



The Morality of Freedom

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The Nature of Rights

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Abstract and Keywords

Begins with a definition of rights and a discussion of the relation between rights and duties. The right to promise, and rights generated by promising are used as examples to show how rights and duties function. Rights are held to be grounded in interests, since their instrumental value derives from the intrinsic value of well-being. Thus only those whose well-being is intrinsically valuable have rights, and rights cannot be regarded as trumps but must be weighed against other valuable ends. The view that rights should be grounded in respect for persons is discussed and rejected.

Keywords: duties, interests, promising, respect, rights, value, well-being

To prepare for the examination of doctrines which hold individual freedom to be based on rights, this chapter examines the nature of rights. It starts by a sketch of an account (Section 1), followed by an explanation of some of its technical points (Sections 2-5). Sections 6-8 touch on the philosophically significant aspects of the account: the capacity to have rights and the relations between rights, duties and interests. Finally Section 9 introduces the next chapter by considering the importance of rights, and raising the question whether rights can be morally fundamental.

1. Rights: The Main Features

One danger of prefacing a discussion of the importance of rights with a definition of the concept is that one may end with a definition according to which rights are not important, but which is not acceptable to those who claim that they are. An opposite danger is of proving their importance by calling

anything of value a right. Both dangers result from the fact that a philosophical definition of 'a right', like those of coercion, authority and many other terms, is not an explanation of the ordinary meaning of a term. It follows the usage of writers on law, politics and morality who typically use the term to refer to a subclass of all the cases to which it can be applied with linguistic propriety.

Philosophical definitions of rights¹ attempt to capture the way the term is used in legal, political and moral writing and discourse. They both explain the existing tradition of moral and political debate and declare the author's intention of carrying on the debate within the boundaries of that tradition. At the same time they further that debate by singling **(p.166)** out certain features of rights, as traditionally understood, for special attention, on the grounds that they are the features which best explain the role of rights in moral, political, and legal discourse. It follows that while a philosophical definition may well be based on a particular moral or political theory (the theory dictates which features of rights, traditionally understood, best explain their role in political, legal and moral discourse), it should not make that theory the only one which recognizes rights.¹ To do so is to try to win by verbal legislation. A successful philosophical definition of rights illuminates a tradition of political and moral discourse in which different theories offer incompatible views as to what rights there are and why. The definition may advance the case of one such theory, but if successful it explains and illuminates all. In this spirit I shall first propose a definition of rights and then explain various features of the definition and criticise some alternative definitions.

Definition: 'X has a right' if and only if X can have rights, and, other things being equal, an aspect of X's well-being (his interest) is a sufficient reason for holding some other person(s) to be under a duty.²

Capacity for possessing rights: An individual is capable of having rights if and only if either his well-being is of ultimate value or he is an 'artificial person' (e.g. a corporation).

Note that since 'a right' is a very general term, one rarely asserts that someone has a right without specifying what rights he has, just as one does not normally mention that a person is subject to a duty without saying something more about what duty it is. Sometimes one may state of another that he has rights in order to indicate that he is the kind of **(p.167)** creature who is capable of having rights. For example, one may say that slaves have (legal or moral) rights, or that partnerships have rights, or that fetuses have them. (Similarly one may say that monarchs have duties, etc.) The fact that assertions of rights *tout court* are rare does not invalidate the definition, nor does it detract from its value as the key to the explanation of all rights. It is true that there is much about statements of rights which cannot be learned from my definition alone. One needs to distinguish a right to perform an act from a right in an object, and that from a

right to an object, and that from a right to a service or a facility, and that again from 'a right to. . .' where the dots stand for an abstract noun. A right to use the highway, for example, is a liberty right to use the highway or a right to have that liberty. A right in a car may be a right of ownership in the car, or some other right in it. Detailed explanations of rights are in part linguistic explanations (a right in a car differs from a right to a car) but in part they depend on political, legal or moral arguments (does a right to free speech include access to the mass media or to private premises?) The proposed definition is meant to be neutral concerning all such detailed questions. At the same time it aims to encapsulate the common core of all rights, and thus to help to explain their special role in practical thought.

The definition is of rights *simpliciter*. Some discourse of rights is of rights as viewed from the point of view of a certain system of thought, as when one compares Kantian rights with utilitarian rights. Prefixing an adjective to 'rights' is one way to indicate that the speaker does not necessarily accept the existence of the right and is merely considering the implications of a system of thought. (On other occasions such adjectives identify the contents of the rights, e.g. economic rights, or their source, e.g. promissory rights, or both.)

Rights are grounds of duties in others. The duties grounded in a right may be conditional.¹ Consider the duty of an employee to obey his employer's instructions concerning **(p.168)** the execution of his job. It is grounded in the employer's right to instruct his employees. But it is a conditional duty, i.e. a duty (in matters connected with one's employment) to perform an action if instructed by the employer to do so. When the condition which activates the duty is an action of some person, and when the duty is conditional on it because it is in the right-holder's interest to make that person able to activate the duty at will, then the right confers a power on the person on whose behaviour the duty depends.¹ Thus the employer's right over the employees is a ground for his power to instruct them. This power is one aspect or one consequence of his right. But the very same right also endows him with a power to delegate his authority to others. It can, if he chooses to delegate authority, become a source of a power in one of his subordinates. In that case the employee will have a duty to obey the person in whom power was vested and that duty as well as the power of the delegated authority is grounded in the right of the employer. To simplify I shall not dwell specifically on rights as the grounds of powers.

2. Core and Derivative Rights

Some rights derive from others. Just as rights are grounds for duties and powers so they can be for other rights. I shall call a right which is grounded in another right a derivative right. Non-derivative rights are core rights. The relation between a derivative right and the core right (or any other right) from which it derives is a justificatory one. The statement that the derivative right exists must be a conclusion of a sound argument (non-redundantly) including a statement

entailing the existence of the core right. But not every right thus entailed is a derivative one. The premisses must also provide a justification for the existence of the derivative right (and not merely evidence or even proof of its existence). To do so their truth must be capable of being established without **(p.169)** relying on the truth of the conclusion. An example may illustrate the point.

