



Are Human Rights Conditional?

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Introduction

We usually think of human rights as attaching unconditionally to all human beings. Bracketing off, as I shall do throughout this article, the issue of children's rights (which raises the question of the conditions under which a person can claim the *full* set of human rights), we see human rights as claims that do not have to be earned. You have them simply by virtue of your humanity without having to do anything special to be awarded them. Different theories are put forward to explain which feature or features of human beings ground the ascription to them of human rights, but the relevant features are supposed to be universally shared. Human rights are also often said to be inalienable: they are not things that a person can lose by virtue of the way she acts.² These two thoughts taken together amount to the claim that human rights are unconditional: they do not have to be earned, and they cannot be alienated.

That is how we regard human rights in theory, but our practice seems to be different. We act in ways that deny people at least some of their human rights, and we claim to be justified in doing so. In particular we wage wars in which people are killed and wounded, seemingly violating their rights to life and bodily integrity; and we punish people by imprisoning them, seemingly violating their right to freedom of movement as well as a whole host of others. A few might say that, for this very reason, such practices cannot be justified. But much more

¹ This essay was originally written to be delivered as the Kobe Lecture, Doshisha University, Kyoto, Japan, 9 July 2011. Earlier versions were also presented to the Scandinavian Conference on Normative Political Philosophy/Theory, Vejle Fjord, Denmark, 30 May-3 June 2011, the Nuffield Political Theory Workshop, 14 November 2011, the MANCEPT seminar, Manchester University, 17 November 2011, the CSSJ seminar, Oxford University, 16 January 2012, and the PPEL Kick-Off Conference, University of Richmond, 27-28 January 2012. I am very grateful to the participants in all of these events for their comments and questions, and especially to Richard Dagger, Thomas Douglas, Francois Hudon, Cecile Fabre, Luara Ferracioli, Joanna Firth, Jeffrey Howard, Tetsu Sakurai, Hirohide Takiwaka, Katsu Tomisawa and Andrew Williams for written commentaries which have been invaluable in helping me to revise it.

² I leave aside here the question of voluntary waivers of human rights, such as occur, in the short term, when a person agrees to have invasive surgery. My interest is in whether than human rights can be lost other than by the consent of the right-holder.

commonly it is believed that under the right circumstances warfare can be just, and likewise custodial punishment, and so on the face of it we appear to believe that human rights are not unconditional after all. Either, it seems, they can be lost entirely, or at least there are circumstances in which they can easily be overridden. This then generates the problem that my article addresses: how can we announce in our manifestos that human rights are held unconditionally by all human beings, while in our everyday practice – fighting wars or punishing criminals – we appear to violate them without being troubled by the fact.³ Is there some way to reconcile these two positions? In particular, do we need to distinguish between human rights that really are unconditional – cannot be lost no matter what their bearer does – and others that may be forfeited by acting in certain ways?

My interest in this question has been provoked by two contemporary political issues, which led me to reconsider a celebrated philosophical text, John Locke's *Second Treatise of Government*. The first issue is somewhat parochial and involves the clash (still unresolved) between the British government and the European Court of Human Rights over the political rights of prisoners. Historically, following the 1870 Forfeiture Act, British law has denied all convicted prisoners the right to vote. This blanket ban has been challenged by prison inmates appealing to the European Court, and the Court has insisted that on human rights grounds the ban must be lifted. The Court, however, has not said that every prisoner must have the right to vote. Its complaint is about the indiscriminate character of existing British law; it would be satisfied if removal of political rights became contingent on a judicial investigation of

³ Later on in the article I shall discuss a number of possible ways in which theory and practice might be reconciled, but let me respond here to one challenge to my initial formulation of the problem. This holds that human rights are always understood to have exceptions built into them, allowing for loss of rights in certain circumstances. In other words, when human rights are described as 'inalienable' this means only that they cannot be alienated in certain ways, for instance by signing contracts of servitude. Support for this challenge might come from Article 29 of the *Universal Declaration of Human Rights* which speaks, rather vaguely, about the 'limitations' to which everyone is subject in exercising their rights, on grounds of public order, etc. More concretely, the *International Covenant on Civil and Political Rights* goes into some detail about which practices of punishment are to be allowed and which are not (including even the death penalty in some cases), thereby implying that the loss of rights entailed by these practices is permissible. My reply is that these official documents give no explanation as to why such exceptions should be written in. Philosophical defences of human rights spend much time laying out the grounds of these rights, but typically fail to address the question of when and on what basis restricting them is justifiable. So the issue that arises is whether current state practice, as reflected in the official documents, can be given a coherent rationale. In order to attempt this, we need to tackle the issue of rights conditionality directly.

individual cases. In other words both sides appear to accept the *principle* of forfeiture – meaning here that someone who commits a crime of sufficient gravity thereby forfeits his or her human right to vote – while disagreeing about whether all crimes that receive custodial sentences cross that threshold regardless of the particular circumstances of the perpetrator. Some liberal critics, however, deny this: their view is that criminals should lose only such rights as are an unavoidable corollary of their imprisonment. All other human rights, including political rights, are held unconditionally. But they too, it seems, must accept the principle of forfeiture in the case of the rights that inevitably *are* lost when a person is imprisoned. The underlying premises according to which this whole argument is being conducted therefore remain very unclear. How can we decide which human rights may be forfeited, and under what circumstances?

A more momentous political issue concerns how liberal societies may respond to those engaged in terrorist activities that threaten their citizens. May they, for example, preemptively kill those who have been identified as suicide bombers? May they intern terrorist suspects without trial? May they torture known terrorists to gain information about forthcoming attacks? Responses such as these put some of the most fundamental human rights of the suspected terrorists into question. But one often hears it said that by engaging in a campaign of terror, these individuals have lost the protection of such rights. If the measures in question are indeed necessary to protect innocent people, it is not wrong to implement them, so it is claimed.

