

## ON A RELEXIVE CASE FOR HUMAN RIGHTS

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*Abstract: Can there be a categorical, reasonably non-rejectable grounding of human rights? The paper engages a recent attempt to provide such a grounding, namely, Forst's "reflexive" account. On this account, moral-political validity claims commit us to a constructivist requirement of reciprocal and general acceptability, while this requirement both commits us to accord to others a right to justification and allows for a justification of other human rights. The paper grants the substantive implications of this requirement, but takes issue with the claim that it is reasonably non-rejectable. I argue that this requirement cannot be established reflexively in Forst's sense, and this is for reasons that mark general limitations of reflexive, presuppositional arguments for relevantly contested conclusions. I argue, as well, that we should not suppose in this context an idea of the reasonable that would entail that it is unreasonable to reject that requirement. Thus, this reflexive case for human rights fails, as it remains hypothetical. But it shifts the issue in an interesting direction.*

### I

It is sometimes argued that at least some human rights have a moral life, whether or not they also have suitable legal recognition, so that an adequate normative account of such rights must justify them on *categorical*, reasonably non-rejectable grounds – rather than merely hypothetical, “ethical” grounds that would anchor them in interests, needs, ideals, or conceptions of the good, widely conceived, that can be, and are, rejected reasonably. But can there be a categorical grounding of such rights? Rainer Forst thinks that this is so, and in various recent writings suggests a constructivist account of such rights that tries to provide one.<sup>1</sup> At the systematic core

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<sup>1</sup>Rainer Forst, “The Justification of Human Rights and the Basic Right to Justification: A Reflexive Approach”, in *Ethics* 120 (2010), and “The Basic Right to Justification: Toward a Constructivist Conception of Human Rights”, *Constellations* 6/1 (1999). See also Forst, *The Right to Justification* (New York: Columbia University Press, 2012). Components of his view are worked out in his “The Limits of Toleration”, *Constellations* Vol 11/3 (2004), and “Toleration, justice and reason”, in C. McKinnon and D. Castiglione (eds.), *The culture of toleration in diverse societies* (Manchester: Manchester University Press, 2003). See also Forst, *Contexts of Justice* (Berkeley: University of California Press, 2002). He takes issue in particular with the “ethical” views of James P. Griffin, see Griffin’s *On Human Rights* (Oxford: Oxford University Press, 2008), and John Tasioulas’s approach, see Tasioulas, “The Moral Reality of Human Rights”, in Thomas Pogge (ed.), *Freedom from Poverty as a Human Right* (Oxford: Oxford University Press, 2007). Forst offers his approach as an alternative, as well, to political-legal views that anchor human rights in contingent political, legal, or other institutions or conventions, such as advanced in John Rawls, *The Law of Peoples* (Cambridge (MA):

of his account are three views: (i) our moral-political validity claims – as we raise them in claiming our moral or political views (principles, value-judgments, reasons, and so on) to be right or correct – “reflexively” commit us to a constructivist requirement of reciprocity and generality; (ii) in adhering to this requirement, we accord to all affected others a right to justification; (iii) this requirement allows for a justification of other human rights.<sup>2</sup> Forst takes this requirement to be reasonably non-rejectable, and so offers it as the sought-after, categorical basis for a right to justification and other human rights.

What I want to do here is to examine whether Forst’s account indeed provides a categorical grounding for human rights. I shall argue that it does not, and cannot, do this. My argument will not dispute (ii) and (iii), above, nor will I reject Forst’s requirement of reciprocity and generality. I shall argue, however, that this requirement is not reasonably non-rejectable. It cannot be established reflexively in Forst’s sense, and this is so for reasons that reflect more general limitations of reflexive, presuppositional arguments for normatively selective, relevantly contested conclusions. Moreover, we have reasons not to suppose in this context any idea of the reasonable that entails that it is unreasonable to reject a constructivist acceptability requirement. Thus, Forst’s reflexive case does not provide a categorical grounding for human rights. At best, we shall see, it provides a conditional, *hypothetical* grounding (which, however, is precisely the sort of thing it seeks to provide an alternative to). It thereby shifts the issue to two important questions – which, however, remain unanswered: why should we accord to others strong, constitutive forms of discursive standing? And in terms of what idea of the reasonable may we assess the cogency of an answer to this question?

My discussion proceeds as follows. To provide some needed conceptual tools, I begin by distinguishing between different kinds of discursive moral standing, i.e., “constitutive” and weaker, “derivative” kinds. A Forst-type right to justification is a right to constitutive discursive moral standing. Section 3 then maps contours of Forst’s reflexive case and engages its systematic core. Its aspiration to provide a categorical, reasonably non-rejectable grounding of human rights hinges on the view that moral-political validity claims commit us to a constructivist standard of justification, i.e., his requirement of reciprocal and general acceptability. Yet, I argue, this view is mistaken as it runs up against more general limitations of reflexive arguments for relevantly contested conclusions. Section 4 substantiates the general nature of this problem by addressing a related presuppositional case for a conclusion congenial to Forst’s, i.e., O’Neill’s attempt to defend a form of cosmopolitanism by arguing from the presuppositions of other-regarding activity. Section 5 returns to Forst to consider another strand of thought in his view. He sometimes tries to build a

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Cambridge University Press, 1999), or in Charles Beitz, *The Idea of Human Rights* (Oxford: Oxford University Press, 2009).

