilities are not presentation of how to live “the good life” either, like any Christian or teleological justification, but instead more like a minimum threshold that all people should stay above to be able to seek their own flourishing. The capabilities are equal in worth and related, as violating one criterion may affect another, much the human rights we know today.\textsuperscript{113}

An important aspect of her theory is that it her list of capabilities allows for changes stemming from historical progression, which makes more like a lower-case essentialism than the capital essentialism that speaks of an unchanging essence.\textsuperscript{114}

\subsection*{3.5.2 Authority}

\textit{Necessity}

Why human rights are something that should be realized according to Nussbaumen seem to rely on the claim that her capabilities contain the obligation of flourishing which obliges everybody else to respect these claims. Since human beings are not able to live up to their capabilities themselves without assistance from society this creates a social responsibility for a collective effort to create an environment where they are realized. This becomes extra powerful in combination with her claim to incommensurability, and that there can be no tradeoffs in regards to capabilities without loss. So, humans cannot achieve their capabilities by themselves, and all capabilities must be achieved or humanity will sustain moral loss. This suggests a necessity to implement rights, and lives up to my necessity criteria. An interesting aspect here is that this could be expressed in terms of created value, when combined with for example MacIntyre, as the capabilities are so tied to strong functioning societies/communities, even though Nussbaum’s capabilities are presented as primarily “given” as they are simply attached to humans when they are born. In the face of my necessity criteria her strength is similar to Wolterstorffs’, as a clear necessity appears when accepting her anthropological

\textsuperscript{112} (Nussbaum, Women and Human Development: The Capabilities Approach, 2000): pg. 71.
\textsuperscript{113} (Nussbaum, Creating Capabilities: The Human Development Approach., 2011): 37.
\textsuperscript{114} (Nussbaum, Women and Human Development: The Capabilities Approach, 2000): pg. 79-80.
assumptions. Nussbaum’s does present grounds to actually take action and implement human rights and thus lives up to the criteria of necessity.

*Inalienability*

Does Nussbaum have an objective reference-point which makes the legal implementation of her rights valid? She claims to avoid all metaphysical or epistemological views or concepts that belong to such metaphysical views in order to reach consensus through minimalism, however there are at least one undisclosed metaphysical assumption in her approach. The actual inherent value which grounds Nussbaum’s capabilities – the dignity – is not really explained. A basic respect for life, which she describes as an “Aristotelian sense that there is something wonderful and worthy of awe in any complex natural organism” Aside from her own quote, this view is apparent in the way she defends the dignity of animals as well as humans. She gives up at forming capabilities for the animals though, which takes us back to Rorty’s point of how difficult it is to actually separate humans and animals when it comes to justifying exclusive human rights.

Nussbaum’s hidden metaphysical reasoning is actually very useful as it is difficult to reasonably argue against the statement that life contains objective value at least in relation to the human subject. That life is not good is a position nobody could take in a neutral manner. This I see as reasonable, however justifying human rights through a dignity that seems to appear the more sentient and “alive” the organism is, does not seem as reasonable. This would not be a generous reading of Nussbaum however, so based on her anthropological assumption that life is valuable, her justification lives up to the criteria of inalienability, if my reading of her is to be the same as of the other authors. When accepting Nussbaum’s own premises, his justification lives up to the inalienability criterion.

Although, since Nussbaum claims that there has been an agreement and acceptance that such a dignity actually exists in the world it suggests that she places less though on the discussion surrounding her metaphysical foundations. The very problem of this thesis would instead have it known that it is doubtful whether a general acceptance and agreement about the value of each person has not been reached. As she seems to subscribe to an overlapping consensus approach it seems as she never attempts to ground her notion of dignity more securely. The capability approach still lives up the inalienability criterion though.

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115 (Nussbaum, Frontiers of Justice: Disability, Nationality, and Species Membership, 2006): pg. 182.
3.5.3 Inclusivity

Universality in reach

Nussbaum’s respects the differences in cultural and historical contexts which could affect our conceptual schemes, but she still suggests that we all share a part of our humanity that is independent of the contexts.\(^{118}\) This is the opposite of Rorty, which suggests that she believes that we can hold at least some knowledge about ourselves and are not completely dependent on our conceptual schemes, although she is not a metaphysical realist.\(^{119}\) This common area of humanity is what she wants to capture with here capabilities in order to achieve universality, and these are based on definitive empirical facts about human beings.

The basis for living a dignified life according to her is to achieve these individual capabilities, but does this really manage to achieve universality? Important to her model is that these capabilities are precisely understood individually, as opposed to collectively, to make room for cultural and individual differences. This is the same problem that James Griffin has in his *On human rights*, even though his criteria does not determine when a human is flourishing, it lists some criteria for dignity, or the ability to seek their own flourishing which some people cannot meet. If humans are meant to flourish, are they withered? Or are they just not humans?

An oft-cited anecdote from Raimond Gaita’s *A Common Humanity* comes to mind here, in which he worked as a ward assistant in a psychiatric hospital. The patients there could be said to lack all qualities or abilities that we would value in a human being and Gaita describes how it was “only with bitter irony or unknowing condescension could one say the patients in that ward had any chance of flourishing.”\(^{120}\) Nussbaum’s sensible categories include things such as bodily integrity practical reason, control over ones political and material environment.\(^{121}\) It is hard to see how Nussbaum’s approach can find room for those types of individuals who has lost everything that could make their human dignity visible by the means of capabilities and agency.