Locke on rights-forfeiture and punishment

These were the issues that led me to revisit certain passages in Locke's *Second Treatise* in which he appears to assert quite boldly that human – or as he would say, natural – rights are indeed conditional. Locke is, of course, widely credited with inspiring much of the later development of human rights theory. But although his influence on contemporary liberalism is undeniable, it is important also to recognize that his liberalism was developed as a fighting doctrine. Locke understood that liberal societies might have to defend themselves against would-be oppressors in their midst, and that gave his liberalism a harder edge than it usually has today. In 1689 (or thereabouts) one could not assume that liberal institutions were so firmly entrenched that liberal tolerance could be extended to those who sought to destroy

them. This helps, I believe, to explain the conditionality of Locke's theory of rights, which I shall now try to display and unravel.

The relevant passages in the *Second Treatise* are those in which Locke is explaining how we may respond to those who have harmed us, or who approach us threatening harm. This category of persons may include enemies in war, common thieves, and political tyrants. In all these cases, Locke claims, someone who by virtue of his aggressive conduct ceases to acknowledge 'The Rule of Reason' loses his status as a rights-bearing human being, and may be treated in the same way as a dangerous animal. Here, for example, is Locke explaining how an aggressor forfeits his right to life:

For having quitted Reason, which God hath given to be the Rule betwixt Man and Man, and the common bond whereby humane kind is united into one fellowship and societie; and having renounced the way of peace, which that teaches, and made use of the Force of War to compass his unjust ends upon an other, where he has no right, and so revolting from his own kind to that of Beasts by making Force which is theirs, to be his rule of right, he renders himself liable to be destroyed by the injur'd person and the rest of mankind, that will joyn with him in the execution of Justice, as any other wild beast, or noxious brute with whom Mankind can have neither Society nor Security.⁴

This idea, that the aggressor, by his actions, leaves human society and joins the beasts, is repeated in several places in the book – 'may be destroyed as a Lyon or a Tyger', (p.274), 'for the same Reason, that he may kill a *Wolf* or a *Lyon*' (p. 279), 'as any savage ravenous beast, that is dangerous to his being' (p. 389), and so forth. This may give the impression that Locke holds what we might call a strong forfeiture view of rights, namely that once someone embarks on the unjust use of force against another, he immediately loses all of his rights, since this is what the wild beast analogy would suggest. (Locke, we can assume, would not have thought of animals, let alone savage ones, as having any rights.) And indeed there are places in which Locke appears to hold a strong forfeiture view, for instance:

⁴ J. Locke, *Two Treatises of Government*, ed. P Laslett (Cambridge: Cambridge University Press, 1988), p. 383. Subsequent page references are to this text.

Whosoever uses *force without Right*, as everyone does in Society, who does it without Law, puts himself into a *state of War* with those, against whom he so uses it, and in that state all former Ties are cancelled, all other Rights cease, and every one has a *Right* to defend himself and *to resist the Aggressor*. (p. 419)

But this – ‘all other Rights cease’ – is not Locke’s considered view, for in other places he is careful to distinguish between the rights that the aggressor loses and those that he does not. When an armed robber threatens me on the highway, I am entitled to kill him, but I am *not* entitled, if I can overpower him, to steal his possessions and let him go (p. 390). The robber forfeits his right to life through his unjust use of force, but not his right to property. So now it begins to look as though what Locke is giving us is not a theory about the wholesale forfeiture of rights, as suggested by the lion and tiger passages, but a theory of self-defence. The attacker loses his right to life because I have the right to defend myself against attack, killing him in the process if necessary. But other rights that are irrelevant to the threat he poses are retained.

This also, however, turns out to be incorrect, for two reasons at least. One is that Locke clearly intends his forfeiture story to justify punishment after the event as well as self-defence at the time of the aggression. As is well known, Locke defends the natural right to punish, which he separates from the right to demand reparation for the injury that the aggressor has inflicted.⁵ The aim of punishment is to induce the evil-doer to repent what he has done, and to deter others from doing similar deeds. This cannot be understood as a form of individual self-defence on the part of the victim; punishment will usually be inflicted at a time when the aggressor no longer poses an immediate threat to anyone. And this connects to the second reason, which is that Locke sees aggression as an offence against human kind generally, not just against the person who is its direct object. This is why others besides the injured person may also punish the wrongdoer – the latter loses rights against people at large, not only against the direct object of his wrongdoing.

The details of Locke’s theory of punishment are not important here.⁶ What matters to us is understanding Locke’s account of how natural rights are lost. It is clear that he sees these

⁵ Locke, *Second Treatise*, ch. 2.

rights as attaching to people by virtue of their capacity to reason. In the background stands Locke's claim that anyone in whom this capacity has not been impaired 'through defects that happen out of the ordinary course of Nature' (p. 307) is able to grasp the laws that God has laid down for the guidance of mankind.⁷ In broad outline these laws tell us that 'being all equal and independent, no one ought to harm another in his Life, Health, Liberty, or Possessions' (p. 271). The laws confer rights that protect these basic goods. But they do so on a reciprocal basis: a necessary condition for holding rights is that one should be guided by natural law (or what Locke as we have seen sometimes calls 'The Rule of Reason') when one interacts with other rightholders.

Clearly an aggressor – somebody who attempts to kill or injure another, or enslave them, or rob them – breaches the natural law when he acts in this way.⁸ But it is not so clear why a single breach should change the status of the aggressor in such a way that he is no longer a rightholder. Locke, however, presents such a person as having wholly repudiated the law of nature: the offender, he says, 'declares himself to live by another Rule, than that of *reason* and common Equity' (p. 272). Or of a murderer, he says that 'having renounced Reason, the common Rule and Measure, God hath given to Mankind, [he] hath by the unjust Violence and Slaughter he hath committed upon one, declared War against all Mankind' (p. 274). This thought is developed in Locke's short chapter on the state of war, where it quickly becomes clear that he is describing a phenomenon that is much broader than war as we would normally understand it. It encompasses any situation in which one person has declared 'a sedate settled Design, upon another Mans Life' – and this in turn is stretched to include attempts to enslave or rob another, on the grounds that if someone is prepared to do these things, it is reasonable to assume that he would be willing to take the other's life as well if necessary.

⁶ There is a good discussion in A. J. Simmons, *The Lockean Theory of Rights* (Princeton, NJ.: Princeton University Press, 1992), ch. 3.