Let us assume that I own a whole street because I bought (in separate transactions) all its houses. My ownership of a house in the street does not derive from my ownership of the street as a whole, even though the statement that I own a house in the street is entailed by the statement that I own the street. For in attempting to provide a normative justification for my rights I have to refer to the individual transactions by which I acquired the houses. Therefore my right in the street derives from my rights in the houses and not the other way round. Had I inherited the whole street from my grandfather the situation would have been reversed.

Without grasping the relation between core and derivative rights one is liable to fall into confusion. My right to walk on my hands is not directly based on an interest served either by my doing so or by others having duties not to stop me. It is based on my interest in being free to do as I wish, on which my general right to personal liberty is directly based. The right to walk on my hands is one instance of the general right to personal liberty. The right to personal liberty is the core right from which the other derives. Similarly my right to make the previous statement is a derivative of the core right of free speech, and my right to spoil the cigarette I am holding at the moment derives from my ownership in it, and so on. Often right-holders have a direct interest in that to which they have derivative rights. But those do not always ground their rights. A right is based on the interest which figures essentially in the justification of the statement that the right exists. The interest relates directly to the core right and indirectly to its derivatives. The relation of core and derivative rights is not that of entailment, but of the order of justification. The fact that a statement that everyone has a right to freedom of expression appears to entail the statement that everyone has a right to free political expression does not establish that the first is the core right and the second its derivative. It may well be that freedom of political speech is justified by considerations which do not apply to other kinds of speech. If it is also the case that, while separate independent considerations justify freedom of commercial **(p.170)** speech, and others still freedom of artistic expression, scientific and academic communications, etc., there are no general considerations which apply to all of the protected areas of speech, then the general right to freedom of expression is a derivative right. It is a mere generalization from the existence of several independent core rights.

Furthermore, a general right statement does not entail those statements of particular rights which are instances of it. I may have a right to free speech without having a right to libel people. In matters of libel, the right to free

expression may be completely defeated by the interests of people in their reputation. I will return to this point later.

3. The Correlativity of Rights and Duties

It is sometimes argued that to every duty there is a corresponding right. It is evident from the proposed definition that there are no conceptual reasons for upholding such a view. Some moral theories may yield such a correlativity thesis as a result of their moral principles, but this possibility cannot be explored here.¹ A more popular thesis maintains that to every right there is a correlative duty. Since a right is a ground for duties there is a good deal of truth in this kind of correlativity thesis. Yet most of its common formulations are very misleading. R. Brandt's definition can serve as an example of many: 'X has an absolute right to enjoy, have or be secured in Y' means the same as 'It is someone's objective overall obligation to secure X in, or in the possession of, or in the enjoyment of Y, if X wishes it.'² He proceeds to define *prima facie* rights in terms of *prima facie* obligations. First, note that Brandt misleadingly suggests that to every right there corresponds one duty, that that duty is to guarantee the enjoyment or possession of the object of the right, and that it is conditional on the desire of the right-holder. All three points are mistaken. A right to education grounds a duty to provide educational opportunities to each individual, whether he wishes it or not. Many rights ground duties which fall short of securing their object, and they may **(p.171)** ground many duties not one. A right to personal security does not require others to protect a person from all accident or injury. The right is, however, the foundation of several duties, such as the duty not to assault, rape or imprison the right-holder.

Secondly, and more importantly, Brandt fails to notice that the right is the ground of the duty. It is wrong to translate statements of rights into statements of 'the corresponding' duties. A right of one person is not a duty on another. It is the ground of a duty, ground which, if not counteracted by conflicting considerations, justifies holding that other person to have the duty.

Thirdly, there is no closed list of duties which correspond to the right. The existence of a right often leads to holding another to have a duty because of the existence of certain facts peculiar to the parties or general to the society in which they live. A change of circumstances may lead to the creation of new duties based on the old right. The right to political participation is not new, but only in modern states with their enormously complex bureaucracies does this right justify, as I think it does, a duty on the government to make public its plans and proposals before a decision on them is reached, as well as a duty to publish its reasons for a decision once reached (except in special categories of cases such as those involving defence secrets). This dynamic aspect of rights, their ability to create new duties, is fundamental to any understanding of their nature and function in practical thought. Unfortunately, most if not all formulations of the correlativity thesis disregard the dynamic aspect of rights. They all assume

that a right can be exhaustively stated by stating those duties which it has already established.¹ This objection to the reduction of rights to duties does not rule out the possibility that 'A has a right to X' is reducible to 'There is a duty to secure A in X'. But since this duty can be based on grounds other than A's interest, the two statements are not equivalent.

4. Holding Individuals to Be Under a Duty

The proposed definition states that if an individual has a right then a certain aspect of his well-being is a reason for **(p.172)** holding others to be under a duty. I used this phrase advisedly to preserve the ambiguity between saying that rights are a reason for judging a person to have a duty, and saying that they are reason for imposing duties on him. They are in fact reasons of both kinds, but primarily of the first. Let me explain. Rights are (part of) the justification of many duties. They justify the view that people have those duties. But as has already been noted, they justify such a view only to the extent that there are no conflicting considerations of greater weight. Within certain institutional settings there are weighty reasons not so much against allowing rights to generate new duties as against allowing official action on the basis of new duties unless they are recognized by the appropriate institutions. Institutions such as universities, states, trade unions and football clubs are based on a concentration of power in certain bodies and a division of labour between officials whose duties are the execution of the institutions' policies and rules, and those who make and change those policies and rules. In such an institution it may be proper to say that rights are grounds not so much for judging that certain duties exist as for imposing them.