Gaita reaches the conclusion (after having a revelation about a selfless nun treating these patients) that love is stronger than any artificial sense of dignity. In this context I would rather extract the conclusion that there *are* individuals who are solely depend on love of others “to

\(^{119}\) (Kao, 2011): pg. 114.
\(^{120}\) (Gaita, 2002): pg. 19.
\(^{121}\) (Nussbaum, *Frontiers of Justice: Disability, Nationality, and Species Membership*, 2006): pg. 76-78.
make their humanity visible”, as Gaita expresses it, whom any grounding for a human rights regime need to account for if it aims at universality.

Nussbaum addresses this sort of dilemma in *Frontiers of Justice: Disability, Nationality and Species Membership*, however by expressing that “Dignity is not defined prior to and independently of the capabilities, but in a way intertwined with them and their definition.” Then in the same paragraph stating that “The guiding notion therefore is not that of dignity itself, as if that could be separated from capabilities to live a life, but, rather, that of a life with, or worthy of, human dignity, where that life is constituted, at least in part, by having the capabilities on the list” makes the connection between her capabilities, dignity, and the human being, very confusing. Is dignity inherent, or dependent on individual/cultural context? In her later work she states that it “makes a life not worthy of human dignity” if the capabilities are not reached. This must mean that it is somewhat conclusive that capabilities = dignity, even though dignity is supposedly inherent.

The solution to the disability-problem that Nussabum instead turns towards is the same solution that Gaita reaches, i.e. that “love” is the necessary life-line to keep these individuals as members of the human species. She emphasizes the value of emotional narratives (in much the same way Rorty does) and claims that there is ethical content in emotions. From this it would seem that trying to ground any value-content in the human individual will always be detrimental, as it creates the need to include some sort of quality in the human conception which we must “live up to” in order to meet the dignity attribute.

**Accessibility**

Nussbaum’s justification is based on empirical observations about the humans being, and her anthropological assumption is thus neutral from any narrative. The capability approach is bound to a norm however, by excluding the weakest members of society from her dignity-dependent definition. This makes her definition inaccessible by itself as a disabled person cannot access a human rights justification that cannot justify rights for them.

Aside from this Nussbaum bases her approach on empery and it is free from belief-based assumptions, other than that humans possess inherent value through their dignity. Not being sufficiently norm-free is enough to not meet my criterion of accessibility however.

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122 (Gaita, 2002): pg. 18.
4 Constructive task

In the chapter above I have attempted to clarify that MacIntyre, Wolterstorff, Nussbaum and Rortys’ justifications are all reasonable within their own set of anthropological assumptions. However, at the same time they fail to meet the stricter criteria of a successful human rights justification present in this essay. I have explored the main conflicts between each of the criteria and from the outset of this paper I have reasoned that this is because their respective arguments are all deeply and strictly reliant on either inherent or created value.

From what we have found in the previous chapter, the given and created value-theoretic split seems to contain a rough set of opposing anthropological assumptions in each criterion that are especially interesting as I am about to formulate my philosophical explanation. The first set of assumptions regarding the necessity criteria is that the element that motivates rights are either something fundamentally existential, vs this element being colloquial, such as emotions. Secondly, regarding inalienability I predominately noticed the assumption I named the categories after; that humans already naturally possesses some sort of rights claim pre-socially vs that humans need to create an artificial social sphere where this rights claim exists. The third set of assumption I found in relation to universality in reach would be that the value warranting this rights claim is based on the principle of exclusivity, by making the human status exclusive vs not giving humans any value at all. A fourth set of assumptions was found when analysing the acceptability criterion, and regards whether rights are culturally/normatively constituted vs whether they are based on no radical assumptions at all. Based on these findings I use my theoretic material accordingly in order to achieve an overlap between given and created value.

4.1 Achieving the authority of given value without being limited to given value

4.1.1 Using metaphysics to achieve an external reference point

For human rights to be grounded in a way that achieves any form of inalienability, it needs to apply to something that stands above the opinion of any individual or group. Rorty of course avoids this criterion altogether as his anthropological assumptions tells him that nothing stands above individual or cultural conceptional schemes, while MacIntyre does reference value that is larger than the individual, but is created through culturally contingent social
practices. And as we know from the given value theories that actually meet this criterion, applying to inherent aspects that are common and good in all humans (Nussbaum’s solution) will clash with universality in reach, and applying to powers that transcend all humans (Wolterstorff’s solution) will clash with pluralism and/or the legal aspect of rights.

In the coming sections I utilize metaphysics, in order to fill the same function in achieving inalienability as Wolterstorff’s Christianity while potentially being more accessible, as I apply Putnam’s internal realism and not common metaphysical realism. Combining my minimalist category of metaphysics and Putnam’s internal realist perspective with philosophical anthropology we may open up space for an actual metaphysical buffer-zone to exist between what we perceive and what we do not perceive. This builds ground for a more elaborate explanation for my value. In the next section I establish a set of basic metaphysical condition that are common to all humans, and introduce the theorist Helen Steward who presents a minimal anthropological assumption that is both metaphysical and based on empirical observations. Thereafter I introduce an interpretation of Wittgenstein’s concept of primitive reaction which can accommodate both human rights and our metaphysical conditions. Then I will explain how it can follow that human right are both necessary and inalienable on metaphysical grounds, by applying to something existential. I then steer the philosophical explanation towards universality in reach through not giving humans any value at all, while still housing epistemological relativity and thus respecting plurality in an accessible way. This theory will then lead is back to another anthropological assumption that is empirical and neutral; our tendency to organize ourselves socially and all aspects of this tendency.