⁷ The rider about defects is intended to apply to 'Lunaticks' and 'Ideots' (p. 308). For a full discussion of Locke's claim that knowledge of natural law is accessible to everyone else, see J. Waldron, *God, Locke, and Equality: Christian Foundations in Locke's Political Thought* (Cambridge: Cambridge University Press, 2002), ch. 4.

⁸ Locke assumes that such aggressors are morally responsible for their actions – in contrast to some more recent discussions, he does not consider cases where the aggressor is deranged, acts under compulsion, etc.

Locke's argument about the loss of rights, then, proceeds by a series of inflationary steps. We begin with an act that violates another's rights – an attempted robbery say. Locke then argues that a person who is willing to act in this way demonstrates that he is also willing to violate the victim's rights more generally, to the point of killing him. This is then treated as equivalent to a declaration that the aggressor does not recognize 'the Common Law of Reason' as applying to himself. And this in turn is treated as a declaration of war upon mankind at large, not merely on his particular victim – so even the common robber removes himself from the human community and places himself in the company of those 'noxious Creatures' the wolf and the lion.

Once the argument is laid out in this way, two difficulties immediately appear. The first is that each of the individual steps seems unjustified. We have no reason to regard every robbery as a potential homicide, for example. Nor does breaking a rule on a particular occasion amount to an announcement that one does not recognize the rule's authority *at all*. The second is that the argument appears to entail that the criminal forfeits all of his rights, whereas Locke himself, when he discusses the right to punish, makes it clear that punishment must be proportionate to the offence, and no greater than what is necessary to achieve the two justifying aims of repentance and deterrence. Why would punishment that oversteps these limits be unjust unless the person on whom it is inflicted retains some of his rights?⁹ So it appears that Locke's somewhat striking account of the conditionality of human rights is not only harsh in its implications but also inconsistent with his more considered views about property rights and punishment.¹⁰

Three attempts to reconcile the theory and practice of human rights

Can Locke's theory of rights be rescued? Why might we want to rescue it? What first drew me to Locke's discussion was a sense that there was something right about the idea that

⁹ I ask this question rhetorically in an effort to smoke out the most plausible reading of Locke's position, but I concede that one could hold the view that the convicted criminal loses all of his rights, while it is unjust *for independent reasons* to punish him more severely than he deserves. Is there any evidence, though, that this was *Locke's* view? C.f. Waldron, *God, Locke, and Equality*, pp. 143-4.

¹⁰ There are further complications introduced by Locke's endorsement of a ruler's power to *pardon* offenders, discussed in Waldron, *God, Locke, and Equality*, ch. 5.

human rights are dependent upon reciprocity: our possessing them is conditional on our willingness to respect them in others.¹¹ It then seems to follow, as Locke suggests, that someone who knowingly violates the rights of others without good reason forfeits his claim to have his own rights respected. But as we shall see, many have thought that the idea of forfeiture collapses under closer scrutiny. So before we start down that track, let us explore some other ways in which we might try to reconcile the idea of inviolable human rights with practices such as judicial incarceration.

One answer would be to say that when we engage in such practices, we simply allow human rights to be *overridden* by wider social goals – in the case of imprisonment, for example, by the need for a mechanism that protects society from people who pose a danger to its members and/or that deters potential threats from acting on their intentions.¹² There is no question of prisoners *losing* their human rights, on this view; the rights are simply set aside for the greater good of society (a similar argument might be made in the case of those who are killed in the course of justified military operations). But the objection to this answer is that it appears to miss one of the basic points of attributing rights to people in the first place, which is to create for each individual a protected zone which states cannot enter in their pursuit of other social values. Human rights are supposed to be a serious matter: they are supposed to constrain what governments may legitimately do, perhaps also to provide grounds for international action against states that violate them on a large scale. But if it were permissible to override prisoners' rights (or the rights of those killed or injured in the course of armed conflict) merely by pointing to the overall good consequences of doing so, that purpose would be lost. We would not be 'taking rights seriously'.¹³

¹¹ Locke of course gives this idea a religious interpretation: in violating rights we violate a rule of reason that God has laid down for the governance of mankind. But it readily assumes a secular form. As Simmons puts it, 'protection under the rules is contingent on our obeying them: any rights the rules may define are guaranteed only to those who refrain from violating them... Surely we cannot reasonably complain of being deprived of privileges under rules we refuse to live by.' (Simmons, *The Lockean Theory of Rights*, p. 153.)

¹² A variant on this answer is provided by James Griffin, who argues that when criminals receive fair punishment, this is an example of human rights being overridden by a concern for *justice*, here in the form of (negative) desert. For Griffin, human rights and justice are separate values, which may conflict and need to be traded-off against each other. See J. Griffin, *On Human Rights* (Oxford: Oxford University Press, 2008), pp. 65-6.

A second possible approach is to say that human rights have scope limitations built into them, and that when we punish criminals we are simply enforcing those limitations. The premise that is appealed to here is clearly correct. When we determine the scope of a right such as the right to freedom of movement, we must do so in such a way that the equal rights of everyone else can be simultaneously recognized. Thus traffic laws and crowd control measures do not in normal cases violate the human right to freedom of movement. What they do, if well designed, is precisely to limit my right to move in order to make sure that you can enjoy a right of free movement that is of equal extent to mine. More generally, the scope of any one human right must be limited so that its exercise does not impinge on the (appropriately limited) scope of the others.¹⁴

Although the premise is correct, it does not lead to the desired conclusion. For the practices we are concerned about do far more than enforce the proper limits of human rights. When a person is sent to prison, his freedom of movement is restricted in a much more radical way than when traffic laws (or the riot police) prevent him from exercising that right to the detriment of others' equal rights. Although it is true that while he is locked up, he has little or no opportunity to violate other people's human rights, his own loss of rights is likely to be far greater than is strictly necessary to achieve that end. Punishment as normally understood aims to do more than prevent those who have offended from re-offending.¹⁵ It is that greater

¹³ Here I invoke Ronald Dworkin's celebrated essay with that title in R. Dworkin, *Taking Rights Seriously* (London: Duckworth, 1978). I do not mean that the account we give of human rights must be such that it is *never* justifiable to violate them. We can readily imagine catastrophic situations in which we would have reason to override even the most basic of rights. But these situations would have to be exceptional, whereas the position discussed in the paragraph above envisages human rights being overridden on a day-to-day basis under normal conditions, when criminals are imprisoned or soldiers killed or wounded. It debases the currency of human rights if we allow them to be set aside so easily.

