

Grounding Human Rights¹

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The problem of identifying and justifying human rights is one that Peter Jones addressed on several occasions with his customary lucidity and precision. It occupies several chapters of his book on rights, and he returned to it around five years later in the form of several articles written while he held a Nuffield Foundation fellowship.² I think it is fair to say, though, that the question he returned to wasn't quite the one that he had originally tackled, because in the meantime he had so to speak 'discovered culture'. That is, the main problem in the book is to find a justificatory foundation for human rights in the form of a value that can be used to underpin the range of specific human rights that we would normally wish to recognize, and what he gives us is an exemplary critical survey of the various foundations that have been suggested – moral agency, autonomy, self-ownership, needs, and so forth – which concludes that none of these can do all of the work required of it. What we might call the culturalist challenge is discussed in the last main chapter of the book, and his concluding response to it is fairly robust: 'a doctrine of human rights cannot give its blessing to practices that it identifies as morally grotesque and inhuman merely because those practices are shrouded in the mantle of culture'.³

In his later articles, by contrast, he takes the problem of cultural diversity more seriously. By the problem of cultural diversity I mean simply the problem posed by

¹ An earlier version of this article was written for the conference on *The Value and Limits of Rights: a conference in honour of Peter Jones*, University of Newcastle upon Tyne, 25-26th February 2010; parts of it were also presented to a conference on *Needs and Values*, University of Basel, 17-18th September 2010. I am grateful to both audiences for their comments and suggestions, and especially to Barbara Schmitz and Rowan Cruft for their help in preparing this revised version of the text.

² P. Jones, 'Human Rights, Group Rights, and Peoples' Rights', *Human Rights Quarterly*, 21 (1999), 80-107; P. Jones, 'Human Rights and Diverse Cultures: Continuity or Discontinuity?', *Critical Review of International Social and Political Philosophy*, 3 (2000), 27-50; P. Jones, 'Individuals, Communities and Human Rights', *Review of International Studies*, 26 (2000), 199-215.

³ P. Jones, *Rights* (Basingstoke: Macmillan, 1994), p. 220.

the fact that human rights are supposed to be universal in scope, to apply to all societies in the contemporary world, whereas some of those societies have cultures that appear to be hostile, if not to the very idea of human rights, at least to some of the rights that appear in the usual list. If this appearance is correct, then we seem to face a fairly stark choice between the value of cultural integrity, allowing people to live according to their own culturally specific norms and conceptions of the good life, and the value of protecting human rights. In his book *Rights*, Jones begins by making some conciliatory moves which have the effect of making the conflict seem less sharp, but the bottom line, as the quotation above shows, is that where conflict is unavoidable, human rights trump the claims of culture.

In his later essays, however, Jones suggests a different approach, one that takes the fact of cultural diversity as something to be built in to the theory of human rights itself. As he puts it ‘both the foundation and the content of a theory of human rights has to be of a kind that makes sense against a background of diversity. But we can ask for more than that; we can also require that it should provide for that diversity’.⁴ So how is that to be done? His answer is that we need to be clear about the status of a theory of human rights, about the kind of theory that it is. He argues that it must be seen as a ‘second-level’ theory that does not operate on the same terrain as first-order theories that tell us how human life ought to be lived. Instead, its function is to regulate interactions between people who hold rival first-order views. Or as he puts it, ‘accepting the fact of first-level disagreement, it tells us how individuals should relate to one another as individuals who are caught up in first-level disagreement’.⁵ Now if that is what a theory of human rights is supposed to be doing, this will have a big impact on issues both of justification and of substance. The justificatory question is going to be something like ‘what rights must we ascribe to each person if they are going to live together as equals in a world in which they disagree radically on first-level questions about the meaning of life and so forth?’ And the substantive answer is going to be that the rights we ascribe to them will primarily be the rights that allow them to live according to their own culturally specific beliefs. To cite Jones again,

⁴ Jones, ‘Human Rights and Diverse Cultures’, p. 33.

⁵ Jones, ‘Human Rights and Diverse Cultures’, p. 38.

‘set in the context of a world in which people have different and conflicting beliefs about how they should live, [a theory of human rights] most readily issues in the prescription that each person should be free to live according to his or her beliefs’.⁶

This view about the nature and purpose of human rights is quite radical when set against more familiar accounts, including indeed the one that Jones takes up in *Rights*: ‘the traditional political purpose of natural or human or fundamental rights has been to tell those who wield political power what they may and may not do’.⁷ The effect of the change is to make the doctrine of human rights into something like a doctrine of toleration. The revised theory may well be able to explain some rights on the standard list, for example rights that protect freedom of conscience and freedom of expression. It is much less clear how it will explain the list of socioeconomic rights – rights to subsistence, housing, healthcare and so forth. It is not even clear that it can easily explain rights connected to legal procedure such as equality before the law, or the right to a fair trial. Violations of these rights seem to have nothing directly to do with people who hold one set of cultural beliefs attempting to impose these on people who think differently, which according to the revised theory it is the purpose of human rights to prevent. Of course it is possible to take a revisionist view about the substance of human rights. But the revision here is pretty radical, and not one that I am inclined to accept. So I am not convinced that the position Jones adopts in his later essays responds to the fact of cultural diversity in the right way, at least so far as human rights are concerned.

On the other hand, I believe that he is right about two things: first that a theory of human rights does have to take the fact of cultural diversity seriously, and second that such a theory has to start by asking what the role or purpose of human rights actually is. This, I should stress, is not the way most people think about human rights: they suppose that people just *have* human rights, and don’t ask the question why we should *ascribe* these rights to human beings. My disagreement with Jones, therefore, concerns not the question he asks, but the answer that he gives, which as I have said

⁶ Jones, ‘Human Rights and Diverse Cultures’, p. 38.