4.1.2 Universal metaphysical conditions

There are three obvious central common aspects of humanity to get out of the way: We can be born; we can grow older and we most definitely die. The dying part is an especially prominent aspect, and there is a myriad of additional conditions that we have to meet to actually stay alive, such as keeping the right temperature, maintaining a constant intake of oxygen, nourishment and liquid. Merely this is hard to do in an unpredictable, constantly changing and hazardous world – and that is not even mentioning more specific and complex threats like rare diseases, natural disasters, genetic disorders, internal conflict, or environmental change, which require equally complex measures to make our existence prevail.

According to Putnam’s’ internal realism this line between what is physical and metaphysical changes according to the changes in our conceptual schemes – comprehension transforms the
previously metaphysical conditions into physical ones basically. Thus, it depends on when or where we are – and what we perceive as physical today may just as well have been metaphysical occurrences a few centuries ago. In the theory section I mentioned natural and cultural disasters as good example of this as humanity had no conceptive means to comprehend these sorts of occurrences a few centuries back, and thus we had no manner of acquiring/searching for a way to cope with such events. When one actually starts counting, they realize that humans are affected by an endless amount of metaphysical conditions on a universal scale. The world, real or not, undoubtedly affects us through these definite conditions. And according to internal realism these conditions remain objective facts as long as they do affect us, regardless of whether they are metaphysical or physical. This is the case from a human point of view at least (for a lobster who cannot die of age, the condition of “dying of age” may look different). But in this essay, which is based on an anthropocentric perspective, internal realism must present all objectivity we need since I only try to justify human rights to other humans in a world only humans need to recognize.

4.2 Stewards’ agency and Eriksson’s instinct

Helen Steward argues that our degree of agency sets us apart from other organisms by giving us a large scope of free choice, while Stefan Eriksson holds that our primitive reactions still betray that we tend to act according to what lies outside the scope of our agency and our conceptual schemes; some kind of metaphysical conditions or instincts. These anthropological assumptions will hopefully accommodate all my criteria, given the metaphysical conditions we face to sustain our existence.

4.2.1 Helen Steward

Helen Stewards theory in Metaphysics for Freedom is not a justification of human rights; but rather a justification of the idea that humans possess a certain extent of freedom from causality. Essentially, that humans (and other organisms) can act without being completely bound by something preordained such as instincts. Agency according to Steward is the ability of organisms to make choices and act, as opposed to simply being causal agents. Causing action being something that a single-cell organism will do – by executing what it is naturally programmed to do. This means that its choices are technically not up to the organism itself.

125 (Griffin, 2008): pg. 116.
This way of “causing action” can be called the organisms instinct or natural programming, and it scarcely contains any agency or real “acts”. Complex animals instead have more complex choices within their lives that they can control over, however those choices may still be within a span of instinctive essential activities that limits their agency. For example a cow has some agency and it actively chooses the detail of what it is going to do (i.e. where to graze, when to eat, which individual to mate with etc.), however in the larger spectrum – and compared to a human – those choices are limited. Humans have a very high degree of agency one would think that we are in complete control of our lives. However, according to Steward, humans are only one other organism along this scale of this of having agency vs being governed by instinct.

She suggests that agency is a survival strategy and theorizes that agency developed from the need to prey, or escape from predators. We need the ability to make more complicated decisions in those situations, and fine-tuned capacity in the spur of the moment seem to be the evolutionary answer to that problem. This aspect of choices not being up to the organism itself but rather being inevitable could be seen as a sort of metaphysical border surrounding our consciousness by using the reasoning from the previous section about the relation between metaphysics and our conceptional conceptual spheres. The space for our agency is governed by what we perceive through our conceptional schemes, and it is like a sphere of freedom and control of our lives. The more we understand, the greater our ability to cope with new challenges, and thus the greater our agency. Surrounding this sphere of agency are our metaphysical conditions, which we still cannot control and which we cannot fully comprehend.

For example, while a weather phenomenon could be a metaphysical phenomenon in the eyes of the historical human, other species have an even smaller conception of reality. Their ability to actively maintain their existence is much less reliant on understanding, and more on their natural programming to resist a certain environment. This is where Stewards’ metaphysical explanation of agency as a survival strategy becomes relevant. Seen in this way, her metaphysics for freedom is less an a priori deduction that humans are unbound by fate, and more of a description of our relation to our metaphysical constraints. We may not comprehend the existential laws behind these constraints when they are situated in the

126 (Steward, 2012): pg. 32-33
129 (Steward, 2012): pg. 245.
metaphysical, but our agency as a biological ability enables us to adapt to- and ultimately overcome them.

The historical human had seen this as overcoming fate itself, simply based on their conceptual schemes. That our agency differs from other organisms is an observable feature, and the only non-verifiable assumption we must accept to be able to use this notion as a grounding, is that the idea that we can influence the outcome of anything at all. To borrow Stewards own defense of this belief, since we at least act as if our actions can affect outcomes, believing otherwise would imply that doing anything, even refuting this argument, is pointless. Using Stewards concept of agency as an inherent biological survival strategy as the bedrock for my justification does thus so far live up to my criterion of neutrality (accessibility). It does however, run into the same problem that Nussbaum (and James Griffin) meets in terms of universal inclusion. At this stage one could use Stewards concept of agency to build a justification on the principle of generic consistency.130 For example Gewirth suggests that all agents must hold that they have rights to wield their agency, because if they deny that they have those rights then they also accept that others may interfere in their actions, which contradicts with the original belief that they have a right to wield their agency.131 This is similar to both Kants categorical imperative, and Stewards own notion that agency in itself demands respect for the range of that agency.