¹⁴ A good example used by James Nickel is the way that the right of free speech must be limited in order to protect the right to a fair trial: one is not permitted in court to inform the jury about the defendant's previous criminal record. See J. Nickel, *Making sense of Human Rights*, 2nd ed. (Oxford: Blackwell, 2007), pp. 42-3. For further reflection on how the scope limits of human rights are to be established, see D. Miller, 'Grounding Human Rights', *Critical Review of International Social and Political Philosophy* (forthcoming).

¹⁵ As noted earlier, some critics may respond to the problem I am addressing by arguing that punishment as currently practised, even in liberal societies, is fundamentally unjust precisely because it removes human rights when this is not unavoidable if others' rights are to be

loss of rights that needs to be justified, and that cannot be done simply by pointing to the limitations of scope that are inherent in any coherent doctrine of human rights.

It might be said in reply here that the prisoner's loss of rights, by virtue of its deterrent effect once made public, may contribute to the protection of human rights overall – or, in a variant of this argument, that if our aim is to respect human rights *equally*, then we are justified in overriding the prisoner's rights when this serves to ensure that the rights of others are better protected. But this approach makes sense only if one is willing to adopt a form of rights-consequentialism that allows rights to be deliberately violated where this can be shown to have good effects on rights protection elsewhere. To be clear, the objection is not to allowing considerations of deterrence to play a guiding role when we are considering the extent of punishment that may justifiably be inflicted on offenders of a given description. The problem, rather, is the assumption that once we have shown that punishment has rights-protecting consequences, we have also shown why it is legitimate to take rights away from the particular individuals who are punished. It is not *necessary* to impose severe restrictions on the prisoner's freedom of movement to protect the rights of others in the way that it is necessary to limit my freedom to drive a car by enforcing the rules of the road if your equivalent freedom is to be preserved. Where punishment is justified by its function of deterrence, we are using those punished as a means to protect others, and we need an independent argument, such as the idea of rights-forfeiture provides, to explain why this is permissible.

A third approach involves drawing the now-familiar distinction between *infringing* rights and *violating* them.¹⁶ Here the underlying thought is that it is sometimes necessary to breach one right in order to protect a right of greater importance. When this happens, the former right is not violated, but merely infringed; it is not cancelled, but put into abeyance and this may be justifiable. The cases that are used to illustrate this distinction often involve life and death

protected. My aim is to see whether human rights theory, properly understood, does allow for practices such as punishment in roughly their present form.

¹⁶ This was introduced in J. J. Thomson, 'Self-Defense and Rights', in *Rights, Restitution, and Risk: Essays in Moral Theory* (Cambridge, MA.: Harvard University Press, 1986) and further popularised in J. Feinberg, 'Voluntary Euthanasia and the Inalienable Right to Life' in *Rights, Justice, and the Bounds of Liberty: Essays in Social Philosophy* (Princeton, NJ.: Princeton University Press, 1980).

situations in which if A is to save her life, she must infringe some lesser right of B's, by, for instance injuring B or taking something he rightfully owns. But the idea may be extended to cases of self-defence in which one person kills another to save his own life by introducing the idea that rights may have different degrees of stringency – so when self-defence is justified, it is on the grounds that the defender's right to life is more stringent than the corresponding right of the person who poses a threat.

But this approach also runs into difficulties if we try to apply it to the case of imprisonment. If we are to say that prisoners' human rights are not violated but merely infringed when they are locked up, we will have to show that the incarceration is a necessary means to protect somebody else's more stringent right. This is going to be difficult other than in the case of exceptionally violent convicts whose release from prison might pose an immediate threat to other people's rights to life and bodily security. With most criminals, even if we think that there would be some chance of their reoffending if they were released, the danger they impose is not of the direct kind needed to support the idea that their rights are merely being infringed when they are held in gaol. A similar problem arises if we try to use the infringement/violation distinction to explain why it is permissible to kill enemy soldiers in the course of a just war. This approach might work in the special case where the enemy is attacking, and the soldiers who are being attacked kill in self-defence, their rights being treated as more stringent by virtue of their status as 'just warriors'.¹⁷ But it cannot show why it is permissible to kill the enemy when you are attacking, even with justice on your side, since in that case the immediate conflict of rights is of your own making, and it is not *necessary* to kill enemy soldiers to protect your rights; you could do that by remaining in a defensive posture.

Clarifying the idea of forfeiture

It begins to look, therefore, that the practices we are considering cannot be justified unless we allow that the people whose rights are taken away have acted in such a way as to deprive

¹⁷ I remain agnostic as to whether this is the best way to explain the legitimacy of killing in war, as opposed to approaches which assume the moral equality of soldiers. Nor am I sure whether the rights-forfeiture view that I defend in this article can do all of the explanatory work that is needed. It may do a better job of explaining permissible responses to acts of terrorism than of killing in war itself.

them of what would otherwise be their entitlements – in other words, we will need some version of the forfeiture view if we are going to give a full normative account of justified imprisonment and other responses to rights-violating behaviour (such as disabling terrorists). What are the difficulties to be surmounted? We have to explain in what sense rule-breaking agents forfeit their rights (since it is presumably not true in standard cases that they *intend* to forfeit them); and we also have to explain which rights they forfeit and which they do not. We want to avoid the stark Lockean view that criminals – robbers as well as murderers – remove themselves from human society and join the wild beasts, losing all of their human rights in the process. But then we have to explain how, by acting in a certain way, one can lose certain rights but still retain others.