<sup>2</sup>See, for instance, Forst, “The Justification of Human Rights”, p. 719, and his “The Basic Right to Justification”, p. 44.

commitment to constructivist justification directly into an idea of what it means to be reasonable. But we should not suppose a view of the reasonable in this context that is tied to a doctrinally selective and relevantly contested view of justification. Section 6 concludes matters by observing that the argument of the paper holds especially if we accord to others a right to justification, or a meaningful form of constitutive discursive standing.

## II

To start with, consider the view that people should be accorded not just moral standing, but *discursive* forms of such standing. Where we take others to have moral standing, we take it that there are moral reasons to protect or support them, or their good. Where we accord them discursive moral standing, in turn, we take it that the way in which they may be related to, e.g., in protecting or supporting them, must follow grounds, widely conceived, that are, in some relevant sense, acceptable by them. Discursive and non-discursive moral standing – call the latter *mere* moral standing – are not always expressly distinguished. This is so especially on anthropocentric accounts of morality that view moral standing to hinge on the presence of features that, it is assumed, at the same time call for discursive standing. E.g., Kantians tend to ground the moral standing of people in their capacity for autonomy, while assuming, too, that the presence of this capacity in people, or our properly recognizing it, requires us to accord to them discursive standing of some strong sort – be it by recognizing their communicative freedom (Benhabib), or, in political contexts, by according to them a right to initiate public deliberation (Bohman), or a right to participate democratically (Pogge), or, not least, a Forst-type right to justification.<sup>3</sup> Still, discursive and mere moral standing are conceptually distinct. We *may or may not* take it that a being, if it has moral standing, must be accorded discursive standing. And we *may or may not* take it that a being, if it has moral standing and can have discursive standing, must for this reason be accorded full discursive standing. E.g., pathocentric accounts of morality accord moral standing to beings even where they are incapable of discursive standing, at least so long as they can suffer at our hands. And there are (structurally) particularist views of justice and justification that accord full discursive standing to a mere subset of affected others, e.g., reasonable or rational people, without accordingly limiting the scope of moral standing.<sup>4</sup>

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<sup>3</sup>See Seyla Behabib, *Dignity in Adversity* (Cambridge: Polity Press, 2011), p. 67ff; Thomas Pogge, “Cosmopolitanism and Sovereignty”, *Ethics* 103/1 (1992), p. 64; James Bohman, *Democracy Across Borders* (Cambridge (MA): MIT Press, 2007), p. 52; on Forst, see below.

<sup>4</sup>E.g. political liberals accord strong, “constitutive” discursive standing (see below) only to people who are reasonable in an exclusive, substantive sense; but they do not deny that unreasonable people have moral standing and so should benefit (within limits) from basic rights and liberties. This is one upshot of an “internal” conception of political liberalism. See Jonathan Quong, *Liberalism Without Perfection* (Oxford: Oxford University Press, 2011), pp.

More important now, there are at least two kinds of discursive standing. I take it that where we are reasonable, we are committed to acting on grounds that, as far as we can tell, are good. And where we accord discursive standing, we have seen, we seek to act on grounds that are acceptable. Accordingly, there are strong, *constitutive* and weaker, *derivative* forms of discursive standing depending on the relationship that we take to hold between the goodness and the acceptability of our grounds. If Betty, who is reasonable, accords to Paul constitutive standing, she is committed to acting toward him on grounds that are good and that are acceptable, but she takes it that their goodness (at least partly) depends on, or is constituted by, their acceptability by Paul. If she accords to him derivative standing, in turn, she is committed to acting on grounds that are both good and acceptable, but rather than taking their acceptability to constitute their goodness, she views their acceptability, or valuable forms of it, as something that could, or would, flow from, or derive from, an appreciation of their goodness. To mark this contrast, I shall also speak of *discursive respect* where we accord the strong, constitutive form of discursive standing. (We should not overdraw this contrast: perhaps these two kinds of standing are best seen as ideal types located on opposite ends of a sliding scale.)

Moral and political forms of constructivism typically express a commitment to discursive respect at whatever level of thought at which such views apply a constructivist, interpersonal acceptability standard. E.g., constructivist conceptions of justice take it that (qualified) acceptability by relevant other people justifies, or constitutes the epistemic-practical authority of principles of justice – or, say, their rightness, correctness, validity, reasonableness, and so on. Such conceptions thereby accord to relevant other people constitutive discursive standing – even though they may differ greatly about, e.g., their conceptualization of such standing, the range of others to whom they accord it, and the level of thought and argument at which they accord this standing.<sup>5</sup> It is important to note, however, that even if we require moral-political principles to be based on different, acceptability-independent grounds, we can still attach much value to their acceptability – e.g., we might take it that it is part of the human good that people be able to accept principles that apply to them, or that their free support is necessary for the stability of a just regime, and so on. Still, we would not include others in the scope of discursive respect in relation to the grounds of these principles.