The right to political participation is a legal right in English law. But though in contemporary societies this right justifies holding the government to be under a duty to publicize its plans and the reasons for its decisions, there is no such legal duty on the government in English law. The duty is purely a moral duty. Nevertheless, the existence of a moral right to political participation, i.e. the fact that this right is given legal recognition and is already defended by some legal duties, is a ground for the authorized institutions (Parliament or the courts) to impose such a duty on government officials. If and when they do so, they will be making new law. But they will do so on the ground that this is justified and required by existing law. By the same token the legal right to political participation is a reason for investing people with a legal right to free information. It cannot be used to establish that they already have such a right.¹

(p.173) 5. Promises and Agreements

Some of the points made in the previous sections can be illustrated and clarified by using them to explain the rights involved in promises and agreements. These are two. There is the right to promise which a promisor must have if his promise

is to be binding. And there is the right conferred on the promisee by the promise. I will examine them in that order.

The right to promise is based on the promisor's interest to be able to forge special bonds with other people.¹ The right is qualified. Not everyone has it. Small children and some mentally deranged people lack it. Furthermore, if it is not permissible to have bonds based on immorality, one's right to promise does not include the right to promise to perform immoral acts. The right to promise is no doubt further qualified. Since we are not here concerned with any of these qualifications I will from now on disregard them.

Those who assign sufficient importance to the interest people have in being able to impose on themselves obligations to other people as a means of creating special bonds with other people believe in a right to promise. But why is it a right? The interest on which it is based validates the promising principle, namely:

If a person communicates an intention to undertake by that very act of communication a certain obligation then he has that obligation.

The promising principle establishes that if we promise we are obligated to act as we promised. It also establishes a present obligation to keep our promises, i.e. we are obligated to perform action X, if we promised to perform X. This is a conditional obligation. The condition is an act of the promisor and his obligation is conditional on his action because it is desirable that he should be able to bind himself if he so wishes. It follows that people's interest in being able to bind themselves is the basis of a power to promise which they **(p.174)** possess and of an obligation to keep promises they make. But neither the power nor the obligation point to a right to promise.

The right exists because the very same interest on which the power to promise and the duty to keep promises are based is also the ground for holding others to be subject to a duty not to interfere with one's promising. The duty requires one not to prevent a person from promising (e.g. by denying him the means of communicating an intention to undertake by that very communication an obligation, or by stopping others from receiving such communications). It also requires one not to force people to promise nor to induce them improperly to promise or not to promise. (Again I avoid examining the way these duties are qualified.) Violation of the duty not to interfere with a person's promising will frustrate his right to promise and the interest on which it is based, either by preventing the person from exercising his rights or by perverting the considerations on which he decides whether to promise or not. The fact that such interferences with the right are infrequent is reflected by the fact that the right to promise is rarely invoked in ordinary practical discourse. To conclude, the power to promise and the right to promise are distinct notions. But both stem from a common core, i.e. the interest of persons to be able to forge

normative bonds with others. That is why they coexist, and one has the power to promise if and only if one has the right to do so.

The right to make a particular promise (e.g., to visit my aunt next weekend) is a derivative right of the general right to promise. One such derivative right is the right to make a conditional promise. Two kinds of conditional promises are of interest here:

First a promise made conditional on an action by the promisee (e.g., 'I will give you ten pounds if you give me the book').

Second (which is in fact a special case of the above), a promise made conditional on a promise to be given by the promisee (e.g., 'I will give you ten pounds if you promise to give me the book').

(p.175) Whenever such a promise is made and the condition is fulfilled, there is an agreement between the promisor and the promisee. The right to make such promises is therefore a right to enter into agreements. There are other ways of making agreements but their analysis does not matter for our purpose.

So far we have discussed the right to promise. The right which the promise confers on the *promisee* does not derive from the right to promise which is a right of the *promisor*. Many writers on promises insist that the promised act must be or at least must be thought to be in the interest of the promisee. Elsewhere I have challenged this view and I will not return to the controversy here.¹ But it is interesting to relate this issue to the question of the promisee's right created by the promise.

One view regards the promisee's right under any particular promise as a core right based on his interest in the promised act (and the intention of the promisor to be obligated to perform the act). On this view, if there could be binding promises which do not benefit the promisee (and are not intended to do so) then there are promises which do not create rights in the promisee.

Such a consequence seems at odds with the conventions of discourse concerning promises. I therefore favour a second view (which complements the first) according to which each person has an interest that promises made to him will be kept. Of course, he might lose interest in the specific content of some promises, and keeping some of them may even work against his overall interest. But invariably he has a *pro tanto* interest that promises given to him be kept. This interest is the very one which is reflected in his right to promise. Namely, it is the interest to have voluntary special bonds with other people. We should remind ourselves that while the promisee may not be the initiator of the bond of which the promise is the whole or a part, he is not entirely passive either. It is always up to him to waive his right under the promise and thus terminate the binding force of the promise. It is this general interest which explains why every

promise, and not only those performance of which is to the **(p.176)** specific advantage of the promisee, creates a right in the promisee.

6. Capacity for Rights

The definition of rights does not itself settle the issue of who is capable of having rights beyond requiring that right-holders are creatures who have interests.

What other features qualify a creature to be a potential right-holder is a question bound up with substantive moral issues. It cannot be fully debated here. But the special role of statements of rights in practical thought cannot be elucidated and the significance of the definition cannot be evaluated without a brief explanation of the conditions for the capacity for having rights.

There is little that needs be said here of the capacity of corporations and other 'artificial' persons to have rights. Whatever explains and accounts for the existence of such persons, who can act, be subject to duties, etc. also accounts for their capacity to have rights. Whether certain groups, such as families or nations, are artificial or natural persons is important for determining the conditions under which they may have rights. But we need not settle such matters here.

There is a view, which I shall call the reciprocity thesis, that only members of 'the same moral community' can have rights. This is narrowly interpreted when the same moral community is a community of interacting individuals whose obligations to each other are thought to derive from a social contract or to represent the outcome of a fair bargaining process or if morality is conceived of in some other way as a system for the mutual advantage of all members of the community. Wider conceptions of the moral community extend it to all moral agents and regard anyone who is subject to duties as being capable of rights.