How, then, is the forfeiture view to be understood? The underlying idea is that a person enjoys the protection of human rights so long as she acts in ways that respect the human rights of others. When she fails to act in such ways, she loses that protection; in other words, people at large, including those she has victimized, are no longer under the duties they would otherwise be under to respect her rights. This does not mean, let us notice at once, that she loses any claim whatsoever to the *substance* of those rights. There is always a logical gap between having a right to something – food, say – and having a claim to that same thing, since claims can be advanced on other grounds. If someone forfeits his right to food, that means that other people are released from their (right-based) duty to ensure that he has food. It does not mean that they have no reason at all to feed him; it certainly does not mean that they have a reason (or a duty) to *deprive* him of food. So the first point to note is that forfeiting rights is not tantamount to abandoning all moral claims against others in the relevant domain.

There are other false steps that need to be avoided here. One is to understand ‘forfeiture’ in such a way that it becomes merely a matter of convention.¹⁸ When we talk about ‘forfeit’ in the context of games, for example, what we mean is that a player who breaks one of the rules has to surrender something of his (or perhaps has to perform some ridiculous task in front of

¹⁸ For an account of forfeiture that moves in this direction, see C. Morris, ‘Punishment and Loss of Moral Standing’, *Canadian Journal of Philosophy*, 21 (1991), 53-80. Morris begins from the premise that ‘justice is to be understood as a mutually beneficial convention’ (p. 66) and argues that the conventions of justice have built-in penalties which apply to those who lose moral standing by disregarding them.

the assembled company to redeem his ‘forfeit’). Here what is forfeited is precisely what the rules of the game lay down as the appropriate penalty for misconduct. And this is obviously just a matter of convention. So critics have charged that in criminal law, the idea of forfeiture can play no independent justifying role, because what a person forfeits by his crime is simply whatever prevailing law lays down as the appropriate penalty: if the law says that murderers shall hang, then what a murderer forfeits is his right to life; if instead the penalty is life imprisonment, then the killer forfeits his right to freedom. We cannot then appeal to the idea of forfeiture to explain why one or other of these punishments is the appropriate response to what the murderer has done.¹⁹ So this way of understanding forfeiture is not going to help us if our aim is to make sense of the idea that a person can, by acting in a certain way, forfeit (some of) her human rights, where *how* rights are lost and *which* rights are lost is precisely what we are trying to establish.

Another false step is to suppose that what is forfeited is the exact equivalent of the rights that the offender has violated.²⁰ This makes forfeiture equivalent to the *lex talionis*: an eye for an eye, a tooth for a tooth. But this confuses the idea of forfeiture, which as I have indicated means losing the protection of certain rights, with the very different idea of retribution. A simple retributive view says that, as a matter of justice, whatever an aggressor has done, the same should be done to him in return (or if that is not possible, then the nearest equivalent).²¹ This is one form of reciprocity, certainly, but it is not the form that I intended when explaining why it could be used to support the idea that human rights are conditional. As indicated earlier, when rights are forfeited, others are released from duties they would otherwise have been under, but this by itself does not give them even a reason, let alone a duty, to penalise the forfeiter. Forfeiting rights may entail that certain forms of punishment

¹⁹ For criticism of forfeiture along these lines, see W. Quinn, ‘The Right to Threaten and the Right to Punish’, *Philosophy and Public Affairs*, 14 (1985), pp. 332-4. Tim Scanlon also understands forfeiture as institution-relative in T. Scanlon, *What We Owe to Each Other* (Cambridge, MA: Harvard University Press, 1998), pp. 265-6.

²⁰ For the suggestion that this is how forfeiture is to be understood, see A. Goldman, ‘The Paradox of Punishment’, *Philosophy and Public Affairs*, 9 (1979), pp. 44-6.

²¹ I don’t mean to imply that all retributive theories of punishment must take this simple form.

are permissible, but it does not entail that they are required, or that justice is served by imposing them.²²

So how, positively, should we understand the idea of forfeiture if we are going to treat human rights as in a certain sense conditional? The underlying idea is that we can only claim human rights if we are prepared to recognize others as holders of the same rights. So forfeiting must mean acting in a way that clearly indicates that we do not recognize such rights – that we do not see others' rights as imposing binding obligations on us. This was Locke's thought when he argued that 'in transgressing the Law of Nature, the Offender declares himself to live by another Rule, than that of *reason* and common Equity' (p. 272) but his mistake was to assume that any breach of the law amounted to such a declaration. For, supposing as Locke did that the law of nature covered property rights, this would imply that the action of robbing an empty house, say, implied a wholesale disregard for property rights. But the burglar who did this might on very many other occasions be a respecter of such rights: so a single act cannot constitute the kind of declaration that Locke intends. And when he is trying to justify wholesale forfeiture, Locke uses examples in which one person poses an ongoing threat to another: he talks, as we have seen, about someone 'declaring by Word or Action, not a passionate and hasty, but a sedate settled Design, upon another Mans Life' or as having 'discovered an Enmity to his [the victim's] being' (pp. 278-9). These phrases convey the picture of one person acting towards another on the basis of a conviction that the second person's life is of no consequence, that he or she lacks the protection of natural rights.

Can we get clearer about when it is reasonable to treat someone's behaviour as implying this non-recognition of the rights of others? Locke refers to both words and actions, but words in themselves seem to count only when they signal a real and plausible intention to carry out

²² Most of the discussion of the idea of rights forfeiture has taken place in the context of debates about the justification of punishment, and although this is understandable, it may also be unfortunate, because many of the critics focus on why rights-forfeiture is implausible as an answer to the general question 'For what reason, and with what penalties, may criminals be punished?' For example, David Boonin's forensic discussion is aimed at what he calls 'the forfeiture claim', which he takes to be the claim that 'if P violates Q's right to X, then P forfeits P's own right to X (or perhaps instead forfeits some equivalent right or set of rights)' (D. Boonin, *The Problem of Punishment* (Cambridge: Cambridge University Press, 2008), p. 105). It is then fairly easy to raise objections that apply only to forfeiture as understood in this particular way, namely as explaining and justifying the particular form and amount of punishment that P should undergo.

what is being threatened. Merely saying that, given the chance, I would shoot Silvio Berlusconi or Kim Jong-un does not count if this is merely idle talk. On the other hand, it would be too narrow to understand non-recognition as occurring only when someone poses an immediate threat to a second person's right to life, or to some other right. If Smith has various opportunities to attack Jones, and whenever one of these opportunities arises he does so, it would be wrong to say that his failure to recognize Jones' rights occurs only in those moments when he is actively attacking. His 'Enmity to [Jones'] being' is ongoing. Here the forfeiture approach to loss of rights parts company with one based on the idea of self-defence, which runs into difficulties when threats cease to be imminent because, for instance, the attacking party is disabled or blocked in some way.²³ If (as the self-defence approach suggests) the attacker's rights can be set aside because they are outweighed by the more stringent rights of the person being attacked, then it appears that the former's rights switch on and off as the threat he poses wanes and waxes. If, by contrast, we say that rights are forfeited by virtue of a failure reciprocally to recognize the other's rights, then we can use his behaviour as a guide to the attacker's settled disposition to violate his victim's rights. Posing an immediate threat at a particular moment is no longer a necessary condition for forfeiture.