4.2.2 Combining metaphysical conditions with primitive reactions

While Steward offers a less narratively bound account of the relation between humans and their metaphysical constraints, her agency cannot by itself explain or justify human rights. It is not even a human rights theory after all, but it does provide material for a philosophical explanation for what may have allowed humans to create something as complex as human rights, in a way that no other complex animal has done – namely; our high degree of agency. I will in this section pair it with another theory that has nothing to do with human rights, but represents an extension of my theoretic approach. It is hopefully able to explain why and how the unique agency available to humans has led us to create something as complex and specific as human rights, by focusing on language.

Stefan Eriksson, in reading Wittgenstein with a theological assessment, offers an interesting way of explaining how that behavior that Steward would consider to be outside of our sphere

131 (Gewirth, 1984): pg. 18.
of agency – and thus outside of our conscious control – is translated into human action. This explanation is important because to be able to justify my criteria of a truly inalienable and necessary human rights regime I need to find my value, or my “ought”, in something that is inalienable but also undoubtedly desirable – to achieve the necessity criterion.

In my philosophical explanation the role of moral motivation is filled by the usage of our complex agency in order to behave in a way which directs our instinctive survival instincts in more complex ways. An existential element. According to Steward the utilization of our high degree of agency is a specifically human survival instinct, and since survival must be seen as desirable it is both necessary, and unconditional, as it is a distillation of behavior that its guided by our metaphysical conditions. Eriksson’s name for this metaphysically (my interpretation) guided behavior, is “primitive reactions”.132

4.3 Wittgenstein and Stefan Eriksson

In Stefan Erikssons material, Wittgenstein actually utilizes his philosophy of language through a philosophical anthropological approach, and theorizes about something he calls “primitive reactions”. This concept stems from the thought that language is something more than just relaying information, and that human action come before human thought. This refers to physiological actions and the notion implies that our bodies act before we think.133 It also implies that our bodies act from impulses stemming from more than just our intellect. The connection Wittgenstein does to the language is that our language is an indicator of the primitive action/reactions, or behavior, we share. This is based upon his premise that language originates from shared forms of life.134 I have combined this with Stewards concept of agency based on the premise that primitive reactions are those actions/behavior that lies outside Stewards agency – in the metaphysical sphere.

For example, a baby crying for its parents when it is hungry or hurt would display action, a survival instinct, that is not guided by intellect. Nevertheless, it results in a reaction from the parents that helps it survive, as they give it food. This explanation coincides with the type of instinctive behavior that Steward would describe guides other animals’ available choices. Eriksson reasons along the same lines and describes how even Darwin thought it horrible that the thought and convictions of humans came from natural development, and is ultimately as

132 (Eriksson): pg. 116-117.
133 (Eriksson): pg. 212-213.
meaningful as a that of a monkey. According to his primitive reaction argument our reactions are not fundamentally different than those of monkeys, just a bit more complex, just like Steward describes in her metaphysics for freedom. Darwin would not have enjoyed Stewards’ theory, but Darwin’s conclusion that we must see a baby crying for its parents, as a type of natural/instinctive behavior similar to that of a monkey, and thus meaningless is arguable. It is rather the opposite. Especially when asking someone like Macintyre, according to whom all meaning in life stem from the way we interact with others in society. At least the action of crying becomes meaningful for the baby when its parents react to its crying.

Primitive reactions are thus here seen as those that are not the outcome of reasoning or conclusion. I want to argue that human rights can precisely be seen as such primitive reactions, and that the value which fuels them are thus not dependent on reasoning or conclusions.

**4.3.1 Human rights as language as a primitive reaction**

This explanation makes sense if one views human rights as communication, or a language game, as Griffin does in previous research, and I have chosen to do in the theory section of this essay.

Wittgenstein describes how “our language games are an extension of our primitive behavior […] because our language game is our primitive behavior”.135 For example, commanding, asking, small-talking are actions that are part of our natural history, just as walking, eating and drinking.136 He describes that our language is not a product of reasoning, and discussions about the Platonic meaning of things. It lacks grounding as it is a product of how we act and react in different situations, and he disregards any demand for justifications for certain expressions.

Eriksson concludes that any justification can be given for anything, but as was stated earlier in this paper, it is the consequential nature of language that gives it its meaning.137 That action by several people must conform with the way we talk about things for that language to have meaning. This thesis looks at human rights as precisely this type of language, which instead actually increases the demand for a justification that many people can comprehend, if we want human rights to be meaningful. Wittgenstein calls this “shared language” as opposed to “private language”. An example that can explain how human rights constitutes as a shared

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137 (Eriksson): pg. 199.
language is here borrowed from Stefan Erikssons (who originally used it to find ground for individual religious experiences which culminated in a common religious narrative).

If we all have content in a box that we cannot show or describe to anybody and then give this content a word – then this word will have different meanings for everybody and we cannot communicate about it with anyone. But if we give that phenomenon a usage instead – then other people would be able to relate and understand the sentiment. Wittgenstein describes the phenomenon of pain, which is similar to this. If we cannot show or describe pain to anyone and there is absolutely no way to prove to anybody else that we are experiencing pain. But since pain is a practical problem that warrants action and reaction from us, establishing a usage of communicating our pain to another person makes us able to talk about it. A child who has no way of expressing pain in language naturally and instinctively makes physical signs of being in pain to communicate to other people that it is in fact in pain. It as an action which only generates meaning when the parents respond to it, but when it does it creates an entire language around it. The function of language is thus not to describe reality according to Wittgenstein, but to operationalize usage of people’s shared reactions, as they happen to take shape. By drawing out reactions as the result of the child’s initial action, I mean a survival strategy in the sense that the child just does this naturally, as if it had been programmed to do so, just like a baby will scream when it is hungry.