⁷ Jones, *Rights*, p. 222.

comes close to making human rights into a theory of inter-cultural toleration: human rights set out the terms under which people who inhabit diverse cultures can live together on terms of equality.

On the alternative view that I wish to defend, the purpose of a doctrine of human rights is to specify a global minimum that people everywhere, regardless of societal membership or cultural affiliation, are owed as a matter of justice. They are owed this in the first place by those who wield power in the places they are living – by their governments, in the normal case. But if for some reason the local power-holders are unable or unwilling to deliver this minimum set of entitlements, then responsibility will fall on people and governments in other countries to overcome the deficiency.⁸ Thus a theory of human rights must be able to explain why people in rich countries have obligations of justice with respect to global poverty, or why outsiders may have such obligations when a country is hit by a natural disaster. It must also be able to explain why humanitarian intervention may be justified to prevent governments or other power-holders systematically violating the human rights of their subjects. In other words, the theory of human rights must identify moral claims that are powerful enough to impose potentially demanding obligations on agents who are sometimes only loosely connected to the claimants themselves, and also to override the sovereignty of established governments in certain cases. This establishes the justificatory hurdle that has to be crossed if the theory is to succeed. Moreover the theory must take cultural diversity into account precisely because it forms the basis of a pattern of rights and obligations between people who may belong to diverse cultures. So it cannot be partisan: it cannot justify rights by appeal to reasons that only have practical force for people who belong to one particular culture.

⁸ Deciding how this responsibility should be distributed among those who might bear it, and how demanding are the ensuing obligations, are separate (and difficult) issues. I have discussed them in ‘Distributing Responsibilities’, *Journal of Political Philosophy*, 9 (2001), 453-71 (reprinted in A. Kuper (ed.), *Global Responsibilities: who must deliver on human rights?* (New York: Routledge, 2005)) and in ‘The Responsibility to Protect Human Rights’ in L. Meyer (ed.), *Legitimacy, Justice and Public International Law* (Cambridge: Cambridge University Press, 2009), as well as in *National Responsibility and Global Justice* (Oxford: Oxford University Press, 2007), chs. 4 and 9.

How, then, should such a theory be constructed? One popular approach is the ‘overlapping consensus’ strategy, which seeks to justify human rights by finding separate justifications for the same set of rights from within each cultural world-view. In other words, human rights can have multiple foundations, and the reasons we give to justify them to any given person will depend on the cultural background that he or she comes from. Like Jones, I reject this approach, for reasons that he articulates superbly well in an earlier volume of *CRISSP*, and I am just going to set it aside here.⁹

The alternative is to look for grounds for human rights that transcend particular cultures, in the sense of being available to people regardless of their cultural affiliation. We might describe this approach as attempting to justify human rights by appeal to universal human interests, interests that everyone will recognize whatever culture they belong to. The question, of course, is whether there are any such interests. This general approach subdivides into two: the grounding of human rights may be either monistic or pluralistic. Either one tries to find a way of characterising universal human interests that can ground all of the human rights one wants to support, or else one gives up that attempt and recognizes a plurality of grounding features, each yielding a different set of rights. Although Jones does not explicitly endorse pluralism in his book, the tenor of his argument points in that direction, as he considers how a range of different possible grounds can support specific human rights.¹⁰ Pluralistic approaches may initially seem attractive, since it may seem to strengthen human rights to give them multiple sources of support rather than to rely on a particular ground which may fail to justify some important rights that we would

⁹ See Jones, ‘Human Rights and Diverse Cultures’, pp. 34-7, and for my own critique Miller, *National Responsibility and Global Justice*, pp. 174-8. See also the critique of Rawls on human rights in P. Jones, ‘International Human Rights; Philosophical or Political?’ in S. Caney, D. George and P. Jones (eds.), *National Rights, International Obligations* (Boulder, CO. and Oxford: Westview Press, 1996).

¹⁰ See also the following passage: ‘It may be that different rights have different foundations. If we recognize many sorts of value and if we do not accept that those many sorts of value can be reduced to a single value, it may be that different sorts of rights stem from different sorts of value. After all, rights to life, to freedom of expression, to a fair trial and to social security are rights to very different things. If people have rights to all of those very different sorts of things, they may have them for very different sorts of reason.’ (Jones, *Rights*, p. 118)

want to include on a canonical list.¹¹ But there are two corresponding dangers. One is that the failure to provide a single, coherent rationale for human rights may weaken their ethical force, since they will begin to look more like a rag-bag of claims that we are defending on quite different grounds (and what if the grounds should conflict?). The other, which is particularly germane to the present discussion, is that if we want the theory of human rights to be non-partisan, in the sense explained above, we are going to have to check, in the case of each of the grounds that we put forward, that it is accessible from within the different cultures to be found in the contemporary world. That is quite a tall order. Indeed it seems to me quite unlikely that all of the justifications for human rights that Jones considers in his book are going to pass that test. It is hard to think that self-ownership, for example, as a ground for human rights is going to have much appeal outside of societies with strongly liberal cultures. The same applies to individual autonomy as a justifying ground. So pluralism may lead us in the direction of rival, though intersecting, lists of human rights, which I assume is not a welcome outcome.

It is better, therefore, to aim for a monistic theory of human rights, so long as we can find a justifying ground that a) delivers a sufficiently extensive list of human rights, and b) is non-partisan, in the sense of providing a justification that people from all cultures have reason to accept.. My own candidate for such a theory is human need, and in the remainder of this essay I want to sketch such a theory and defend it against certain objections, including those canvassed by Jones in ch. 7 of *Rights*.