Under what conditions can we say that someone's actions fail to recognize the rights of others? Deliberately and successfully violating them is the most clear-cut case, but failed attempts may count as well, and so may taking active steps to put oneself in a position where a rights violation will occur. Thus a suicide bomber who arms himself and begins walking towards a crowded market may be disabled, perhaps even killed, on these grounds since his intention is so clearly conveyed through his actions. We rightly hesitate to remove rights from people on the basis of expressed intentions alone, because we owe them the opportunity to reflect further and hold back when the moment comes to turn their thoughts into deeds. But where the intention is acted upon, and it is clear that a deliberate rights violation is about to occur, or would have occurred had not some intervening factor prevented it, then we are justified in interpreting the person's behaviour as a failure of reciprocity, as a result of which his own human rights may become liable to forfeit.

²³ The various possibilities here are explored at some length in Thomson, 'Self-Defense and Rights'.

On the other side of the coin, in order to enjoy the status of a rights-recognizing individual, one need not hold any particular beliefs about the reasons why one should act in ways that respect the rights of others. A person's moral code may be duty-based. She may refrain from murder or theft because she believes that God has commanded her to do this, not because she believes that others have the corresponding rights. Or she may be a utilitarian who adheres to a rule with the same practical effect. Yet again she might be someone entirely lacking in moral commitments, but who is fearful of what will happen to her if she violates other people's rights. In all these cases what matters is that the person in question does act so as to respect the rights of others, even though she does not do so *because* it shows respect. So she does not forfeit any rights. We may be especially concerned about the last of the three possibilities I have referred to because it is unstable. If this person discovers the ring of Gyges, she is likely to begin violating rights. So we have reason to try to educate her into upholding the principle of reciprocity, with regard to rights in particular. But we cannot treat her now in the way in which we are justified in treating someone who actually proceeds to violate other people's rights.

Actions may fail to recognize other's rights to a greater or lesser extent. The right that is breached may be more or less important, the breach may happen on only one occasion, or it may be repeated, and the action itself may show disrespect just for a particular person or for a whole class of people. Our response should vary accordingly. Consider different instances in which people kill. Most often one person kills a specific other, in anger, out of revenge, or for instrumental reasons. Occasionally a person will go on a rampage and kill indiscriminately. In between, we have examples where someone tries to kill people belonging to a certain general category – for example a serial killer who murders prostitutes, or a suicide bomber who aims to kill people she regards as infidels. It may seem that only in the second and third cases do the person's actions express wholesale disregard for the rights of others. In the first case, the killer may offer a justification or excuse for what he has done that relates to the individual person killed, trying thereby to deflect the implication that he has no concern for human rights in general. We need not take such a justification or excuse at face value. But nor should we exclude the possibility that such an aggressor does indeed reciprocally recognize the rights of others, and will continue to do so in future, even though in the particular case he has violated reciprocity in the most terrible way. And this possibility should guide us when we think about the degree to which his rights have been forfeited.

As we saw when discussing Locke, it does not seem plausible that a person should forfeit all of his rights whenever he violates other people's rights through his own actions. The extent of forfeit has to be proportionate to the extent of the violation. It is difficult to specify this relationship more precisely. However it is important to keep in mind, when discussing the idea of rights forfeiture, that we are not trying to develop a full-blown philosophy of punishment. Punishment serves a number of objectives, including deterring offenders, and expressing the community's abhorrence of certain crimes, and our aim here is only to establish whether and to what extent punishment is *permitted* by our best theory of human rights.²⁴ At the upper limit we may be able to judge that a certain punishment is so disproportionate to the offence that has been committed that it constitutes a breach of the offender's human rights, but beneath that limit there will be considerable indeterminacy over which particular rights have been lost as a result of a rights-violating action.

This indeterminacy extends to the question of the *duration* of rights forfeiture. We do not want to say that a person who at one time shows himself unwilling to respect the rights of others is to be placed outside the realm of reciprocity in perpetuity. That is one reason why Locke's bestial analogies are disturbing – they suggest that the aggressor should be removed from the human community entirely and be considered forever incapable of recognizing the common rule of reason. If we start from the premise that human rights are dependent upon reciprocity and can be forfeited only to the extent that the offender's behaviour manifests non-recognition of the rights of others, then forfeiture can come to an end when we have good reason to think that the offender is now willing to accord reciprocal respect. This is a necessary but not sufficient condition, since punishment serves other purposes besides prevention. Thus even if it were the case that a person who has forfeited rights immediately and sincerely repents of her action, she would not be entitled to reclaim them forthwith. She has forfeited rights, and it is therefore permissible to inflict an appropriate level of

²⁴ The clear, but limited, role that forfeiture of rights plays in justifying the institution of punishment is well explained in W.D. Ross's brief, seminal treatment: see W.D. Ross, *The Right and the Good*, ed. P. Stratton-Lake (Oxford: Oxford University Press, 2002), pp. 56-64. In contrast, a more ambitious account of the place that rights-forfeiture can play in justifying punishment is developed in Kit Wellman's paper 'The Rights-Forfeiture Theory of Punishment', *Ethics* (forthcoming). Wellman concedes however that his approach does not have much to say about precisely which rights wrong-doers forfeit by their actions, or about the duration of the forfeit.