For instance, consider two extremes: Rawls-type political constructivism and Platonism. For political constructivism, the goodness of reasons for principles of

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290-314, and Besch, “Political Liberalism, the Internal Conception, and the Problem of Public Dogma”, in *Philosophy and Public Issues* Vol. 2/1 (2012). Such approaches are “particularist” in O’Neill’s sense: they do not include everyone to whom moral-political principles apply within the scope of the justification of these principles. See Onora O’Neill, *Toward Justice and Virtue* (Cambridge: Cambridge University Press, 1996), chapter 1.

<sup>5</sup>I elaborate on the (mainly justificatory) notion of constructivism that I shall use here and below in Besch, “On Discursive Respect,” available at <http://sydney.academia.edu/ThomasMBesch>.

political justice is, as Macedo puts it, “*entirely* a function of their capacity to gain widespread agreement among reasonable people.”<sup>6</sup> For Platonism, the goodness of good reasons is a property that can hold *whether or not* anyone sees that this is so, while unanimity about a just order is still seen as a good – at least where it is rational, or derives from the proper appreciation of the merits of a just social order. Views of either kind attach positive value to the goodness and the acceptability of principles of justice, or their reasons. But they posit different directions of fit between these things.<sup>7</sup> Political constructivism views the goodness of good reasons from the perspective of their acceptability by relevant others. Thus, it expresses a commitment to discursive respect. Platonism views the value of the acceptability of good reasons from the perspective of their goodness. It values rational acceptability, but construes acceptability as rational if it is directed at reasons that are good on acceptability-independent grounds. Thus, it seeks “normative” consent or “ideal” unanimity, and so expresses a commitment to the derivative discursive standing.<sup>8</sup>

Accordingly, it is not distinctively constructivist to claim that reasons that are good and moral-political principles that are right are reasonably acceptable – or that we, where we claim moral-principles to be right, commit ourselves to the view that they can reasonably be accepted. As we have seen, Platonism is consistent with the view that there is a link between the goodness of reasons and the rightness of principles and their acceptability, or at any rate “reasonable” or “rational” forms of acceptability – if these adjectives are construed in terms that are uncontentious between constructivists and their opponents (I shall return to the meaning of “reasonable” later). Yet Platonism does not view the rightness of principles, or the goodness of reasons, as something constituted by their acceptability. Rather, it views acceptability as valuable, authoritative – or “reasonable” – if it derives, or can derive, from a proper appreciation of the rightness of these principles, or the goodness of these reasons. Platonists, then, can agree that right, correct, or justifiable, principles are acceptable; yet, again, they would take acceptability, or valuable forms of it, to (ideally) derive from the rightness of principles, rather than vice versa. It is distinctively constructivist, then, to accord to (qualified) acceptability the rank of *constituting* the merit in question.

Here is one thing we can take away from these preliminary remarks. By itself, a commitment to the rightness, correctness, or the justifiability of our moral-political principles and reasons does not commit us to the views (i) that people should have constitutive discursive standing, and (ii) that it is the acceptability of these principles

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<sup>6</sup>Stephen Macedo, *Liberal Virtues* (Oxford: Clarendon Press, 1991), p. 46f; my emphasis. See also John Rawls, *Political Liberalism* (New York: Columbia University Press, 1993), esp. lecture III.

<sup>7</sup>This refers to Platonism in O’Neill’s wide sense, which includes many variants of perfectionism and moral realism, amongst other views. See her *Toward Justice and Virtue*, pp. 48ff.

<sup>8</sup>David Estlund speaks of “normative consent”: see Estlund, *Democratic Authority* (Princeton: Princeton University Press, 2008), p. 10; Thomas Nagel speaks of “ideal unanimity”: see Nagel, *Equality and Partiality* (Oxford: Oxford University Press, 1991), p. 33f.

or their grounds that constitutes their epistemic-practical merit. Saying this is not to suggest that we should reject (i) and (ii). To the contrary, as will emerge later. But it heralds that we cannot account for the practice of claiming moral-political views to be right, correct, or justifiable, in terms that, if they were accurate, would directly commit us to constructivism. After all, there are many intelligent and conscientious people who engage in that practice, but do not accept constructivism, or indeed any other contested, more systematic philosophical doctrine about the nature and standards of moral-political justification. I shall come back to this point shortly.