There seem to me to be three main obstacles to overcome if we want to ground human rights on human needs – ground in the sense just explained. The first is to show that the foundation is sufficiently solid. Our aim is to be able to settle controversies about human rights, and we cannot do this if statements about human needs are equally controversial. They must be objective in the sense that they can be justified to people coming from different cultures and holding different conceptions of the good life. The second obstacle might be called the problem of overshoot. Human needs might

¹¹ For another defence of pluralism, see J. Tasioulas, ‘Human Rights, Universality and the Values of Personhood: Retracing Griffin’s Steps’, *European Journal of Philosophy*, 10 (2002), 79-100.

appear to be too expansive to serve as a basis for human rights. We cannot have a human right that each of our needs is satisfied, if human rights are going to serve the political purposes that I sketched above. Meeting human needs may be a sufficiently weighty goal to ground human rights, but it appears to take us beyond human rights themselves, indeed possibly to constitute a complete, albeit somewhat utopian, political morality. The third problem is the mirror image of the second – the problem of undershoot. It might appear that needs can serve to justify *some* important human rights, but not others. We can explain why rights to food, shelter, and medical aid are human rights by appeal to the human needs they correspond to, but it is harder to do this in the case of civil and political rights such as the right to vote. The problem of undershoot might lead us back in the direction of a pluralistic theory in which some human rights are supported by appeal to needs and some by appeal to other human interests such as the interest in autonomy.¹²

I shall attempt to address each of these three obstacles in turn.¹³ But first let me indicate why needs appear, at least *prima facie*, to provide suitable justificatory grounds for human rights. One reason is that when we identify something as a human need, we identify it as an essential element in human life, and this gives it the right kind of moral urgency to support human rights. Infringing human rights is meant to be a serious matter: protecting them may be costly. If we begin with human interests in general, we draw no line between relatively weighty and relatively trivial interests, but it does not seem that the latter could ground human rights. We have to discriminate among interests, and by appealing to needs we single out those that have the greatest moral weight. A second reason is that human needs are choice-insensitive. People can of course choose to act in such a way that their needs go unfulfilled – they can refuse the food that is offered them, for example – but they cannot choose whether to have the needs in the first place. This again matches the justificatory requirement for human rights, which are supposed to be independent of the particular ways in which people choose to live their lives.

¹² See Tasioulas, 'Human Rights, Universality and the Value of Personhood' and J. Tasioulas, 'Taking Rights out of Human Rights', *Ethics*, 120 (2009-10), 647-78.

¹³ I draw in what follows on my discussion in *National Responsibility and Global Justice*, ch. 7 while trying at various points to address weaknesses in that discussion.

At this point, however, we confront the first objection to human needs as a ground for human rights, which is that needs do not in fact have the objective status that I have just been taking for granted. Even if at the individual level needs are choice-insensitive, once we move to the social level they are not. Needs, it seems, are always socially defined. What a person needs depends upon the society in which she lives, and the conditions that prevail there. So talk of human needs is in one important way misleading. We do not have needs simply as human beings, but always as socially embedded human beings. Human rights, on the other hand, must be universal in scope: the list we come up with must be the same for people everywhere.

There are two main versions of this objection. The first focuses attention on the way in which needs appear to depend on a society's level of development; the richer the society, the more extensive the needs of its citizens.¹⁴ Even if we can speak of people having basic needs for housing, education or health care, we cannot say what level of provision of these goods is sufficient to meet their needs. What is conventionally considered to be a minimum acceptable level for people living in the developed West is far higher than for people living in sub-Saharan Africa, say. A possible response to this is that although the list of human rights is universal, the actual level of provision required to fulfil each right is socially relative. But this is surely not satisfactory, and it would have the paradoxical consequence that human rights might in some circumstances impose obligations on people in poor societies to meet the expanded needs of people in richer societies.

A better response to the first objection, in my view, is to draw a distinction between human needs proper and what I will call *societal* needs.¹⁵ Societal needs are the needs people have qua members of particular societies, and they can be defined as the conditions that must be fulfilled in order for a person to lead a minimally decent life in the society to which he or she belongs. Such needs depend on contingent social norms that define standards of decency; someone whose needs are not met may still be able to function properly in a physical sense, but he will not be able to participate in the full range of activities that are regarded by those around him as together making

¹⁴ This objection is pursued in Jones, *Rights*, ch. 7.

¹⁵ For this distinction and a fuller discussion of the relationship between human needs and societal needs, see B. Schmitz, 'How to Derive Rights from Needs' (unpublished).

up an adequate human life (I assume here that there will be broad agreement within the society over what these activities are, and therefore over what counts as a need and what does not). How, then, should human needs be understood? We must look behind the contingent norms that define societal needs to find a core set of activities that together define an adequate human life *as such*. Human needs can then be identified as the conditions necessary for someone to engage in each of the activities that make up this set without having to forgo any of the others.