punishment up to the extent of the forfeit. Her subsequent behaviour should, however, be taken into account when remission is being considered. If she can demonstrate – not just by making an announcement to this effect – that she is ready to rejoin the community of right-holders on terms of reciprocity, this gives us a reason to bring the forfeiture to an end. I don't suggest that the practice of punishment could or should be mainly governed by this consideration, since there needs to be consistency in the terms of imprisonment handed out for particular offences, but insofar as the existing practice allows for some flexibility – such as reducing sentences for good behaviour, granting prisoners parole, and so forth – this is what a rights-forfeiture approach would prescribe. By contrast, mandatory whole-life sentences seem to be inconsistent with such an approach, inasmuch as they seem to deny those who are given them any opportunity to re-enter the human community as a reciprocal respecter of the rights of others.²⁵

The underlying premise here is that we must approach every human being with the presumption that they are willing and able to recognize the rights of others on a reciprocal basis. That is what lies behind the thought that human rights do not have to be earned. Even in the case of somebody who violates the principle of reciprocity, we should act towards him on the basis that he is capable of rejoining the community of rights-respecting agents until we have conclusive evidence that this is not so.²⁶ This limits the extent to which human rights can be forfeited, and also, I shall now argue, means that certain of these rights must be treated as unconditional.

Conditional and unconditional human rights

To return for a moment to the starting point, I assume that everyone has human rights simply in virtue of features that identify them as human beings and not because of any special actions that they have performed or traits that they display. I have left it an open question

²⁵ I do not take a stand on whether they might sometimes be justified on other grounds, such as providing reassurance to potential victims that particularly dangerous criminals will not be released.

²⁶ Could we have such evidence? Perhaps we might, in the case of extreme psychopaths, whose behaviour and attitudes demonstrated complete indifference to the suffering they were inflicting on others, and who proved wholly unresponsive to all forms of therapy. But I do not know how many such cases there are outside of the realm of fiction.

how human rights are to be justified, i.e. which particular features of human beings we appeal to in order to show that some particular right belongs on the list of human rights. My own view, which I have argued for elsewhere, is that human rights are grounded on human needs, and are to be understood as members of the set of rights that must be protected if human beings are to lead minimally decent lives.²⁷ If we decide that certain of these rights are held unconditionally and others conditionally, this is not because – a point I need to emphasize to avoid misunderstanding – the U-rights, as I shall call them, are more basic or more important than the C-rights. All human rights are important, and if in the hopefully rare cases in which they come into conflict we judge that some are more important than others, this will have to do with the particular needs they serve to protect. The distinction between U-rights and C-rights arises from the idea of forfeiture itself. If we say that a human right may be forfeited when the right-holder displays sufficient disrespect for the rights of others, then we must be able to determine when forfeiture has occurred, and we must also be open to the possibility, as argued above, that rights that have been forfeited may in due course be regained. For these requirements to be fulfilled, there must be some human rights that are held unconditionally, as I shall now try to explain.

There are two categories of U-rights, procedural and substantive. Certain procedural rights are needed if we are reliably to discover what other rights, if any, have been forfeited. Since our underlying thought is that human rights can only be forfeited at all by behaviour that implies non-recognition of the rights of others, we need to be sure that the forfeit has been incurred before acting on it by denying the offender (some of) his rights. This implies using familiar legal procedures having to do with the gathering of evidence, the interrogation of suspects, the right to be defended in court and so on. It might seem at first paradoxical that these rights are unconditional whereas other rights that may be felt as more valuable in themselves by their possessor are not, but the paradox disappears once we accept that no human right can be removed unless there is good and reliable evidence that the person in question has forfeited it.

The second category of U-rights embraces substantive rights. Consider first the right to life. Many (including Locke, as we saw) have assumed that this could be forfeited by a

²⁷ See D. Miller, *National Responsibility and Global Justice* (Oxford: Oxford University Press, 2007), ch. 7 and ‘Grounding Human Rights’.

sufficiently severe breach of the rights of others, paradigmatically deliberate killing. But what distinguishes this right from almost all others is that, obviously enough, if it is forfeited and the forfeit is acted upon, it cannot be regained. So according to the position developed here, before putting someone to death one would have to know, with a sufficient degree of certainty, that that person was incapable of changing in such a way that he or she could re-enter the realm of rights on terms of reciprocity. And, subject to the rider contained in f.n. 26, this is a condition that may prove impossible to fulfil. We owe every human being, no matter what he or she has done, the opportunity to show that he or she can after all re-enter the community of rights. If we impose the death penalty we block this opportunity entirely. So the argument for an unconditional right to life does not rely on a claim about the intrinsic wrongness of all killing,²⁸ but on the presumption that the person we would be about to kill is prospectively someone with whom we are able to engage with on terms of reciprocity.

Another substantive U-right is the right not to be physically or mentally damaged in a way that is likely to prevent the sufferer from leading a minimally decent life in future. Since the idea of forfeiture, as I have argued, implies losing certain rights for a period until the person subject to the forfeit is able to demonstrate that they are willing to re-enter the community of human beings fully on terms of reciprocity, the rights that are forfeited cannot be rights that it is impossible to regain, such as bodily mobility or sight. Included here too would be the right to basic health care, since without health care during the period of forfeiture there must be a significant risk that the person will lose some of the capacities needed to lead a minimally decent life.

This approach also allows us to see why the right not to be tortured is a U-right. Assume for present purposes (what may not be true in fact) that torture does not leave its victim permanently disabled, mentally or physically. Consider a case in which the person who is due to be tortured has shown himself willing to torture others on numerous occasions. Clearly this person has forfeited his human rights to an extent that makes severe forms of punishment permissible. Torture, however, is not punishment, nor is it just the infliction of severe pain. It involves a direct assault on the victim's personhood, which it tries to destroy

²⁸ It does not therefore rule out killing in immediate self-defence against lethal attack. In such a case the rights of life to two people cannot both be protected, and the forfeiture approach allows us to discriminate in favour of the one who is not in breach of reciprocity.

from within by getting the tortured person to collude with his torturer. As Sussman explains in his analysis of the experience of torture, ‘in the most intimate aspects of his agency, the sufferer is made to experience himself not just as a passive victim, but as an active accomplice in his own debasement....the victim experiences within himself a dialectic where some part of him serves as the eager agent of his tormentor’.²⁹ On the view defended here, to treat someone in such a way as to undermine their very capacity to act as a rights-bearing and rights-recognizing individual is impermissible no matter what they have previously done.