### III

Turning next to Forst's constructivism about human rights, here are some of its contours that are relevant now: 1. According to Forst, moral-political principles and their reasons must meet a requirement of "reciprocal" and "general" acceptability (RGA). This is a constructivist standard. In light of RGA, moral-political principles qualify as right, correct, or valid, only if they are reciprocally, or equally, acceptable by all affected others. RGA thus accords to (qualified) acceptability a strong, justification-constitutive role and so accords to relevant other people constitutive discursive standing. 2. RGA and the right to justification are systematically intertwined. It is not always clear how exactly they are intertwined. On the reading of Forst's constructivism that I shall focus on here, however, RGA is part of what ground the right to justification. The view here is that while RGA cannot reasonably be rejected, agents, if they take principles and reasons to depend for their authority on their acceptability, are committed to accord to the relevant others a right to justification.<sup>9</sup> 3. Correspondingly, the right to justification is a right to constitutive discursive standing in moral-political matters that affect one. It is a right to justifications that meet RGA, and that hence accord to others a "(qualified) veto"<sup>10</sup> in matters that affect them. It is in this sense that where we accord to others this right, we are committed to treat them as "worthy of being given adequate, justifying reasons,"<sup>11</sup> or as beings who "can demand acceptable reasons for any action that claims to be morally justified and for any social or political structure or law that claims to be binding upon [them]."<sup>12</sup> 4. Not least, the right to justification is intertwined, as well, with other (moral) human rights. RGA not only requires us to accord to others a right to justification. It also grounds (moral) human rights, or the moral-political principles allocating them.

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<sup>9</sup>On a different reading of this case, of the systematic relationship between RGA and the right to justification is reversed, and the latter forms part of the grounding of the former. I briefly touch on this reading below. For a detailed account: see Besch, "Reflections on the Foundations of Human Rights," available online at <http://sydney.academia.edu/ThomasMBesch>.

<sup>10</sup>See Forst, "The Justification of Human Rights", p. 719; "The Basic Right to Justification", p. 44.

<sup>11</sup>Forst, "Toleration, justice and reason", p. 76f.

<sup>12</sup>Forst, "The Basic Right to Justification", p. 44.

RGA, then, is at the core of Forst's attempt to provide a categorical, reasonably non-rejectable grounding for the right to justification and other human rights. Accordingly, his case can achieve its aspirations just in case RGA itself is reasonably non-rejectable. Even if we suppose that once we accept RGA, it is incoherent for us to reject that others have a right to justification and other human rights, no categorical grounding of these things will have been achieved if RGA is based on grounds that can reasonably be rejected. Forst, of course, does not take RGA to be reasonably rejectable. In his view, this requirement reveals itself reflexively, or recursively, through a reconstruction of the practice of raising moral-political validity claims, or its presuppositions:

[Human rights] are to be regarded as constructions (...) that have an intersubjectively non-rejectable "reason." They are justified constructs the respect of which moral persons, who see no good reasons to deny them, owe to each other. The basic right to justification reveals itself in a recursive reflection combined with a discursive explanation of what it means to justify individual actions and general norms in a moral context. Any moral norm that claims to be generally and reciprocally valid must be able to prove its validity to those to whom it is addressed according to these criteria. Consequently, it must be able to be the subject of a practical discourse in which, in principle, all arguments for or against the norm can be presented. Thus, if one begins with an analysis of claims to moral validity and asks further for the conditions of their validity, one finds the "simple" principle of justification [i.e., RGA].<sup>13</sup>

This suggests something like this: F1 Where we claim moral-political principles to be right, we commit ourselves to their general and reciprocal acceptability.

It is incoherent to raise such validity claims, but to reject that must meet RGA. But is F1 true? Should we take it that our moral-political validity claims commit us to RGA, or a constructivist view of justification, for that matter? I shall suggest that we should not construe them in such terms – for reasons that mark more general limitations of reflexive arguments. Much depends here on how inclusive in doctrinal diversity the reconstructive basis of an account of moral-political validity claims is allowed to be in the first place. Forst, I take it, aspires to build on *generic* features of the practice of raising such claims. Now, a reconstruction of generic features of this (or any other) practice cannot be fully adequate unless it is true of every *prima facie* competent and reasonable instantiation – "competent and reasonable", that is, as construed prior to settling the truth about constructivism, anti-constructivism, or any other contested philosophical doctrine. To initially arrive at such a reconstruction, in turn, equal charity must be extended to all its *prima facie* competent and reasonable participants. Accordingly, we would need to reconstruct their discursive behavior so as to *maximize*, rather than selectively decrease, its coherence. Now, *prima facie* competent and reasonable participants in the relevant practice can, and often do, disagree about constructivism, Platonism, or the relationship between the goodness

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<sup>13</sup>Ibid.

and the acceptability of moral-political reasons. Hence, we need to reconstruct this practice in terms that are abstract, thin, or trivial enough to remain *neutral* between constructivism and anti-constructivism, or any other relevantly contested philosophical doctrine about moral-political reasons and justification.