Another good example is an individual religious experience and how Wittgenstein explains how these types of very specific individual experiences can turn into shared languages of religion. Just like I discussed in Wolterstorff’s accessibility-discussion it all bottoms in a shared basic experience or feeling. In the case of religion, he explains that we are scared of the unknown, just like a man in a small boat, lost at sea during a raging storm. We cannot fathom our own helplessness and thus we try to find explanations for it, but we only grasp things such as “absurdity”, “God”, etc. Reactions to events such as these are common and match those of everybody else. Thus, it becomes a language that we can communicate to as we all share the same conceptual scheme in the matter. For example, the man in the small boat; we all somehow understand how it would be to be present in that boat and experience that feeling of helplessness.139

This is precisely the reason why Eriksson’s interpretation of Wittgenstein is so important for my intentions. He extends Wittgenstein’s reasoning on pain and other primitive reactions to

religion and religious experience. Religious expressions as set of terminology require certain primitive reactions, certain instinctive expressions. These are so common and shared among people that it is meaningful to describe them as common experiences and observations in our language. Our religious language game can thus be described as an extension of how we spontaneously react and act in situations that warrant such reactions – those that put us in existential dilemma.

I believe that it can be useful to think of human rights as the same kind of resulting “common/shared language” that Wittgenstein sees forming from religion. The important aspect here is the usage of the individual indescribable experiences from which a common language derives. A common language about pain is an important part of why we do not think that it is right to cause others pain. This language is thus an important part to how we act and think around such phenomenon, and it becomes a part of the shared forms of lie which makes us able to understand each other. Suddenly we no longer wonder what people mean when they show an expression of pain. Language triggers reaction from people and when our reactions are conforming, then our values and norms surrounding the subject are also conforming.

To view human rights as a common language in the same way as Wittgenstein, and later James Griffin, is to already employ a philosophical anthropological focus on how humans communicate. In order to meet my aim, there is no need to conceive of human rights as something like divine law or anything more profound than a human ability, to explain its common, as opposed to its individual character. This pushes the study into the territory of created-value theory, and it is why the many philosophers are inspired by this Wittgenstenian approach (MacIntyre, Rorty and Holt, for example). I believe that if you combine this view with Stewards anthropological metaphysical lens, we will find a good middle ground which overlaps both created and inherent value.

4.4 Achieving the inclusiveness of created value without being limited to created value

Since this is not a historical account of the creation of human rights, but a philosophical explanation to highlight new areas of value, I will choose the route the provides the best explanation that allows me to live up to my criteria, and not necessarily the one that is the most straight forward. I have now managed to utilize the elements of an external power that is

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140 (Eriksson): pg. 212.
larger than any individual human, by using the minimalists metaphysics of Putnam combined with Helen Stewards anthropocentric metaphysical account of agency. The given value I have formulated does not rest upon the concept of agency, but rather on the basic metaphysical conditions that all humans must submit to, and that our instincts are thus shaped in accordance with. I specifically refer to the creation of the language of human rights – which I argue can be seen as the result of a specific set of these primitive reactions, which are directly linked to our metaphysical conditions. Stewards agency thus represents more of an explanatory tool to link the given and the created value in my justification, than the foundation for my given value. By introducing Eriksson, Wittgenstein and primitive reactions, I have now laid out the groundwork for overlapping into created-value justification. The first step in doing to is to explain how this metaphysically informed primitive reaction, that has taken the shape of human rights language, creates value for human.

I will here argue as follows: that our metaphysical conditions compel us to be social, and form societies in order to increase our capacity to interpret the world around us into our conceptual schemes, and thus cope with it and survive. This instinct, or primitive reaction continuously compel us to expand these societies as a survival strategy, a pattern that has long been observed in the field of anthropology as a human universal, and thus still within the lines of the accessibility criterion, as no excitedly drastic assumptions has been made yet.

The created value, I will argue, appears as human rights functions as legal tool to sustain these societies, and thus perpetuates our means of coping in a world bound by metaphysical conditions.

4.4.1 How the language of human rights can perpetuate human existence

Humans are fundamentally social beings and we organize ourselves, and take part in, societies. This is a concept borrowed from how Rorty argues that sentimental stories extent our empathetic scope to include other people in our frame of reference for who is human. In Rorty’s justification he provided no grounds for inalienability or necessity, but this has already been achieved here through applying to the existential element of our survival to motivate necessity, and referencing our metaphysical conditions in order to achieve the criterion of inalienability. I will instead interpret Rortys notion as a primitive reaction being directly related to our social nature and instinct, in a way that Rorty would not do as he is adhering to strictly created value. While he is forced to see the sentimentality as but a means, my loose philosophical explanation is free put it in a more given-value oriented context.
The primitive reaction of being social will lead to three things, the first one thus being seeing others as similar to oneself. This notion is fittingly also a precondition for having a language, i.e. recognizing ourselves as similar beings to attempt to interact with. Eriksson describes this as something pre-lingual that does not necessarily express itself before language (since modern societies that do not recognize each other as humans do exist), and James Griffin and Martha Nussbaum may describe this same principle as the inherent moral knowledge of recognizing others as being possessing the same capabilities and needs. I would just want to keep it at “seeing others as similar to oneself”.