Can the approach I am developing here go far enough to explain the full list of human rights that intuitively we regard as unconditional? Consider in particular the right to bodily integrity. We would normally regard it as a breach of human rights if criminals’ rights over their bodies were violated in ways that did not significantly impair their ability to lead a minimally decent life in future. My approach can explain why the cutting off of a hand is disallowed, but what about the amputation of one finger? Or, an even more disturbing case, consider the removal of a kidney in cases where it is known that the victim will manage well enough with his one remaining kidney.³⁰ Such treatment would be disallowed by the human right not to be subjected to ‘cruel, inhuman or degrading treatment or punishment’ listed in the official documents, but the problem is to explain why this alleged right takes the form that it does.

One can of course find good reasons from within the general theory of punishment why these invasive modes of treatment would be disallowed. If the aim of punishment is prevention or deterrence, there will be modes of treatment (such as incarceration) that serve these aims better than bodily violation. But here we are approaching the problem strictly from a human rights perspective. The issue is why the human right to bodily integrity qualifies as a U-right, even when we know that certain ways of breaching this right will not prevent the victim from leading a minimally decent life in future. Why is the right in question not (partially) forfeitable?

²⁹ D. Sussman, ‘What’s Wrong with Torture’, *Philosophy and Public Affairs*, 33 (2005), pp. 23-4.

³⁰ I am grateful to Francois Hudon for suggesting this example.

It may be helpful at this point to return to Locke, and to reflect further upon the uneasiness aroused by the bestial analogies he uses to explain how we may treat rights violators. As we saw, Locke himself does not accept the full implications of these analogies, since he asserts that wrongdoers retain certain rights despite their wrongdoing, something he would not have said of wolves or lions. We must, in other words continue to treat the wrongdoer as a human being even while we defend ourselves against him and later impose punishment, curtailing certain of his rights in the process. My development of Locke's argument has emphasized reciprocity and the importance of preserving the conditions under which the person who has violated rights can later rejoin the human community as an equal participant. But it now seems that this appeal to future reciprocity cannot do all of the work that we need it to do. Instead we must introduce the idea that certain ways of treating human beings are forbidden no matter what they have done. Appeal might be made here to the idea of human dignity. It certainly seems that what we find objectionable about violations of bodily integrity, or for example about treating people in ways that are humiliating even if they do not cause permanent damage, has something to do with this idea.³¹ I do not think that an appeal to dignity can actually *explain* why we find certain ways of depriving people of their rights acceptable and others ways unacceptable, but it may be helpful as a way of signalling that such a line exists.³² The basic intuition is: 'This is a human being. Because he has deliberately violated others' rights, some of his own may be forfeit. But because he remains a human being nonetheless, there are certain things that we may not do to him.' If this intuition is correct, we can explain why some human rights are U-rights, even if violating them would not prevent the victim from regaining her full set of rights at some future time.

Conclusion

Let me now attempt to retrace the steps in the argument I have presented. I began from what one might call the naïve view of human rights, which is that they are rights that all human

³¹ It is worth underlining again that C-rights may be more valuable to their possessor than U-rights. For example, it is conceivable that a convicted criminal might prefer the loss of a finger, or a short period of humiliating treatment, to several years of imprisonment. Nevertheless, the latter would be permissible as punishment while the former would not.

³² There may also be some cultural variation over which ways of treating people are regarded as compromising their dignity. If so, it may reinforce my suggestion that an appeal to dignity works better as a signal than as an explanation of why certain rights are unconditional.

beings hold unconditionally, simply by virtue of *being* human and regardless of their conduct. This is probably the view that many of us would be inclined to take at first glance. But if we left it at that, it would first of all make nonsense of a good deal of our actual practice. Even those who hold pacifist views from a conviction that killing in war is always an unjustifiable violation of the rights of those killed would probably concede that it was permissible to punish criminals in ways that would otherwise count as violating their rights, subject to the usual riders about due process. Now one might bite this bullet too and outlaw most of the forms of punishment we currently use on human rights grounds. But second, there is surely something paradoxical about treating human rights as entirely exempt from the requirements of reciprocity that otherwise pervade our moral life. That is, much (perhaps most) of our moral behaviour consists in complying with moral rules on the assumption that others are going to comply with them too, and this in turn implies that we have to be willing to do something to sanction non-compliers. Why, then, should it be any different when human rights are involved? Human rights correspond to some of the most important duties that human beings owe to one another. So we should be very reluctant to violate them, but by the same token, we have reason to apply heavy penalties to persistent violators. If we could find penalties that were severe enough but that still left all of the human rights of the violators intact, that might be ideal, but equally it is not clear on what grounds one who deliberately violates the human rights of others can complain when some of his own rights are taken away in turn.

In addressing this question, my main proposal has been that once we see human rights in this way as subject to requirements of reciprocity, we have to introduce and use the idea of forfeiture. When people act in ways that reveal a clear disposition not to recognize the human rights of others, they forfeit some rights of their own. The rest of us are released from the specific duties that correspond to these rights, and in this way practices such as imprisonment for serious crimes become permissible. I have gone a little way, though not far enough, in exploring how forfeiture occurs and how we can judge which rights are forfeited.

At the same time, I have wanted to resist Locke's strong claim that once he has acted in ways that make his rights liable to forfeiture, we may treat the aggressor as though he were 'one of those wild Savage Beasts, with whom Men can have no Society' (p. 274). Whatever the extent of his wrongdoing, this person is still a human being, and therefore *potentially* able to

recognize the rights of others reciprocally. This is a capacity we must respect. We do not do so when we torture people, treat them in degrading ways, or engage in targeted assassinations that are not cases of immediate self-defence. So within the standard roster of human rights whose continued possession, I have argued, *should* be seen as conditional on the right-holder reciprocally recognizing the rights of others, there is a smaller sub-set of rights, some procedural and some substantive, that cannot be forfeited no matter what.