But this disables the inference from moral-political validity claims to RGA. For if a proposed reconstructive account of the practice of raising these validity claims entails that they commit to RGA, the account will not be neutral between pro-constructivist and con-constructivist stretches of that practice. Thus, it will not provide a fully adequate reconstruction of all relevant instantiations of that practice (rather than pro-constructivist instantiations only). But if this account is suitably neutral between pro-constructivist and con-constructivist stretches of that practice, it may be duly inclusive and reconstructively adequate, but it cannot commit to RGA, or constructivism. As far as a reconstruction of the relevant validity claims is concerned, then, inclusive scope and reconstructive adequacy comes at the cost of critical force. An inclusive and adequate reconstruction of these validity claims cannot establish RGA, or constructivism, while a view that might establish such things could at most claim to be true of pro-constructivist species of that practice. Whatever provides a categorical, reasonably non-rejectable basis for a right to justification and other moral rights, then, it cannot be our raising of moral-political validity claims. Instead, it would have to be whatever it is, if anything, that would make it unreasonable for us not to raise (or redeem) them in ways that comply with RGA. And this seems to be the most plausible stand to take on this matter to begin with. The problem at hand marks a general methodological limitation of reflexive arguments for relevantly contested conclusions. Let  $P$  be a given practice,  $\phi$  a doctrinally selective view of how to exercise  $P$  (e.g., how to raise or redeem moral-political validity claims), and let  $\psi$  be a suggested reconstructive view of generic features of  $P$ . Assume, not least, that it is relevantly contested between *prima facie* competent and reasonable participants of  $P$  whether  $\phi$  should be accepted. Thus, if  $\psi$  implies that it is incoherent to participate in  $P$  without committing to, or complying with,  $\phi$ , then *this very implication* gives us reason to believe that  $\psi$  is *not* an adequate reconstruction of  $P$  (rather than pro- $\phi$  stretches of  $P$  only). Consequently, what makes the case relevant for the question of whether to accept or reject  $\phi$  simultaneously gives us reason to reject the reconstructive account it draws on. The reflexive argument from  $\psi$  to  $\phi$  hence is self-undermining, and so cannot vindicate  $\phi$ , or even provide a categorical, reasonably non-rejectable grounding for  $\phi$ . An argument of this form can at most establish this: so long as  $\phi$  is relevantly contested by relevant people, the practice in question may not be reconstructed in terms that, if they were accurate, would commit to  $\phi$ ; accordingly,  $\phi$ , if it is justifiable, must be justifiable on different, independent grounds.

#### IV

To substantiate that Forst's problem is more general in nature, let me consider another reflexive, presuppositional case for a conclusion similar to the one he defends, namely, O'Neill's Kantian constructivist case for cosmopolitanism about the scope of

“reason or of ethical consideration.”<sup>14</sup> Her case does not openly distinguish between derivative and constitutive forms of discursive standing, but we may read her as aiming at a case about the latter, stronger standing. For O’Neill, if we include others in the scope of reason or of ethical consideration, we must accept that thought and activity that affects them must be “followable” – i.e., coherently acceptable – by them. This requirement of followability is constructivist: it imposes an important constraint on thought and activity, and it is part of what constitutes the reasonableness of thought and activity in the first instance.<sup>15</sup> Thus, O’Neill’s case is about constitutive discursive standing. The requirement of followability applies, as well, to reasoning about the scope of reason or of ethical consideration. For O’Neill, then, any attempt to determine that scope must itself be coherently acceptable by everyone for whom it is to count. Yet, she argues, all major attempts to determine that scope fail. Neither Platonist (or perfectionist, or realist) appeals to a metaphysically based, objective value of people or their moral inclusion will do, nor will particularist appeals to the norms and values of “our” form of life, or “our” traditions, suffice, nor will it be enough to appeal to the instrumental value that the moral inclusion of other people may have for some people or other. Such appeals, O’Neill argues, instantiate thinking that relevant others cannot follow, and that hence is not fully reasonable.<sup>16</sup> Related considerations disqualify appeals to ideas of recognition.<sup>17</sup> To provide an alternative, she advances a presuppositional account: in her view, the very presuppositions we inevitably make about others whom we take to be on the receiving end of our activity render it incoherent for us not to include them in the scope of reason or of ethical consideration.

Now, O’Neill plausibly argues that we, where we take others to be on the receiving end of our activity, presuppose assumptions of “plurality”, “connection” and “finitude” about them – i.e., we take them to be, in one way or other, independent “sources of activity” that are connected to us and that are vulnerable to the effects of our activity.<sup>18</sup> She claims, too, that these assumptions cannot coherently be denied where they are presupposed. But this leaves open how we are to relate to others about whom we presuppose these assumptions. This is as it needs to be. Again, to be suitably inclusive and reconstructively adequate, a reconstructive view of generic features of other-regarding activity needs to be true of a wide variety of activity, including activity that unduly excludes others, or that seeks to demean, hurt, or even destroy them. For better or worse, then, such a view must be abstract enough to

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<sup>14</sup> O’Neill, *Toward Justice and Virtue*, pp. 48-52, 91-121; *Bounds of Justice* (Cambridge: Cambridge University Press, 2000), pp. 112-29, 186-202. For a detailed discussion: see Besch, “Kantian Constructivism, the Issue of Scope, and Perfectionism”, in *European Journal of Philosophy* 19/1 (2011).