The principle of capacity for rights stated at the beginning of the chapter is not committed to the reciprocity thesis but is consistent with it. Since by definition rights are nothing but grounds of duties, if duties observe a reciprocity condition and can be had only towards members of the (same) moral community then the same is true of rights. Alternatively, **(p.177)** the reciprocity thesis obtains even if one can have duties towards non-members of the (same) moral community provided those are not based on the interests of the beneficiaries of those duties. For example, if my duties to (non-human) animals are based on considerations of my own character (I should not be a person who can tolerate causing pain, etc.) and not on the interests of animals, then animals do not have rights despite the fact that I have duties regarding them.

The merits of the reciprocity thesis will not be examined here. The problem to which the principle of capacity for rights is addressed is different. Often we ought to or even have duties to act in ways that benefit certain things, and often we ought so to act because of the benefit our action will bring those things. For example, I have a duty to water certain plants because I promised their owners

to look after them while they are away on holiday. My gardener has a duty to look after my garden because his contract of employment says so. Some scientists have a duty to preserve certain rare species of plants because they are the only source of a medicine for a rare and fatal disease. In all these cases the people who have duties to act in certain ways have them because it benefits plants. Yet in none of them is it true that the plants have a right to the benefits. The reason is that in all these cases the benefit is to be conferred on a thing whose existence and prosperity are not of ultimate value.

Being of ultimate, i.e. non-derivative,¹ value is being intrinsically valuable, i.e. being valuable independently of one's instrumental value. Something is instrumentally valuable to the extent that it derives its value from the value of its consequences, or from the value of the consequences it is likely to have, or from the value of the consequences it can be used to produce. Having intrinsic value is being valuable even apart from one's instrumental value. But not everything which is intrinsically valuable is also of ultimate value.

Consider a man who has a deep attachment to his dog. I share many people's feeling that the relationship is valuable **(p.178)** and the man's life as richer and better because of it. Many feel that the relationship is intrinsically valuable. Its value is not just that of a cause of a feeling of security and comfort in the man. Such feelings may be produced by tranquillizers. The relationship is not valued just as a tranquillizer. Its value is in its being a constitutive part of a valuable form of life. Those who share these views believe that the existence of the dog is intrinsically valuable. It is a logically necessary condition of the relationship and one which contributes to its value (it is the more valuable for being a relationship to a living—rather than a dead—dog). But so far as the story goes the intrinsic value of the dog is not ultimate for it derives from the dog's contribution to the well-being of the man. The man's well-being is here taken as the ultimate value. The dog non-instrumentally contributes to it. Hence his existence is intrinsically but derivatively valuable.

Some people are willing to go further and to hold that the value of the relationship between the man and the dog derives equally from its contribution to the well-being of the dog and that the dog's well-being is not merely derivatively important because of its contribution to the man's well-being. They hold it to be ultimately valuable. They regard the relationship between man and dog in the same way as they and most others regard a relationship between two persons.

My proposed principle of capacity for rights entails that those who regard the existence and well-being of (some) dogs as merely derivatively valuable (even if they believe them to be intrinsically valuable) are committed to the view that dogs can have no rights though we may have duties to protect or promote their well-being. For such people dogs have the same moral standing that many

ascribe to works of art. Their existence is intrinsically valuable inasmuch as the appreciation of art is intrinsically valuable. But their value is derivative and not ultimate. It derives from their contribution to the well-being of persons.

It seems plausible to suppose that just as only those whose well-being is of ultimate value can have rights so only interests which are considered of ultimate value can be the basis of rights. But there are plenty of counter-examples (**p. 179**) demonstrating that some rights protect interests which are considered as of merely instrumental value. All the rights of corporations are justified by the need to protect the interests of these corporations but these are merely of instrumental value. The rights of journalists (however qualified) to protect their sources are normally justified by the interest of journalists in being able to collect information. But that interest is deemed to be worth protecting because it serves the public. That is, the journalists' interest is valued because of its usefulness to members of the public at large. The rights of priests, doctors and lawyers to preserve the confidentiality of their professional contacts are likewise justified ultimately by their value to members of the community at large.

Furthermore, some people, and this seems to be the general view of the English Common Law, regard the interests on which a right as fundamental as freedom of speech is based as instrumentally valuable. Scanlon¹ distinguishes between three kinds of interest on which the right of free speech is based: (1) speaker's interest, (2) audience interest, and (3) third party interest. Only the first is the interest of the right-holder, the interest of a person to be able to communicate with others. The second (the interest of persons that others will be free to communicate with them) and third (the interest of people to live in a society in which communication is free—even if they personally do not wish to communicate with others) are interests of people other than the right-holder in his right.

In the Common Law freedom of expression is regularly defended, where it is defended, on grounds of the public interest, that is on the interests of third parties. The right-holder's interest itself, conceived independently of its contribution to the public interest, is deemed insufficient to justify holding others to be subject to the extensive duties and disabilities commonly derived from the right of free speech.²

We must conclude that (apart from artificial persons) only (**p.180**) those whose well-being is intrinsically valuable can have rights; but that rights can be based on the instrumental value of the interests of such people.

7. Rights and Interests

According to the definition, rights-discourse indicates a kind of ground for a requirement of action. To say that a person ought to behave in a certain way is to assert a requirement for action without indicating its ground. To assert that an individual has a right is to indicate a ground for a requirement for action of a

certain kind, i.e. that an aspect of his well-being is a ground for a duty on another person. The specific role of rights in practical thinking is, therefore, the grounding of duties in the interests of other beings.

Rights ground requirements for action in the interest of other beings. They therefore assume special importance in individualistic moral thinking. But belief in the existence of rights does not commit one to individualism. States, corporations and groups may be right-holders. Banks have legal and moral rights. Nations are commonly believed to have a right of self-determination, and so on.