The question that arises here is whether there is indeed such a generic human form of life over and above the many specific forms of life that human beings have created for themselves. I believe that such an idea lies behind many of the practical judgements that we make, even if we are not fully clear as to where its boundaries lie. For example, we would have little hesitation in judging that those held captive in the Guantanamo Bay detention centre are unable to lead a minimally decent human life while they remain incarcerated. We can make that judgement without knowing anything about the societies from which the inmates came, or about their specific cultural beliefs. How might we respond if challenged to justify this judgement? Leave aside for present purposes the various harms that have been inflicted on the captives in the course of interrogation, since the denial of human needs here requires no underlining, and consider just the impact of being incarcerated in such an institution. To show that the inmates are being denied the opportunity for a minimally decent life, we would point to facts such as these: Guantanamo inmates cannot engage in productive work; they cannot build houses; they cannot form friendships or raise families; they have few opportunities for recreation, and cannot plan the pattern of their days; they cannot participate in religious or other cultural rituals; and so forth. The absence of these opportunities indicates unmet needs that belong to the captives merely as human beings. Individual people may of course be unable to fulfil one of their needs, or may choose not to because of the particular plan of life they have adopted – say if for religious reasons they decide not to raise a family. So it would be too strong to say that a person cannot lead a decent human life unless all of the needs on the list of human needs are satisfied.¹⁶ Nevertheless, if a person lacks the

¹⁶ Alert readers may at this point wonder whether it would not be better to ground human rights on *capabilities* rather than on needs, since the capabilities approach, whose two most influential defenders are Martha Nussbaum and Amartya Sen,

opportunity to meet one of these needs, this threatens her ability to lead a decent life, understood in terms of a core set of activities such as those listed above. To say that X is a human need, therefore, is to say that a person who lacks X cannot lead a decent life unless he chooses not to avail himself of X despite having the opportunity to do so.¹⁷

The form that these core activities take in any society will naturally depend on the conditions and conventions that prevail in that society. So human needs will present themselves as societal needs, which are likely to be more extensive in the sense of requiring more resources, or more specific resources, to satisfy them. The human need for food takes the form of a need for socially acceptable food – food that does not contravene cultural taboos – in each society. But we can still distinguish the human need as such in these cases. Since it is human needs, not societal needs, that are being invoked to ground human rights, these rights can be understood as universal in form, even though what we must do to fulfil them may in some cases have to take account of social circumstances.¹⁸

emphasizes the distinction between capabilities and functionings: a capability is an opportunity to achieve a functioning that need not be taken up if the person who has the capability chooses otherwise. See M. Nussbaum, 'Capabilities and Human Rights', *Fordham Law Review*, 66 (1997), 273-300, and A. Sen, 'Elements of a Theory of Human Rights', *Philosophy and Public Affairs*, 32 (2004), 315-56, for the application of this approach to human rights. It is often said that a needs approach overlooks this distinction and can lead to paternalistic policies where people are obliged to have what they need whether they like it or not. As the text above shows, however, this by no means follows. One can first define human needs and then say that what matters practically is that each person should have the *opportunity* to satisfy their needs so defined.

¹⁷ This definition needs to be refined to deal with the problem of people who lack the capacity to engage in one of the core activities I have identified – say people with severe physical disabilities that limit the extent of their bodily movement. We don't want to say that they cannot have a decent life. Equally, however, we do want to say that sufficient freedom of movement is in other cases essential to such a life – so there is a human need for freedom of movement.

¹⁸ One can draw the distinction between human needs and societal needs without assuming anything about the relative moral urgency of meeting the two kinds of needs. For an argument that we should not treat basic human needs as more morally demanding than needs that arise within specific forms of social life, see S. Reader, *Needs and Moral Necessity* (London: Routledge, 2007), ch. 5. By implication this means that by grounding human rights on human needs, one does not yet say anything

So far I have been trying to meet the objection that holds that needs cannot ground human rights because they are socially relative, in particular by being relative to levels of economic development. But an alternative objection holds that they are *culturally* relative, in the sense of being dependent on culturally specific notions of what is important in human life. An example may illustrate the objection. Suppose someone asks whether religious education is a human need – religious education in the sense of being thoroughly immersed in the beliefs and rituals of a particular religion. It seems that this question cannot be answered without first settling the question of the proper place of religion in human life. Suppose one holds that religious faith and practice are of supreme importance. Then it would seem that a minimally decent life must include these, and someone who is not given the kind of education that would allow her to lead such a life has one of her essential needs left unfulfilled. From this perspective, the fact that many people in the contemporary world appear to live lives that are more than minimally decent despite having little or no religious content cuts no ice; a minimally decent life must, *inter alia*, be a religious life. Moreover from the same perspective it may well appear that needs that are assumed by others to count as basic human needs, such as the need for sexual relationships, should be deleted from the list.

The thrust of this objection is that the only human needs that are capable of being defended cross-culturally will be basic physiological needs, such as needs for food and water; and there is no guarantee that even these will be given priority over other needs whose urgency springs from culturally specific notions of value. Clearly, this would provide too slender a basis for an adequate theory of human rights. So we must find some way to deflect the force of the cultural objection. I want to say two things in response to it.

The first is that we may be able to salvage the idea of an agreed set of human needs by formulating these in a suitably abstract way. We may not agree that there is a need for religious education as such, but we can agree that there is a need for education, and this can be spelt out as a need for an education that prepares children to take part

about the relative importance of protecting these rights as against rights of other kinds.

in the range of activities that together constitute a decent life in the society to which they belong. So the specific content of the need will depend upon the character of the society in question, and in the case of a society in which religious participation is a central activity this will obviously mean that education must have a significant religious component. It's true of course that this way of understanding the need won't satisfy the person who stands within the culture we are considering. From his perspective there is a primitive human need for religious education, not simply a derivative need that arises in a society in which religion plays an important role in structuring social life. Such a person must think that children in Western liberal societies who receive an essentially secular education are not having one of their human needs met. On the other hand, it would be difficult for him to deny that the education that is provided is necessary for children who as a matter of fact are going to live in these societies, and must therefore be equipped with certain skills if they are going to participate fully in economic and social life. He must admit, in other words, that when children are Western societies are taught to be literate and numerate, their human need for education is being met – albeit, from his perspective, not in full. So the position is that we have cross-cultural agreement on there being a human need for education, and partial, but not complete, agreement on what this means more concretely in given circumstances.