<sup>15</sup> On O’Neill’s requirement of followability: see Besch, “Constructing Practical Reason: O’Neill on the Grounds of Kantian Constructivism”, in *The Journal of Value Inquiry* Vol. 42/1 (2008).

<sup>16</sup> O’Neill, *Toward Justice and Virtue*, pp. 51, 91-97.

<sup>17</sup> O’Neill, *Toward Justice and Virtue*, p. 92.

<sup>18</sup> O’Neill, *Toward Justice and Virtue*, pp. 97-106.

remain *neutral* between contested ethical, philosophical, and other doctrines about the scope of reason or of ethical consideration – including the view that others ought to be accorded constitutive discursive standing within a cosmopolitan scope. Still, it is on the basis of her account of the presuppositions of other-regarding activity that O’Neill infers that we must accord constitutive discursive standing to all whom we take to be on the receiving end of our activity. But this does not follow. At most, it follows that we must accord constitutive discursive standing to the relevant others *if* we already endorse a pro-cosmopolitan and pro-constructivist view to the effect that such standing must be accorded to everyone who is, or whom we take to be, a vulnerable and connected source of activity.<sup>19</sup>

Again, then, the conjunction of inclusive scope and reconstructive adequacy comes at the cost of critical force. An inclusive and adequate account of generic features of other-regarding activity will not show that it is unreasonable not to accord constitutive discursive standing to the relevant others, while an account that might show this can at most claim to be true of pro-constructivist and pro-cosmopolitan stretches of such activity. Thus, it cannot be the presuppositions of other-regarding activity that make it unreasonable for us not to accord constitutive discursive standing to others. Instead, it would have to be whatever it is, if anything, that makes it unreasonable for us not to act toward others in ways that comply with a constructivist acceptability-requirement such as O’Neill’s requirement of followability. And, again, this seems to be the most plausible stand to take on the matter to begin with.

## V

To return to Forst. Once we see that a reflexive grounding of RGA is out of the question, other strands of thought in Forst’s account emerge. One is this. Sometimes, he suggests that what commits us to RGA is not just our validity claims, but (also) proper moral respect for other people.<sup>20</sup> And the idea that moral respect calls for constructivist, interpersonal and acceptability-based justification marks a familiar theme.<sup>21</sup> Still, what we saw above suggests that moral respect cannot, or not *by itself*, commit us to a constructivist standard of justification like RGA. Even if we suppose (i) that it is unreasonable not to morally respect others and (ii) that such respect requires that our actions toward them be based on good and acceptable reasons, it follows neither that we must accord to them constitutive discursive standing (rather than derivative discursive standing), nor that we must adopt RGA (rather than some

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<sup>19</sup> See Besch, “Kantian Constructivism, the Issue of Scope, and Perfectionism”, p. 10ff.

<sup>20</sup> Forst, “Toleration, justice and reason”, p. 76f, and “The Basic Right to Justification”, p. 44.

<sup>21</sup> Exemplary here are political liberalism and some stretches of deliberative democratic theory: consider, for instance, Charles Larmore, “Political Liberalism”, in his *The Morals of Modernity* (Cambridge: Cambridge University Press, 1996), p. 137; “The Moral Basis of Political Liberalism”, in his *The Autonomy of Morality* (Cambridge: Cambridge University Press 2008), pp. 146ff; Amy Gutmann, Dennis Thompson, *Deliberative Democracy* (Princeton: Princeton University Press, 2004), esp. pp. 79ff.

non-constructivist standard of justification). Any direct inference from moral respect to RGA, and with it to the constitutive discursive standing that a Forst-type right to justification calls for, either starts from a doctrinally enriched, constructivist conception of moral respect – which would beg the question in the systematic context at hand – or involves a disabling non-sequitur.<sup>22</sup> A second strand of thought is this. It sometimes seems that Forst defines a commitment to RGA directly into the idea of reasonableness that he employs in his account. On his view, the following holds:<sup>23</sup>

F2 Reasonable people are committed to providing reasons for moral-political principles that are reciprocally and generally acceptable. If we focus exclusively on the practices of people who are “reasonable” in this sense, Forst’s reflexive case may escape failure after all. A reconstruction of our validity claims that is true only of pro-constructivist stretches of the practice of raising such claims might be unobjectionable if only such stretches of that practice are reasonable to begin with. Thus, given a constructivist idea of the reasonable, it might in fact be true that reasonable people cannot coherently reject a Forst-type right to justification. Supposing a constructivist idea of the reasonable like this places Forst’s approach in good company; such ideas abound. E.g., Rawls-type political liberalism anchors its idea of public justification in such a constructivist conception of the reasonable.<sup>24</sup> For another example, consider Scanlon’s seminal view of reasonableness. Reasonable people, he claims, desire to be able to justify their actions, practices, or institutions, to others on grounds that people like them cannot reasonably reject – grounds, that is, that can serve as a basis of agreement from an “impartial perspective,” as Barry puts it.<sup>25</sup> The idea of justification invoked here is constructivist (that is, in the wide, justificatory sense of “constructivism” that I use here): to justify  $\phi$  to the relevant others here is seen as a matter of establishing that  $\phi$  meets the standard of reasonable non-rejectability, which, in turn, amounts to a particularly strong and indirect acceptability requirement. Accordingly, on this view, too, the reasonable are committed to accord to others constitutive discursive standing. Not least, Scanlon sometimes suggests that this idea of the reasonable tracks the meaning that the word “reasonable” has in ordinary discourse.<sup>26</sup> If it does have this meaning, there may be a strong sense in which it can be claimed to be incoherent for reasonable people not to adopt, or comply with, a