Though rights are based on the interests of the right-holders, an individual may have rights which it is against his interest to have. A person may have property which is more trouble than it is worth. It may be in a person's interest to be imprisoned, even while he has a right to freedom. The explanation of this puzzle is that rights are vested in right-holders because they possess certain general characteristics: they are the beneficiaries of promises, nationals of a certain state, etc. Their rights serve their interests as persons with those characteristics, but they may be against their interests overall.

Some rights are held by persons as the agents, or organs of others. Thus company directors have rights as directors of the company. In such cases it is the interest of the principal which the right reflects. The same applies to rights held by persons *qua* guardians, trustees and the like.

The proposed definition of rights identified the interest on which the right is based as the reason for holding that **(p.181)** some persons have certain duties. Later on I referred to the rights themselves as being the grounds for those duties. The explanation is simple. The interests are part of the justification of the rights which are part of the justification of the duties. Assertions of rights are typically intermediate conclusions in arguments from ultimate values to duties. They are, so to speak, points in the argument where many considerations intersect and where the results of their conflicts are summarized to be used with additional premisses when need be. Such intermediate conclusions are used and referred to as if they are themselves complete reasons. The fact that practical arguments proceed through the mediation of intermediate stages so that not every time a practical question arises does one refer to ultimate values for an answer is, as we saw when discussing rules in Chapter Three, of crucial importance in making social life possible, not only because it saves time and tediousness, but primarily because it enables a common culture to be formed round shared intermediate conclusions, in spite of a great degree of haziness and disagreement concerning ultimate values.

For example, many who agree that people have a right to promise will disagree with my view, expressed above, of the interest on which it is based and will

justify it only by reference to some other interests of the right-holders. The importance of intermediate steps like rights, duties, rules and the like to a common culture explains and justifies the practice of referring to them as reasons in their own right, albeit not ultimate reasons.

An interest is sufficient to base a right on if and only if there is a sound argument of which the conclusion is that a certain right exists and among its non-redundant premisses is a statement of some interest of the right-holder, the other premisses supplying grounds for attributing to it the required importance, or for holding it to be relevant to a particular person or class of persons so that they rather than others are obligated to the right-holder. These premisses must be sufficient by themselves to entail that if there are no contrary considerations then the individuals concerned have the right. To these premisses one needs to add others stating or establishing that these grounds are not altogether defeated by **(p.182)** conflicting reasons.¹ Together they establish the existence of the right.

One result of the fact that a right exists where the interests of the right-holders are sufficient to hold another to be obligated should be noted. Sometimes the fact that an action will serve someone's interest, while being a reason for doing it, is not sufficient to establish a duty to do it. Different moral theories differ on this point. Some utilitarian theories deny that there is a useful distinction between moral reasons for action and duties. Some moral views confine duties to matters affecting human needs, or human dignity, etc. Be that as it may, it is in principle possible that a person should not have a right that others shall act to promote a certain interest of his simply on account of the fact that while they should do so, while it is praiseworthy or virtuous of them if they do, they have no obligation so to act.

These considerations help to explain how it is that even if a person has a right, not everyone is necessarily under an obligation to do whatever will promote the interest on which it is based. Rights are held against certain persons. Some rights are held against the world at large, i.e. against all persons or against all with certain specified exceptions. Thus the right to personal security is the ground of a duty on everyone not to assault, imprison or rape a person. Other rights are held against certain persons in virtue of a special relation they have to the right-holder. Thus children have a right to be maintained by their parents. The reasons many rights are against some definite people are varied. Sometimes the interests on which they are based can be satisfied only by some people and not by others. For example, since contractual rights are based on an interest in being able to create special relations, they give rise to rights against other parties to the agreement as they are the only ones who can satisfy that interest on that occasion. In other cases, even though **(p.183)** many can satisfy the

interests of the right-holder, these interests may be sufficient to establish a duty on some people and not on others.¹

Just as rights may impose duties on some persons and not on others, so they can impose a duty to do certain things but not others. The right to life may impose a duty not to kill or endanger the life of another without imposing a duty to take whatever action is necessary to keep him alive. Which duties a right gives rise to depends partly on the basis of that right, on the considerations justifying its existence. It also depends on the absence of conflicting considerations. If conflicting considerations show that the basis of the would-be right is not enough to justify subjecting anyone to any duty, then the right does not exist. But often such conflicting considerations, while sufficient to show that some action cannot be required as a duty on the basis of the would-be right, do not affect the case for requiring other actions as a matter of duty. In such cases, the right exists, but it successfully grounds duties only for some of the actions which could promote the interest on which it is based.

8. Rights and Duties

Rights are the grounds of duties in the sense that one way of justifying holding a person to be subject to a duty is that this serves the interest on which another's right is based. Regarded from the opposite perspective the fact that rights are sufficient to ground duties limits the rights one has. Only where one's interest is a reason for another to behave in a way which protects or promotes it, and only when this reason has the peremptory character of a duty, and, finally, only when the duty is for conduct which makes a significant difference for the promotion or protection of that interest does the interest give rise to a right. Naturally there may be other grounds for not holding a person to be subject to such a duty. The definition requires that the right is a sufficient **(p.184)** reason for a duty.

Hence, as we saw, where the conflicting considerations altogether defeat the interests of the would-be right-holder, or when they weaken their force and no one could justifiably be held to be *obligated* on account of those interests, then there is no right. Where the conflicting considerations override those on which the right is based on some but not on all occasions, the general core right exists but the conflicting considerations may show that some of its possible derivations do not.