My second response to the problem of cultural relativity is that we may be able to agree on a list of human needs without necessarily agreeing on the relative importance of meeting different needs on the list if for practical reasons it is impossible to fulfil them all. If we define human needs with reference to the core activities that make up the human form of life, there is likely to be disagreement across cultures about how important each of these activities is relative to the others. Some may rank productive work more highly than religious observance; others may reverse this priority. These relative weightings are likely to make a difference when it comes to drawing up a list of human rights, particularly when it is a question of delineating the scope of one right as against that of another. Let me illustrate this point: consider the right to liberty and the right to personal security. The boundaries of these rights are not fixed. In order to protect the right to security, we need to restrict the freedom to act of those threaten it, for example by incarcerating criminals convicted of violent crimes. But where the balance should be struck – for example in terms of the length of sentences imposed on

particular offenders – can't be determined without weighing the relative importance of the human needs that lie behind the rights in question. This exercise might yield somewhat different results in different societies, and one could not then say that human rights were not being respected because society S imposed greater restrictions on the freedom of those who posed a security threat than we would wish to impose in our society (there may perhaps be a threshold beyond which we would judge that the right to freedom was being infringed). A similar point can be made about the case where, because of a scarcity of resources, human rights to education and to basic health care cannot both be fully met together; which should then be given priority will depend on socially specific judgements about the relative importance of the two human needs at stake. It should not be part of a theory of human rights to offer an authoritative resolution in such a case.

Let me try to summarise my argument about the objectivity of human needs. I have said that we should understand them as setting out the conditions for a decent human life, and a person has a decent human life when she or she has the opportunity to engage in a range of human activities that are reiterated across societies in such a way that we can speak meaningfully of a human form of life. It is therefore possible to say of people in a particular society that they fail to recognize need X, because they do not see that without X, people cannot engage in one or more of the core activities. In that sense they have made a mistake about human needs. On the other hand, since these generic activities always take concrete forms, there can legitimately be disagreement about needs that arise in relation to any one such concrete form; in my example there cannot be legitimate disagreement about the human need for education, but there can be disagreement about whether there is a human need for *religious* education specifically. There can also be legitimate disagreement about the relative weight that should be given to different human needs in cases of conflict. In the light of this, my suggestion is that human needs are sufficiently objective to ground human rights; the disagreement that can legitimately arise about them does not undermine the doctrine of human rights once we understand the purpose that that doctrine is meant to serve. It does not attempt to cover all of the needs that should be met, as a matter of justice, in any particular society, but to specify a minimum set of freedoms and resources, in whose absence the legitimacy of the local regime is put in question and global obligations are potentially triggered.

But even if we restrict ourselves to the set of human needs that are *not* subject to reasonable disagreement, there is still the question whether meeting these needs in full may impose requirements that are too demanding from the perspective of human rights. This is the second obstacle that appears to lie in the path leading from human needs to human rights – what I called the problem of overshoot. People, in other words, will need certain things that they cannot claim as human rights, because to allow that claim would be to demand too much of others – of governments in the first place, but through them of the people who would have to supply the resources to satisfy the need. Medical needs provide the most obvious illustration. Some medical conditions require round-the-clock supervision, for example; others require the supply of scarce body-parts. If the human right to medical care were interpreted so as to require that these needs were met, then although a government could take steps to try to ensure this, there is no guarantee that it will succeed unless it is prepared to coerce people into taking on the necessary supervisory roles or giving up their body parts. But this would mean interfering with what seem *prima facie* to be the human rights of the people being coerced – rights to personal freedom and bodily integrity – which in turn would be justified by *their* human needs. One person's need conflicts with the needs of others in such cases, and it therefore seems impossible to appeal to needs themselves to resolve the conflict and establish where human rights begin and end. If we stipulate that the human right to medical care does *not* include the right to round-the-clock supervision or to be given vital organs, then it seems that we are arbitrarily deciding that one set of needs should count when rights are at stake while another set should not.

Is there any way forward here? The first step is to grasp that we should not see the justificatory relationship between human needs and human rights as one-to-one, in normal cases. Perhaps occasionally there will be a need that is so clear and so compelling that it generates a corresponding right without much argument. But more often a particular need will lend support to several rights, while on the other hand a particular right may be grounded in several distinct needs. For instance the human need for social contact with other human beings can help to ground rights to freedom of movement, freedom of association, and freedom of expression. What this suggests is that we should see the justificatory relationship as holding between the set of

human needs and the set of human rights – the justification for the latter being that by recognizing the human rights included in the set, we provide those who hold the rights with the best possible opportunity to have their human needs met. That would mean that where needs conflict – where one person’s need for X can only be met by sacrificing other people’s need for Y – we have to decide which need takes precedence before we can decide how the corresponding human right should be defined. We cannot at this stage assume anything about human rights themselves – we cannot discount the need for X on the grounds that meeting it would require us to deny others their human right to Y, for we have not yet settled that there *is* a human right to Y, as opposed to some more restricted right.¹⁹

How then should we proceed? We might begin by considering which need was more significant, asking what would be the impact on someone’s life if the need was not satisfied. This would mean, however, always giving priority to medical need in the kind of case I am considering. If John is suffering from kidney failure and is not provided with a transplanted kidney, then he will either die, or at least will have to undergo the rigours of a dialysis regime with its attendant side-effects. If Frank is forced to supply a kidney to John against his will, he may find this a traumatic experience and suffer the psychological after-effects, but the risk that he will subsequently suffer a loss of bodily functioning is very small, and so he is much more likely to be able to lead a sufficiently good life than John will be if the kidney is not transplanted. So following this line of thought, in place of a general right to bodily integrity which would prohibit any taking or use of a person’s body parts without her consent, we would have a more limited right that allowed the compulsory taking of organs in circumstances where the predicted cost to the supplier was much smaller than the predicted cost to the recipient if the body part is not transferred.