The need to do so may, to achieve my purposes, stem from our metaphysical conditions. A shared human experience of standing before the unknown and needing others to survive against those conditions.

By employing Helen Stewards view that this is just an extra extensive animal trait, we see that this pattern is observable in all complex organism, and to a lesser extent in simpler organisms. However, the greater agency of humans gives us an entirely different way of interpreting the world. We see cows as agents, but we do not judge that desires and beliefs are the best explanation for their behavior. This is where humans truly differ from animals. While our choices are made within a set of metaphysical conditions, we still recognize ourselves and determine our choices based upon our reason and our interests, in a way that we would never judge a cow. Instead of a more transcendentally oriented Kantian perspective where agency is viewed as an intrinsic (almost sacred) attribute, Stewards view of agency is more instrumental. It also offers a metaphysical connection between our survival strategy of social organization, and forming extremely complex societies.

The previously mentioned powerless man in the flailing boat captured in a storm at sea is a good example of how simple primitive reaction turn into complex results as well. Eriksson describes how this man would say that his life was in the hands of God, if he had access to religious expressions. However, this expression would not be the result of a reasoning process which deduced that his life was in fact in the hands of God. Since this expression would be a primitive reaction, as all language, it would just be a certain conceptional frameworks way of expressing that experience of standing before the unknown. Stewards agency here becomes a distiller of primitive reactions; a distiller that lets us turn these reactions, or instincts, into

141 (Eriksson): pg. 195.
142 (Nussbaum, (video) Creating Capabilities: The Human Development Approach, 2010)
143 (Eriksson): pg.90.
complex actions. The shared language becomes something more, and in the end, it becomes human rights. These attributes are natural, transcendental and “inherent” to us by natural selection, but this does not bestow the individual human with any value.

4.5 Step 1. Recognizing others as similar to ourselves

To move the argument forward I posit that when humans recognize people as similar to oneself, we create space for another primitive reaction. Namely that we are a species that form societies. Forming societies is a basic social practice that we do, and this is not a controversial statement. In anthropology kinship and social organization are seen as human cultural universals, it is a constant factor which has remained the same throughout human history. One of the most obvious signs- and results of the fact the humans are inherently social is the existence of complex languages in order to communicate. If one is to find value in anything for a human rights justification that must achieve all my criteria, then our social nature seems stable and uncontroversial enough.

Social organization represents the promising middle ground between inherent and created-value too. Each individual has an instinct to form societies and engage with fellow humans, and this is one of the metaphysical survival-instinct that has allowed us to prolong our existence for so long. This is an example of the inherent value of human rights. One could object here and say that this is just another version of a created-value theory that bases its value on social practices. However, I do not agree that it is (even though an overlap is desirable to achieve a middle ground). It is BOTH value that is created through social practices, and value that is inherent in us through our metaphysical conditions.

When looking at the sentiment that facilitates this instinct of social organization one finds that it is rather the recognition of other people as similar to oneself, which stops human from attacking and killing other humans upon sight. To achieve the aim of this paper I believe that this sentiment could be described as something like the way Wittgenstein describes how we search for ourselves and our own experiences in others to establish connection and understanding. When this happens, space is cleared for social groups/individuals to connect and more complex forms of social organization to form. If one views the communicative aspect of human rights in the same way, it becomes clearer how the function of this aspect is like a door to seeing others as oneself.
4.6 Step 2. Forming societies

So, if we accept the presumption that human rights can be thought of as a shared language in the way that Wittgenstein, Robin Holt and James Griffin describes; the primitive reaction that is translated into the language of human rights specifically is the primitive reaction of social organization, stemming from- or initiating survival, according to anthropological theory (ref), which in turn stemmed from- or initiated humans beginning to realize that other humans are like themselves. Here it is a bit like with the hen and the egg; one cannot know which came first. Only that these developments were no conscious choices and that they stemmed from language usage according to Eriksson perspective.

Since common language stems from a specific usage, one could say that human rights have been operationalized from the start. However, the application and function of human rights is so complex that it requires a further function, since human rights does not simply “happen” just because we talk about them. This is where the legal aspect of a human rights regime become very relevant. Regardless of the content of the human rights regime, a legal regime is required if we are to care about- or follow them at all. What is more is that legal regimes are also a type of complex and common language, stemming from its own practical use, based on anthropological empirical studies.

Here MacIntyre’s critique about the lack of historical traces of a rights language also becomes relevant again. If a shared human rights language would be the result of a primitive reaction in response to a physical phenomenon, such as pain, then why are there not historical depictions of a legal “rights” language? Just like there a shared language to cope with pain?

To explain this, I will again use one of Wittgenstein examples of how the expression of primitive reactions can change, even though the original “reaction”, or meaning of the reaction, has remained the same throughout history. He uses this example in the context of arguing against the idea that all ancient religions must have to do with the belief in magic. He points at the fact the modern person also practices “strange rituals”, such as kissing the photo of his family without believing the kiss will be transferred to them, or taking of the hat in church without believing that he will be struck by lightning he does not. They are just traditional expressions of primitive reactions that do not make sense outside a tradition, but expresses similar fundamental sentiments that we experience today. If we view the concept of a universal, inalienable human rights regime in the same way, we do not need to find traces of the concept of “rights” in history and we can instead look for concepts that portray the same
sentiment. I.e. holding humans to a similar standard to guarantee certain preconditions or a certain order.

4.7 Step 3. Legally sustaining societies

If we view ideas (such as human rights) in an instrumental way, like Rorty does, then human rights are only valuable to the extent they help us solve practical problems. The practical problem we are grappling with today, courtesy of Helen Steward and Stefan Eriksson is and to sustain our existence.