There is a necessary conflict between free speech on the one hand and the protection of people's reputation or the need to suppress criticism of the authorities in time of a major national emergency on the other. (I assume that in both cases the reasons for suppressing libellous or critical expression are also reasons for not holding individuals to have a duty to protect the freedom to express such views.) If in these circumstances the reasons against free expression override those in favour of free expression, then while it is true that one has a right to free expression, one does not have a right to libel or to criticise the government in an emergency. A general right is, therefore, only a

prima facie ground for the existence of a particular right in circumstances to which it applies. Rights can conflict with other rights or with other duties, but if the conflicting considerations defeat the right they cannot be necessarily co-extensive in their scope.¹

These remarks help explain one sense in which rights ground duties. Two further points are, however, crucial to the understanding of the priority of rights to the duties which are based on them (and not all duties are based on rights). First, one may know of the existence of a right and of the reasons for it without knowing who is bound by duties based on it or what precisely are these duties. A person may know that every child has a right to education. He will, therefore, know that there are duties, conditional or unconditional, to provide children with education. But he may have no view **(p.185)** on who has the duty. This question involves principles of responsibility. It is part of the function of such principles to determine the order of responsibility of different persons to the right-holder. Does the primary responsibility rest with the parents, with the community stepping in only if they cannot or will not meet their obligations? Or does the primary responsibility rest with the community? The issue is of great importance. If it is the parents' duty then there is no duty on the community to provide free education to all. And yet one may be in a position to assert that there is a right to education without knowing the solution to such a problem, or to whether the communal responsibility is local or national, whether it extends only to primary education or beyond and so on.

In a sense such ignorance shows that the person's knowledge of the precise content of the right to education is incomplete. But this merely means that he does not know all the implications of the right to education (given other true premisses). It does not mean that he does not understand the statement that every child has a right to education. Furthermore it is reflection on the right to education, its point and the reasons for it, which helps, together with other premisses, to establish such implications. If a duty is based on a right, on the other hand, then it trivially follows that one cannot know the reasons for it without knowing of the right (or without knowing that the interest which it protects is sufficient to be the ground of a duty—which is the definition of a right).

The second point to bear in mind is that the implications of a right, such as the right to education, and the duties it grounds, depend on additional premisses and these cannot in principle be wholly determined in advance. At least, if it is true in principle that the future cannot be entirely known in advance, then there may be future circumstances which were not predicted and which, given the right to education, give rise to a new duty which was not predicted in advance. Even if no such duty is unpredictable, the total implications of the right to education are in principle unpredictable. Because of this rights can be ascribed

a dynamic character. **(p.186)** They are not merely the grounds of existing duties. With changing circumstances they can generate new duties.

9. The Importance of Rights

Let us recap. Rights ground duties. To say this is not to endorse the thesis that all duties derive from rights or that morality is right-based. It merely highlights the precedence of rights over some duties and the dynamic aspect of rights, their capacity to generate new duties with changing circumstances. Notice that because duties can be based on considerations other than someone's rights the statement (1) 'Children have a right to education' does not mean the same as statement (2) 'There is a duty to provide education for children.' (1) entails (2) but not the other way round. (1) informs us that the duty stated in (2) is based on the interests of the children. This information is not included in (2) itself.

The connection between rights and duties establishes that rights are special considerations, since duties are. But just as there are trivial duties so there are trivial rights. And not only derivative rights: core rights can also be of little consequence. The reason is the one remarked on in the first section of this chapter. Duties are special in the role they assume in practical reasoning. Their role cannot be captured by the usual weighing metaphor which applies to the evaluation of ordinary reasons. They have pre-emptive force. The point is seen clearly when we consider again the duty to obey a legitimate authority.¹ It is special since being pre-emptive it replaces rather than competes with (some of) the other reasons which apply in the circumstances. But the authority may have power over a trivial matter, and the importance of its directives relative to other considerations, those which they do not displace, need not be very great. It is not part of the very notion of a right that rights have great weight or importance. Some rights may be absolute, others may have little importance.

Are rights 'trumps', the expression given wide currency by Dworkin?² It all depends on what is meant by 'trumps'. **(p.187)** Given that rights are based on people's interests it cannot be claimed that they are trumps in the sense of overriding other considerations based on individual interests. Moreover, in the discussion of collective rights in the next chapter we will see that collective or group rights represent the cumulative interests of many individuals who are members of the relevant groups. It follows that there is nothing essentially non-aggregative about rights. Nor are rights necessarily agent-relative considerations. Some rights and some duties are or may be agent-relative, but there is no reason to think that all are nor do I know of anyone who has argued that. Some people regard rights as the non-utilitarian component of morality. But one has to be at least a partial utilitarian to accept that. Furthermore, if one is a utilitarian at least in part one may well wish to argue that some rights are based on utilitarian considerations.¹

Some have suggested that rights are distinctive in that, while being based on individual interests, they are given greater weight than is due to that interest.² But if rights are given greater weight than is warranted by the interest they protect considered in itself, this is presumably due to considerations which do not derive from concern for the well-being of the right-holder. Such considerations do exist. I may have a moral reason against killing a person who deserves to die, or who wishes me to kill him and whose suffering will make his death a blessing. But such reasons turn on my well-being or that of others. I may be the wrong person for the job, or I may refuse to defile my hands with his blood, or be a person whose life is committed to ways of **(p.188)** relating to other people which is inconsistent with killing, even a justified killing, or perhaps others may misinterpret my action with, given my position in life, undesirable consequences.

Many other, and more subtle, considerations may be adduced in such cases. They show that we have reasons to act in ways which benefit others, and reasons which depend on the fact that our action (or inaction) will benefit the other, but where the fundamental concern reflected in the reasons is not for the well-being of that other person. His well-being is merely instrumentally invoked. My definition of rights allows for such cases, provided that they amount to duties, and not merely to ordinary reasons for action. But it would be wrong to elevate them into a universal rule and claim that rights exist only when such considerations apply. Moreover, emphasizing the importance of these, generally marginal, factors obscures the fundamental role of rights in practical reasoning as representing concern for the interest of the right-holder sufficient to hold another subject to a duty.

Some will argue that the distinction between the interests of the (putative) right-holder and those of others misses a consideration which is central to the conception of rights as trumps. The duties one owes a right-holder derive from or express respect for him as a person. Rights, one may say, are based neither on the right-holders' interest, nor on that of others. Rather they express the right-holders' status as persons and the respect owed to them in recognition of that fact.