¹⁹ My discussion in *National Responsibility and Global Justice*, pp. 187-8 is vulnerable to this criticism, effectively pressed by Rowan Cruft in ‘Kamm and Miller on Rights’ Compatibility’, *Ethical Theory and Moral Practice*, 13 (2010), 393-401. What follows is an attempt to restate my position in a way that avoids Cruft’s critique. Cruft argues that the ‘holistic’ strategy for moving from rights to needs, while it can avoid begging the question by already taking certain human rights for granted, will nonetheless generate stronger assistance rights (and correspondingly weaker rights to non-interference with the person) than we can accept. I try to show why this does not follow.

Most of us would find this conclusion repugnant, but are we right to do so? The argument I've just sketched in favour of limiting the right to bodily integrity focussed on just a single need, the need to have functioning bodily organs. But if we think about why we value the full-blown right to bodily integrity, there is clearly more to it than that. Having control over our bodies, and in particular being protected against unwanted interference by others, is important to our sense of ourselves as human agents in a number of respects. Why, for example, do people find it distressing and unsettling to be touched in unwanted ways by others even though no physical harm is involved? Or why would I feel violated if, for example, somebody came in and spray-painted my body while I was asleep (with no harmful side-effects)? What is wrong with forcing somebody to use their body in a way that goes against their will, again in the absence of any further physical harm? This suggests that there are a number of human needs related to the body that together go to justify the right of bodily integrity of which the need to have a functioning set of vital organs is only one. We cannot just look at John and Frank and ask whose need is more urgent, and therefore who should be granted the corresponding right. Instead we have to ask about the overall impact, in terms of fulfilling needs, of having an unqualified right of bodily integrity against having a more qualified one. Indeed we have eventually to go further, because each of these rights will have to be integrated into the full set of human rights. That will mean considering, among other things, how one right might either support or hinder the fulfilment of other rights. In the present case, for example, a right to bodily integrity supports the right to freedom of conscience, since it disallows a person being compelled to let her body to be used in ways that contravene her beliefs (many Jehovah's Witnesses, for instance, reject organ transplants as part of their wider rejection of blood transfusions which they see as contrary to biblical teaching).²⁰

The approach I have suggested may also help to address the problem of needs that clearly cannot be translated directly into human rights, such as needs for love and

²⁰ Of course it would be possible to combine a weaker right to bodily integrity – say one that permitted the state to require people to donate blood or other body parts under certain circumstances – with a right of conscientious refusal that recognized religious grounds for refusing to donate. That would still be a lesser right to freedom of conscience, however, because the onus would be on the person concerned to demonstrate that he or she had such grounds.

friendship. Although there is no way to guarantee the satisfaction of these needs by legal or political means, by creating a structure of human rights we can also help to create an environment in which a person's chances to fulfil these needs are maximised. As suggested above, rights such as freedom of movement and association make it easier for people to satisfy their need for social contact, and a fortiori for these deeper emotional needs. Thus such needs can support human rights, while also giving individual people reasons for action that go well beyond anything that could be turned into a formal obligation.

That concludes my response to the problem of overshoot. It is clear that the moral force of needs carries us well beyond human rights, but that does not constitute an obstacle to giving needs a foundational role in debates about rights, provided their role is understood in the way I have suggested – that is holistically rather than in terms of one-to-one connections. This also allows me to restate slightly the conclusion of my earlier argument about cultural relativity. I suggested that the way particular rights were defined would depend upon the relative importance that a culture attaches to different human needs. We can now see that this suggestion should really apply to the *set* of human rights, taking into account the role a particular right will have in supporting other rights as well as its direct function in fulfilling specific needs. For each society, then, it will be possible to say which set of human rights, more precisely defined, best meets its members' needs. This does not mean that it will be impossible for people from different societies to agree upon formal declarations of rights. It just means that when these documents are being put to use, for example to criticize government policy or to mount a legal challenge, there has to be what European lawyers call a 'margin of appreciation' which permits some flexibility in the way the documents are interpreted in different states.²¹

Let me turn finally to the problem of undershoot. Are needs a rich enough source of human rights - can they generate all of the human rights that we think should belong

²¹ This is the phrase used by the European Court of Human Rights when it defers to national courts over the interpretation of some element of the European Convention on Human Rights. There may however be some ambiguity over its meaning, as suggested in G. Letsas, 'Two Concepts of the Margin of Appreciation', *Oxford Journal of Legal Studies*, 26 (2006), 705-32.

on the canonical list, or do we have supplement them with other values, in other words embrace some version of pluralism in our justificatory theory of human rights?

The main concern here is that an appeal to human needs may be able to explain and justify what we might call *material* human rights, such as rights to subsistence and basic health care, but it is much less clear that it can explain liberties, like the right of free speech, or political rights, such as rights to vote or form political associations. It does not look at first glance as though there are human needs that will go unmet if these latter rights are not recognized; it does not, in other words, seem that our idea of a minimally decent human life must include the activities these rights protect as necessary components. So it seems that either we will have to broaden the grounds that we appeal to in support of human rights, or else we will have to shorten the list of human rights significantly, leaving out some of the rights that feature prominently in familiar documents such as the U.N. Declaration.