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<sup>22</sup>For a more extensive discussion of the argument from moral respect: see Besch, “Reflections on the Foundations of Human Rights”.

<sup>23</sup>For what follows: see Forst, “Toleration, justice and reason”, p. 81; Forst, *Contexts of Justice*, chapter 4. See also Besch, “Diversity and the Limits of Liberal Toleration”, in Duncan Ivison (ed), *The Ashgate Research Companion to Multiculturalism* (London: Ashgate, 2010), pp. 84ff.

<sup>24</sup>I argue this case in Besch, “Political Liberalism, the Internal Conception, and the Problem of Public Dogma”.

<sup>25</sup>Thomas Scanlon, “Contractualism and Utilitarianism”, in Amartya Sen, Bernard Williams (eds.), *Utilitarianism and Beyond* (Cambridge: Cambridge University Press, 1982); Scanlon, *What We Owe to Each Other* (Cambridge: Belknap Press, 1998), esp. chapter 5; Brian Barry, *Theories of Justice* (Berkeley: University of California Press, 1989), p. 290; Barry, *Justice as Impartiality* (Oxford: Oxford University Press, 1996), 67-72.

<sup>26</sup>See Scanlon, *What We Owe to Each Other*, p. 192.

constructivist standard of justification of RGA's overall type, or to accord to others a form of constitutive discursive standing.

May we suppose a constructivist view of reasonableness here? This is doubtful. To begin with, we have reasons not to construe of the meaning of the word "reasonable" in terms that from the outset tie the reasonable to constructivism – or any other relevantly contested philosophical doctrine. There are *prima facie* competent and reasonable speakers who reject constructivism about moral-political justification. And our account of the meaning of that word can hardly be suitably inclusive and reconstructively adequate if it entails that the usage these speakers make of that word follows meaning rules that, despite what they might think, commit them to refer to their own practices of reason-giving as unreasonable. It is more plausible to take it that any idea of the reasonable that does tie reasonableness to constructivism does not capture the meaning of that word, but expresses a substantive conception of reasonableness. However, what meaning does the word "reasonable" have in ordinary discourse? Moore's view on this matter seems suitably minimal and uncontentious. In her view, reasonable people are committed to a practice of reason-giving, or justification; and they are committed to the view that other people are worthy of reason-giving and *some* moral consideration.<sup>27</sup> By itself, this implies little. E.g., it does not imply that reasonable people are committed to engage in constructivist reason-giving, or to comply with Forst's RGA. Nor does it imply that they accord to others a Forst-type right to justification, or constitutive discursive standing, rather than discursive standing of the weaker, derivative kind. Accordingly, Moore rightly emphasizes that reasonableness does not by itself rule out all forms of partiality. Reasonable people often offer reasons, she notes, that "are inextricably linked to the things that they deem important from the personal perspective, such as their own desires, aims and ends" – rather than reasons that all relevant others can equally accept.<sup>28</sup> There may be other commitments that can be built into a suitably uncontested idea of the reasonable – they may not be part of the meaning of the word, but they are typically present where the word applies. E.g., the reasonable are committed to exercise "basic capacities of reason", seen as involving a commitment to some degree of coherence, reasonability, and criticality.<sup>29</sup> They also committed to exercise "executive virtues" that enable us to do as we say and to act in ways aligned with our beliefs.<sup>30</sup> Not least, and perhaps slightly less trivial, they place positive value on agreement – which is emphasized in Scanlon's (and Barry's) views. It is not easy to capture this, but perhaps we can say that reasonable people place positive value on what they regard as reasoned convergence in judgment between what they view as relevant other people. Accordingly, they prefer solutions that are the subject of such convergence over relevantly similar solutions that are not. Again, this entails little. It leaves open what justificatory or moral rank the reasonable accord to agreement,

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<sup>27</sup>Margaret Moore, "On Reasonableness", *Journal of Applied Philosophy* 13/2 (1996), p. 171.

<sup>28</sup>Ibid.

<sup>29</sup>Larmore, *The Autonomy of Morality*, p. 143.