This may be a verbal disagreement. For it may be dissolved by responding that a person has an interest in being respected as a person. That shows that rights grounded in respect are based on interests. Whether or not the response dissolves the disagreement, it seems to me that people have such an interest. Yet logically it is a special kind of interest. It is not just one interest people have alongside others. Respecting a person consists in giving appropriate weight to his interest. The interest in being respected is but an element of the interest one has in one's interest. If respecting people is giving proper weight to their interests, then clearly we respect people by respecting their rights. But this is so precisely because their rights are based on their interests whose **(p.189)** claim

on us is sufficient to subject us to duties to respect them.¹ Since we respect others by giving proper weight to their interests, neither the duty of respect nor the interest in being respected can show that rights deserve greater weight than the interest they are based on.

Still, is it not open to argument that while respect for a person consists in giving due weight to his interest, the reasons for respecting him need not be to serve his interest? One may be duty-bound to respect a person just because one is a person oneself. Such a duty may defy consequentialist interpretation. On this interpretation it is not so much that rights have a force greater than the one justified by the interest they serve. At bottom their force is independent of that interest. That John's action will serve Judy's interest shows that it is an action which respects Judy. But John is obligated to perform it not in order to promote or defend Judy's interest. He may have a separate, independent reason to do that. The reason, the only one, on which Judy's right is based is that John, as a person, owes respect to all other persons.

Considerations of this kind do indeed exist, and will be discussed in the next chapter as well as in Part Four. They are what are traditionally known as deontological considerations. They have always been regarded, by those who believe in their validity, as establishing the existence of duties, rather than of rights. That attitude is captured and reflected in the explanation of rights advanced here. According to it rights must be based on the fact that the interest of the right holder is sufficient reason to hold another to be subject to a duty. The deontological view sketched above does not regard the interest of the alleged right-holder as the reason for the duty. It is, therefore, at best an argument for the existence of a duty with no corresponding right.

I believe that, whatever the general case for deontological **(p.190)** duties, there are no good grounds for conceiving the duty of respect for persons along the lines suggested in the preceding two paragraphs. It is, as was indicated before, the duty to give due weight to the interests of persons. And it is grounded on the intrinsic desirability of the well-being of persons. To that extent it can give rise to rights: it serves as the basis of people's right that others shall give due weight to their interest. Being a very abstract right, nothing very concrete about how people should be treated follows from it without additional premisses. This explains why it is invoked not as a claim for any specific benefit, but as an assertion of status. To say 'I have a right to have my interest taken into account' is like saying 'I too am a person.' This may perhaps explain its 'deontological' flavour.

Not surprisingly, those who see rights as grounded on respect for persons deny that respect for persons consists in giving due weight to their interests. The reason is clear. Combining the claim that respect for persons consists in having due regard for their interests with the claim that rights rest on respect for

persons leads to the conclusion that a person has a right that his interests will be duly respected. There is no apparent way by which this line of thought could explain the distinction between a person's interests which are protected by rights and those which are not. Instead, one may claim that respect for persons consists in respecting some of their interests only. In particular, it may be said, it consists in respecting their interest in being free to choose do and to live as they like. This may be thought to explain why some interests people have are not protected by rights. Rights protect not their interests generally but only their interest in freedom. The capacity to be free, to decide freely the course of their own lives, is what makes a person. Respecting people as people consists in giving due weight to their interest in having and exercising that capacity. On this view respect for people consists in respecting their interest to enjoy personal autonomy.

This argument calls for careful scrutiny. The claim, made above, that respecting people means giving proper weight to their interests is not a devious way to justify wholesale paternalism, at least not for those who believe in the value **(p. 191)** of personal autonomy. Since, as will be argued in Part Four, people's well-being is promoted by having an autonomous life, it is in their interest not to be subjected to the kind of oppressive paternalism which consists in running their lives for them allegedly in their own best interest. Therefore, the view that personal autonomy is an important element in people's well-being means that respect for people if understood as giving due consideration to all their interests leads to respect for their autonomy. It is true that on this view of respect it does not serve as a foundation of a theory of rights. But this is as it should be since one can, and people often do, show disrespect to others, including disrespect which amounts to denying their status as persons, by acts which do not violate rights. Each one of us can think of appropriate instances of insulting behaviour which illustrate the point.

It may be claimed that by defining rights as based on the well-being of individuals I have ruled out of court the view that morality is rights-based. By definition rights are not fundamental but derive from interests. If true this is a damaging criticism. As explained in the first section the account of rights aims to make sense rather than nonsense of rival theories about the role of rights in morality. The view that rights are fundamental can, however, be explained in terms of the proposed definition.

All rights are based on interests. Some rights may be based on an interest in having those same rights.¹ No vicious circularity is involved in the claim that X has a certain right because it is his interest to have it. It is no more circular than the statement that Jack loves Jill because she needs his love. In many cases an individual's interest in a right does not justify holding him to have it unless it serves some other worth-while interest of his (or of others). My son's interest in

a right to education justifies holding him to have it only because the right will serve his interest in education.

(p.192) If school places were saleable I would have had an interest in having a right to education even if further education were not in my interest. Such a right would serve my interest in my economic welfare since it would add to my disposable assets. Such an interest would not, of course justify holding me to have the right.

A right is a morally fundamental right if it is justified on the ground that it serves the right-holder's interest in having that right inasmuch as that interest is considered to be of ultimate value, i.e. inasmuch as the value of that interest does not derive from some other interest of the right-holder or of other persons.

Thus the proposed account of rights allows for the existence of fundamental moral rights. It has to be admitted though that it makes it unlikely that morality is rights-based. It is after all very unlikely that all moral considerations derive from people's interests in having rights. Are not their interests in avoiding starvation, in being adequately educated, and other similar interests of moral relevance as well? According to our account the special features of rights are their source in individual interest and their peremptory force, expressed in the fact that they are sufficient to hold people to be bound by duties. In these ways rights have a distinctive and important role in morality. But it is also a specialized role, not a comprehensive one. They contribute their share as a distinctive type of moral consideration, not as the foundation of all moral considerations. The next chapter points to some of the considerations omitted by those who concentrate on rights to the exclusion of all else.