I want to defend some shortening of the list, and not merely by cutting out rights such as the notorious right to periodic holidays with pay that somehow found its way into the U.N. Declaration. If we understand the purpose of a human rights doctrine, as I suggested earlier, to be one of specifying the minimum entitlements that people everywhere can claim as a matter of justice, first from their own governments and failing that from the wider international community, then we must at the same time acknowledge that the formal documents in which human rights are codified, including the U.N. Declaration, often go beyond this purpose. They do not merely specify a minimum, but set out aspirations that states should try to meet in favourable circumstances. Indeed this purpose is hinted at at the beginning of the Declaration, when it is described as setting a ‘common standard of achievement’ for all peoples, who are urged to ‘strive by teaching and education to promote respect for these rights and freedoms, and by progressive measures, national and international, to secure their universal and effective recognition and observance’.²² There is nothing wrong with aiming high and setting out a long-term goal to be achieved by ‘progressive measures’, but this is different from listing rights whose fulfilment is a matter of justice here and now.

²² I. Brownlie and G. Goodwin-Gill (eds.), *Basic Documents on Human Rights*, 5th ed. (Oxford: Oxford University Press, 2006), p. 24.

So the issue is not whether a needs approach can deliver all of the rights found in the U.N. Declaration, or any of the later documents drawn up in its wake, but whether it can produce a catalogue that is long enough and full enough to represent the minimum demands of global justice. Let me suggest three ways in which we can justify civil and political rights on the basis of human needs.

First, a number of such rights will follow directly from the idea of the conditions that are necessary for a minimally decent human life. Rights against slavery, against torture, against arbitrary arrest or detention, all fall into this category. Human beings need to be protected against these forms of oppression if they are going to be able to plan and organize their lives securely. Freedom of conscience and expression, and freedom of association, can be justified in the same way, once we recognize that a minimally decent life must involve having the opportunity to communicate and interact with others. The fact that a small number of human beings have chosen at certain moments to withdraw from society and live as hermits should not obscure the equally obvious fact that the human form of life itself is social and made up of shared practices. For a person to have a minimally decent life, she must have the opportunity to engage in these common practices as far as she is able, and for that she needs to be able to associate with others, speak, sing, dance, etc., depending on the case. Rights that protect such elementary freedoms can in this way be justified by appeal to the rudimentary needs of a social animal.

Second, among the needs that human beings have is the need for recognition. This is a difficult idea, and one should resist the temptation to try to extract too much from it. It seems clear, however, that humans cannot lead minimally decent lives unless they achieve a certain standing, at least in the eyes of those who matter to them. Being systematically demeaned, ignored, treated as a non-person, undermines a person's capacity to lead a decent life even if the material conditions for such a life are present and the freedom to lead it is secured. So this may justify rights to be given a certain legal status and to be protected against certain forms of arbitrary treatment. The U.N. Declaration states that 'everyone has the right to recognition everywhere as a person before the law' (Article 6) and also that 'everyone has the right to an effective remedy... for acts violating the fundamental rights granted him by the constitution or

by law' (Article 8).²³ These formulations are somewhat vague, but I think they capture the idea I am invoking here. Recognition in this narrow legal sense is a necessary, although perhaps not sufficient, condition for being recognized as a person in a wider social sense. Sandwiched in between these two rights is the right to 'equal protection against any discrimination'. Here I think we have to tread more carefully. It does not seem that a general right against discrimination, in the sense of a right against the existence of any law or policy that treats different categories of people differently, could be justified on the basis of the human need for recognition. That need can be met by being recognized as a person who belongs to a certain category or occupies a certain role. So a society that enshrined clear distinctions of status, but nevertheless provided secure recognition for people qua members of each status group, could not be faulted from this perspective. Liberals would of course criticize such an arrangement in the name of equality, but a strong, universal, right of non-discrimination has to be seen as an expression of this liberal world-view, and therefore not a human right according to the theory I am advocating.

Third, some civil and political rights can be justified instrumentally, on the grounds that they are necessary to protect other rights whose basis in human needs has already been established. The right to a fair trial and the right to political representation fall into this category. One could not argue that these rights correspond directly to human needs. But it has long been recognized that a person who lacks such rights is vulnerable to having other, more basic, rights violated or taken away entirely. Core freedoms such as freedom of expression are only secure if there are legal procedures in place to protect people who might otherwise be subject to arbitrary interference by agents of the state. Equally, material rights such as the right to subsistence have to be protected by forms of representation, democratic or otherwise, that put pressure on state officials to ensure that the right is fulfilled. Rights such as these are often regarded as intrinsically valuable, and in liberal societies they have an important expressive function as component parts of the idea of equal citizenship. But if we are going to justify them by appeal to human needs that are universal in scope, then the justification we offer has to be instrumental, involving an appeal to the accumulated

²³ Brownlie and Goodwin-Gill (eds.), *Basic Documents*, p. 25.

weight of evidence that where these civil and political rights are not implemented, other rights are very likely to be violated.²⁴