<sup>30</sup>Macedo, *Liberal Virtues*, p. 275.

whose agreement they value, how deep the agreement is that they value, or what considerations, if any, trump or nullify that value. Now, it seems that where constructivist moral-political justification supposes an idea of reasonableness – e.g., by aiming at *reasonable* acceptability, or by addressing *reasonable* people, or by invoking grounds and employing means that are *reasonably* non-rejectable, or by avoiding *reasonable* disagreement, and so forth – a near-trivial idea of the sort just sketched may be suitably uncontentious and inclusive for the purpose. Yet what matters now is not whether there is a suitably uncontentious and inclusive idea of reasonableness, but whether reasonableness so construed commits us to a constructivist standard of justification such as RGA. And this does not seem to be so. Any idea of the reasonable of sort just sketched is too minimal in content to have such an implication.

It is not clear just how much more normative or evaluative content may be added to a minimal idea of the reasonable of the sort just sketched before it turns into a substantive moral-political virtue in its own right – a virtue that, at least if that additional content is relevantly contested by relevant others, may not simply be supposed in moral or political reasoning and justification, but should instead be recognized as needing justification in its own right. However, if we add a commitment to a constructivist standard such as RGA, or to constitutive discursive standing, we add content that relevant other people reject reasonably – “reasonably”, that is, in the minimal sense. But this, if anything, puts that content and with it the resulting, constructivist conception of the reasonable in need of justification. Consequently, if we build a case for a Forst-type right to justification, or other human rights, or for relevant, rights-allocating moral-political principles, on the supposition that all relevant others are reasonable in that enriched sense, we either start from *error*, or engage in *undue idealization*, or advance a stretch of mere, pro-constructivist *dogma*.<sup>31</sup> And this cannot yield a categorical, reasonably non-rejectable grounding of the things just referred to.

## VI

Here is what all this suggests. Perhaps a constructivist conception of reasonableness (“reasonableness”) allows us to claim that reasonable people, by pain of incoherence, must follow RGA, or accord to others the constitutive discursive standing a Forst-type right to justification calls for – or adopt whatever rights-allocating principles meet

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<sup>31</sup>On idealizations: see O’Neill, “Abstraction, Idealization and Ideology in Ethics,” in J. G. D. Evans, ed., *Moral Philosophy and Contemporary Problems* (Cambridge, England: Cambridge University Press, 1988). There may be ways to enrich the content of a politically basic idea of the reasonable that do not run into the listed problems. E.g., using O’Neill’s notion of abstraction, we can conceive of a method of “inclusive abstraction” that, within limits, helps to identify additional, reasonably non-rejectable content that such an idea may contain – but, arguably, this would not give us a categorical grounding of rights-allocating principles. See Besch, “On Political Legitimacy, Reasonableness, and Perfectionism,” pp. 70ff.

RGA. But this anchors these things in a moral-political virtue that is reasonably contested and that stands in need of justification. Prior to further argument, the reasonable *may or may not* be committed to a constructivist standard of justification such as RGA. Thus, Forst's case does not ground human rights, or a right to justification, categorically. At the very best, it suggests how these things can be grounded *if* we take it that all relevant other people have, or should be accorded, constitutive discursive standing. The grounding of these things hence remains *conditional*, or *hypothetical*. Two concluding remarks are in place. First, my argument does not deny that people should be accorded a right to justification, or a meaningful form of constitutive discursive standing – the opposite is true. I have repeatedly invoked the consideration that a reconstruction of generic features of a given practice – e.g., our raising of validity claims, other-regarding activity, or indeed our usage of the word “reasonable” – should extend equal charity to all its *prima facie* competent and reasonable participants, and therefore should be neutral between, e.g., con-constructivist and pro-constructivist stretches of the relevant practice. This marks a methodological demand for reconstructive neutrality – or, say, a variant of *highest-order impartiality*, to adapt Nagel's phrase<sup>32</sup> – that does not in its own right entail the view that people should be accorded constitutive discursive standing, but that is evidently consonant with this view. For it is precisely its neutrality that is part of what enables a reconstruction of the relevant practices to be equally accessible and acceptable by people who may hold deeply competing views of how best to participate in these practices. There is a sense, therefore, in which the argument of this paper holds *especially* if we take it that people should be accorded a Forst-type right to justification.

Not least, we saw that Forst's case remains hypothetical in nature: it supposes a commitment RGA – that is to say, it supposes that everyone affected by moral-political principles should be accorded constitutive discursive standing. A categorical grounding of human rights, if it is to take a form similar to Forst's attempt, will accordingly hinge on whether a suitable defense of the importance of constitutive discursive standing can be supplied – one, moreover, that appeals to “reasonably” non-rejectable grounds, where the adjective is understood in terms that are suitably minimal and inclusive. As proponents of ethical accounts of human rights will readily concede, it is doubtful that such grounds can be provided, rather than, say, more substantive, “ethical” grounds. Still, perhaps the value of Forst's case is to raise, rather than answer, two important questions: why accord discursive respect to other people to begin with? And in light of what conception of the reasonable, if any, may we assess the cogency of an answer to that question?

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<sup>32</sup>Thomas Nagel, “Moral Conflict and Political Legitimacy”, in *Philosophy and Public Affairs* Vol. 16/3 (1987).