Notes:

(1) I refer of course to what philosophers most commonly do, whether they know it or not. I do not wish to deny that some understand their enterprise in other ways.

(1) Though a consideration of notions such as 'chastity', 'honour', 'chivalry' shows that not all political or moral theories have room for all normative concepts. Some theories may not recognize rights.

(2) The definition draws on several elements of analyses of rights which stem from Bentham's beneficiary theory. It shares some features of R. M. Dworkin's explanation in *Taking Rights Seriously*, London, 1977, p. 100 (but not of his better known 'trump' theory), and has much in common with D. N. MacCormick's 'Rights in Legislation' in P. M. S. Hacker and J. Raz (eds.) *Law, Morality, and Society*, Oxford, 1977. Most of all I have been influenced by K. Campbell's ideas in his 'The Concept of Rights', 1979, an Oxford D.Phil. thesis.

(1) Throughout I draw no distinction between duties and obligations. Nor will I indicate how to distinguish a future duty which will exist if a condition is satisfied (If . . . then one has a duty to. . .) from a presently existing conditional duty (One has a duty to. . . if. . .). I will assume that only conditional duties can be conditioned on the exercise of powers to impose them.

(1) For a clarification of the notion of a normative power cf. my *Practical Reasons and Norms*, London, 1975, section 3.2. By extending the same reasoning rights can be shown to be grounds of immunities and liberties: they are reasons for not subjecting individuals to duties or to the power of others.

(1) It will be rejected in the next chapter. See also Ch. 10.

(2) Richard Brandt, *Ethical Theory*, Englewood Cliffs, NJ, 1959, p. 438.

(1) Needless to say core rights can lead also to new derivative rights.

(1) These points are developed in my 'Legal Rights', *Oxford Journal of Legal Studies*, 4 (1984), 1, and 'The Internal Logic of the Law', *Materiali per Una Storia della Cultura Giuridica*, 14 (1984), 381.

(1) I am here summarizing some of the points made in my 'Promises and Obligations', in P. M. S. Hacker and J. Raz (eds.), *Law, Morality and Society*, Oxford 1977; and in 'Promises in Morality and Law', *Harvard Law Review* 95 (1982) p. 916.

(1) See 'Promises and Obligations', op. cit.

(1) To say that something is of ultimate value is not to claim that one cannot justify the statement that that thing is valuable. It merely indicates that its value does not derive from its contribution to something else.

(1) See T. M. Scanlon, Jr., 'Freedom of Expression and Categories of Freedom', *University of Pittsburgh Law Review*, (1979), 519.

(2) Two typical English cases are *A.-G. v Jonathan Cape Ltd.* [1976] Q.B. 752; *Home Office v Harman* [1982] 1 All E.R. 532.

(1) One case deserves special attention: if B's interest does not justify holding A to be under a duty to do X then B has no right that A shall do X even if A has a duty to do X based on the fact that the action will serve the interest of a class of individuals of whom B is one. Thus a government may have a duty to try to improve the standard of living of all its inhabitants of the country even though no single inhabitant has a right that the government shall try to improve his standard of living. This point will be developed in the next chapter.

(1) The fact that rights may be held against some persons only is compatible with the principle that everyone ought to respect everyone's rights. That principle asserts that all persons have a reason (not necessarily a conclusive one) to avoid action which will make it more difficult for those subject to duties towards right-holders to fulfil their obligations.

(1) Conflicts of rights are possible if conflicts of duties are. If considerations against requiring an action defeat the right-based reasons for requiring it on all the occasions to which they apply, then the right does not create a duty for that action. If, however, they defeat the right-based reasons on some occasions only, then the right-based reasons create a duty which is sometimes defeated.

(1) This point is developed in my 'Promises and Obligations', op. cit.

(2) Dworkin, *Taking Rights Seriously*, London 1977, ch. 4. I have criticised Dworkin's account in 'Prof. Dworkin's Theory of Rights', *Political Studies*, 26 (1978) 123.

(1) See my argument to that effect in 'Hart on Moral Rights and Legal Duties', *Oxford Journal of Legal Studies*, 4 (1984), 123. The point has often been argued. See for another example, J. Gray 'Indirect Utility and Fundamental Human Rights' in E. F. Paul, F. D. Miller, Jr., J. Paul (eds.), *Human Rights*, Oxford 1984. For powerful, though ultimately unsuccessful, arguments that Utilitarianism is incompatible with rights see H. L. A. Hart, *Essays on Bentham*, ch. 4, Oxford, 1983; and D. Lyons, 'Utility and Rights', in J. Waldron (ed.), *Theories of Rights*, Oxford, 1985.

(2) This view is said by D. Regan, 'Glosses on Dworkin: Rights, Principles and Policies' in M. Cohen (ed.), *Dworkin and Contemporary Jurisprudence*, London 1984, to be the better interpretation of Dworkin's position. It is also apparently A. Sen's view. See his 'Rights and Agency', *Philosophy & Public Affairs*, 11 (1982), 3.

(1) The argument above disregards the possibility that personal autonomy is not to be counted among people's interests. The argument in Chs. 13 and 14 is designed to establish this point, among others. I do agree, however, that not everyone has an interest in personal autonomy. It is a cultural value, i.e. of value to people living in certain societies only. This denies the equation between respect for people and respect for personal autonomy. There is, however, no need to develop this point here.

(1) One may think that one's right to X always derives from one's interest in X. If so then one's interest in having a right to X yields at best a right to have a right to X. It does not yield the right to X itself. This objection is based on a misunderstanding. While rights are based on interests of the right-holder, these need not be his interests in the object of the right. They can be any interests

which can be served by the possession of the right. Since an interest in having a right can be served by having it, it can be the foundation of such a right.