It might be argued here that in order to deal with the problem of undershoot, I have tacitly adopted a pluralistic grounding for human rights, referring to different human interests to justify different rights rather than grounding them all in human needs. For example, I have appealed to a need for recognition, but could one drop the reference to need and simply say that it matters greatly to human beings that they are given a certain kind of recognition, and it is this interest that explains why there is a human right to legal status and to legal remedy for breaches of rights? Now it is certainly true that the account I have given appeals to a wide range of human needs, not merely to the physical necessities of life, but it is not just a verbal manoeuvre to describe them all as needs. The key distinction, as I see it, is between conditions that are simply of great value to human beings, and conditions in the absence of which they cannot lead decent lives. In drawing this distinction, I am not tacitly assuming value pluralism. It may be true that what human beings value most differs greatly. But suppose, for instance, that every human being took great pleasure in listening to opera – suppose it really mattered to them to go to the opera from time to time. It would still not be the case that opera attendance was a human need. People's lives would be a bit colourless if it was no longer possible to go to the opera, they would sigh wistfully when they remembered the days when they could, but still they could lead decent lives without that wonderful experience. Even a universally shared interest, I am suggesting, cannot ground a human right, whereas a universal need can. Why is this so? Rights give rise to obligations: human rights create obligations on governments and others to protect and fulfil them. No such obligations arise when values and interests that are not needs are at stake. Certainly if there were a universally shared interest in opera, there would be a good reason to promote it. A Bill Gates or George Soros who offered massive opera subsidies would be a great benefactor of humanity in the circumstances I am imagining. But there couldn't be an obligation to do this, on anyone's part. I cannot explain why needs can ground

²⁴ An obvious example here would be Amartya Sen's research on the (negative) relationship between democracy and famines: see A. Sen, *Development as Freedom* (Oxford: Oxford University Press, 1999), chs. 6-7. In short, 'no substantial famine has ever occurred in any independent country with a democratic form of government and a relatively free press' (p. 152).

obligations whereas other interests, however strong, do not; that is a fundamental intuition that I take for granted here. But if the intuition is correct, then for human rights to be genuine, obligation-imposing rights, they must be justified by reference to human needs. So it is incumbent on us to show that all the needs we appeal to in the grounding process really are needs. If that is not the case – if the justification for human rights is in fact pluralistic – then the doctrine acquires a different status. It becomes something like a statement of human priorities – these are the freedoms and resources that we value most. That might be worth having, if it were possible to obtain agreement on its content, but it would not serve the purpose that I have suggested the doctrine of human rights is intended to serve.

So, to summarise, I have identified three obstacles to grounding human rights on human needs. The first is the problem of objectivity – are human needs sufficiently objective to play this foundational role? In response to this I distinguished human needs proper from what I called societal needs, and suggested that although there was still some scope for legitimate disagreement about how human needs should be concretely specified, this was not so wide as to undermine their objective status. The second is the problem of overshoot. In response to this, I suggested that the grounding relationship should be seen as holding between the set of human needs and the set of human rights, so that where needs conflict, we make trade-offs before specifying the optimum set of rights. The third is the problem of undershoot. Here I suggested three ways in which human needs can ground civil and political rights – directly, in some cases, instrumentally in others, and specifically through the need for recognition, in yet others. And I have suggested that this can be done without venturing down the primrose path of pluralism.

Having spelt out my favoured method of grounding human rights, I want finally to return to Peter Jones and his formulation of the challenge posed by cultural diversity for human rights. In responding to that challenge, his main concern is with the question whether human rights can be seen as a threat to non-Western cultures. Is the doctrine of human rights an individualistic doctrine in a sense that places it at odds with cultures that place a great deal of value on communal activities of various kinds? I think that Jones's strategy here is very successful. He distinguishes different senses in which we might describe human rights doctrine as individualistic, and then points

out that once the relevant sense is identified we can see that human rights pose no necessary threat to communal cultures; indeed they may help to protect the conditions under which such cultures can flourish and develop as their members exercise rights of cultural self-determination.²⁵ So he gives us an argument that shows why non-Western cultures should not *reject* human rights as a threat to their way of life. However this is not quite the same as an argument for why, positively, they should embrace them. As I suggested earlier, Jones in his later writings effectively presents human rights as a recipe for cultural toleration: these are the rights that will allow each person, or each group of people, to live according to their own ideas of what is valuable in life. But if that is going to be the selling point, then why not move directly to a doctrine of cultural non-interference: why not say that each culture simply has the right to organize its members' lives according to their own standards of value without interference from others? Human rights doctrine doesn't go so far, because it *does* justify interference in cases where a politically organized culture restricts freedoms or denies opportunities in a way that infringes its members' basic rights. In Jones' own words, it is 'a fighting doctrine'²⁶: it fights against rights abuses whether or not they have a cultural defence. ('Fighting' here should not of course be taken literally: what form the action to protect human rights should take will depend upon the case.)

But if that is so, and if we want to be able to justify human rights to people living in different cultures even in cases where we are going to appeal to these rights to condemn some of their practices and encourage or possibly require change, then we require foundations. We must be able to explain why there is a right to bodily integrity that prohibits compulsory female circumcision, or a right to freedom of conscience that prohibits people being required to participate in their country's official religion. My suggestion has been that a theory of human needs can do this. It is non-partisan by virtue of the fact that it rests upon the idea of a minimally decent human life that everyone should accept simply because they themselves participate in

²⁵ Jones, 'Individuals, Communities and Human Rights' esp. pp. 203-4, 208-11; Jones, 'Human Rights and Diverse Cultures', pp. 42-5.

²⁶ Jones, 'International Human Rights', p. 183; Jones, 'Human Rights and Diverse Cultures', p. 28.

one or other version of the human form of life and can therefore recognize its essential components. It is also an advantage of the human needs approach that the list of rights it produces is not too ambitious. It does not, for example, generate a right to full-blown democracy or to unlimited freedom of religious practice. The list may therefore disappoint Western liberals who want it to play a standard-setting approach and to use it to criticize their own governments for various lapses. But equally it becomes a more powerful weapon when turned against regimes that really do make it impossible for their subjects to live lives that anyone could regard as minimally decent.