There are of course many different functions of the “right” in human rights, and MacIntyre does not even justify legal rights but virtues instead. My problem formulation holds that the legal nature of rights are necessary for their inalienability and necessity, and those two criteria are included. This is why I do not want to talk about obligations, entitlements or protection of value here, but rather of the strictly anthropological function of a rights regime that is exclusively but universally human. No matter the contents of that rights regime. What do human rights practically do in social organization? Seen in this way human rights theoretically and practically supposes that all humans are equal in value and thus possess no more or less human rights than anybody else. Human rights are also a law in the sense that they function as guidelines with legal and/or social enforcement mechanisms like courts and social repercussion if rights are not upheld. Thus, the ambition is to be a universal social contract.

Returning towards Eriksson and Steward’s metaphysical discussions about survival instincts one could say that the rights’ function is to be an authoritative regime which sustains social organization, which in turn sustains its human individual members. Law, or any sort of regime, seems to be a condition for complex societies to exist. Anthropological data supposedly makes it clear that humans from outset of organizing ourselves into societies, have struggled with maintaining internal peace law and holding that society together.144 This need spurred the creation of law (or some sort of legal function), which kept societies of different sizes form disintegrating due to internal conflict.

The complexity of these laws gradually developed over time, and the categorizing of societies by their sizes and complexity into that of bands, tribes, chiefdoms and states makes this concept clearer. Bands and tribes would solve their internal conflicts through social pressure

144 (Hoebel, 2006 (1954)): pg. 329.
put on the conflicting parties by their kin as everyone actually knew each other. However, we still tended to kill strangers upon meeting them during this time, showing that humans are also inherently violent. About 7500 years ago when we started forming much larger societies, humans had to learn how to not kill stranger upon meeting them and the solution was found in chiefdoms. Here one actor had monopoly on authority, the use of force and diplomatic secrets, and conflicts were solved through that higher order.145 This higher order however almost always shared its authority with an even higher power in that of the God/s their divine or natural laws.

The practical difference between all legal rights and human rights is that human rights implies international action is required to ensure protection of the rights, and that other legislatures are constrained formally or morally from legislations that violate human rights.146 So they are above the legal national level, and they are above other law. Here it is worth considering that as late as during the Nurnberg-trials the Nazis standing on trial tried to form their case around the fact that they had the right to commit genocide against their own population by the power and violence monopoly granted by the state. The jump from state level to international level is a huge step, but is a step that one may say has happened.

There are often attempts at making a distinction between legal and moral rights, however as I have argued in the introduction, in this context the human rights project to be justified is characteristically a regime. This regime must also be universal, inalienable and necessary, which is not impossible. But also, because moral contains the discussion about the “good” and often context-dependent normative conceptions of justice, value, and which are the morally relevant aspects of human life. Some societies consider certain colors immoral in some context for narrative dependent reasons (such as the color red in Christianity), while other societies attribute moral value to other things (such as money lending in Islam for instance). The moral discussion is not minimalistic enough to fit in this justification. Moral language conveys belief.147 The communicative aspect – and function of human rights according to this study rather suggests that human rights CAN accommodate a universal moral, precisely because the very idea implicates the possibility of a universal narrative. It is this justificatory narrative, situated in between inherent-value theory and created-value theory, that I am trying to formulate in this paper. Inherent-value – through the metaphysical conditions we have been

145 Diamond, Jared. Discussing cultural evolution in Guns, Germs and Steel (1999), pg. 602-611
146 (Ekelaar, 2011): 238
147 (Sundman, 1996): pg. 50.
“bestowed with” through the unknown, and created – through the legal/regime function which enables us to be successful in nature.

4.8 Achieving my own criteria

In trying to justify every single human individuals’ value to achieve the criterion of universal reach one has to add something extra which bestows the value upon the human, or the human conception has to be formulated so that the very human definition entails value. Wolterstorff does the former and his narrative consequentially only speaks to believing Christians. However, his universality is truly universal – something which no other justification manages.

Out of all my theoretic tools I have none which can fill this value-granting function, make sense, and still live up to the criteria of universality in reach. Nussbaum instead does the latter and she manages to achieve a secular and (almost) neutral justification through the function of her capabilities. Her approach is closer to how a created value theory approaches this issue, but even though her justification speaks to non-Christians she fails to include all humans in her value-induced definition as she still relies on the given value of the human dignity approach.

The created-value theories fare better in achieving universality without adding something extra and Rorty manages to live up to this criterion even though his account has other problems. He does this through simply not basing his value in the human being at all. MacIntyre comes very close to achieving universality as he manages to justify all humans being applicable to moral rights. Just not the same legal regime for everybody as they vary depending on community. By adding his anthropological focus on all human’s vulnerability, he even manages to overcome the communitarian element that stops him from achieving universality in reach. It does seem as if the created value approach of completely avoiding this problem is the most reasonable, as it meets both the criteria of universality in reach, and accessibility. It simply seems too difficult to formulate an anthropological conception of the human and infuse it with value without adding something far-reaching or sweeping to it, for it to make sense (or failing to include all humans in the definition).

In order to achieve the criterion of universality in reach, I am thus removing the value from the individual and placing it in the act and function of building and upholding societies. I believe that MacIntyre is on to something when he finds his solution in communities, as an intermediary of moral value. They have to be stripped of their moral content though, to make sense without telos. This is why social organization as a fundamental aspect of human nature
is promising in achieving my aim to find a middle ground between inherent value and created value which justifies rights that are truly universal (and necessary, inalienable and accessible).

But does my explanation truly meet the accessibility and the inalienability criterion? Human rights create value for humans, but this value does not stem from “individual good experience” as in Rorty’s account (or Griffins), since I suggested that the inalienability of human rights stems from the anthropocentric given value of existence. The created value of human rights thus stem from its instrumental function as a social practice to prolong human existence. This also enables this study to utilize human nature, but in a non-normative way. Rorty for example, dedicates many pages towards pointing out how redundant human nature is in ethics, but if we limit the inclusion of human nature to factors which are given in anthropology we could remain within the neutral anthropological assumption of the human, without having to add anything extra – thus achieving both neutrality and inalienability.

It would seem as these conditions also fit well into what Steward means when she describes “agency within a certain degree of pre-set conditions”. Our instincts or preset nature undeniably compel us to act in a certain way to stay alive, such as eating, drinking, sleeping, treating problems with our body and creating a sheltered environment. This type of behavior is common among living organism to stay alive, but they are fine-tuned differently in different species. The human species in indisputably a social and intelligent agent. The universality in reach and inalienability of human rights are thus based in the very nature of the human being which compels us to form complex societal structures, and our agency has allowed us to solve this problem and create larger and more inclusive societies than ever. In this manner my inalienability, accessibility, and universality criteria have been met, and the necessity is achieved through the existential nature of the explanation as a whole. This attributes a sort of sanctity to human rights culture as an internal solution to sustaining the larger communal vessels of our own continued existence in a hostile world.

5 Conclusive remarks

5.1 Conclusion

In this essay I have firstly outlined the gap between given and created value, where the first is bestowed upon us simply by existing, and the second we create for ourselves and experience. I have explained how these two types of value create a sharp divide between human rights
justifications, where one type of value is picket and the other is rejected, something which results in unnecessarily constricted human rights justification. After a descriptive and critical analysis where given value theorist Nicholas Wolterstorff’s rights justification managed to achieve both criteria of authority, while only for a Christian audience, and Martha Nussbaum’s justification managed a secular given account that fell short on its normative and exclusive human attributes, which unfortunately does not extend to everybody. These flaws stem from their adherence to given value, as their value-accounts were reliant on assumptions about the human, that in turn were reliant on belief to make sense. In my explanation I managed to avoid both of these flaws by adding created-value elements like value based on social organization rather than the human individual, and a strictly minimalist human conception where the only metaphysical assumption is the humans have higher degree of agency than other organisms, and that this agency is inherently similar to that of other organisms. The created value theorists Richard Rorty and Alasdair MacIntyre instead both managed to achieve universality in reach easily since they held much fewer anthropological assumptions. But where Rorty fell short on justifying the inalienability and necessity of human rights, MacIntyre instead rejects the inalienability of rights completely. I managed to avoid both of these flaws by applying to the existential and metaphysical elements of instinctual survival in a state of basic metaphysical conditions. It achieves a minimalist inalienability through its metaphysical anchor-point in establishing that we have a metaphysical horizon, but not stating anything specific about what lied beyond it. Regarding the criteria of accessibility, I believe that if we have to hold any anthropological assumptions, more than what we know to be biological facts in order to justify human rights, then it is not too presumptive to hold that we have a certain degree of freedom from our metaphysical conditions. Even though we are ultimately limited by the horizon of our perceptive ability, and by the metaphysical conditions which constrains us beyond that. In doing so I attempted to provide a philosophical explanation for a middle-ground between given and created value.

I have hopefully managed to present a nuanced outlook on value, and shown that it is possible to not resort to tither of these types of value.

I believe that a middle ground between inherent and created value may create space for alternative justifications of human rights, and I also believe that there are many more possibilities to be explored. Due to time and space-constraint the ambition of my philosophical explanation was limited to the focus of achieving my criteria while at the same
time over-lapping given and created value. I am certain that this can be achieved with more finesse in the future.

5.2 Final thoughts and further research

Even though this essay is shaped as a justification of human rights, it is still in essence a philosophical explanation. This theoretical long and winding road does not aspire to provide an alternative to given- and created-value human rights justification, but rather show new possibilities in terms of the value content of these justifications. The account is also not a factual theory of how human rights have come to exist, but rather a philosophical explanation of how they might have come to exist that appears outside the bounds of the categorical divide between the story that human rights are either 1. the results something mystic/something or an attribute that makes us decisively not animals, or 2. That human rights are essentially artificial and a constructed cultural concept.

I think that an interesting direction for further studies could be an analysis more focused on the split between a natural and an artificial society, in the context of justifying human rights. This strict divide became apparent often, and especially in relation to Aristotelian perspectives, contra more anthropologically and naturalistic perspectives. Perhaps we do not need to think of human rights as something entirely different than other “natural” human actions we perform to ensure our survival in the world. Not by adhering to my unassuming philosophical explanation according to my explanation, but simply by not treating it as if it should be an entirely artificial and special more principle, or a holy virtue. Returning to the Hobbesian man from the introduction (a man because Hobbes himself designated him as such), we see this concept being displayed well. Hobbes argued that if a man existed in a pre-social “state of nature”, outside of such an artificial sphere, he is free to do what he wants as there are no “notions of right and wrong, or justice and injustice”. Implied is thus the idea that the man in an artificial society is bound by artificial principle. But is he also not bound by natural conditions and consequential principles?

Through my philosophical explanation I hope to have at least shown the possibility in finding new explanations and foundations for human rights justifications, and further exploring the private-public divide may lead to such new explanation.

Bibliography


