

# On the Foundations of Human Rights

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## I. Foundations Without Foundationalism

The nature of human rights, the subject we are talking about when we invoke this globally resonant category of practical standards, is a distinct matter from their foundations or grounds. On the former question there is disagreement as to the merits of the orthodox view, according to which human rights are moral rights possessed by all human beings simply in virtue of their humanity.<sup>1</sup> Even for those with orthodox sympathies, however, the question of grounds remains to be faced: what are the conditions that make it the case that anything is a right of this kind, and are they ever satisfied?<sup>2</sup> At most, orthodoxy about the nature of human rights is committed to the thesis that the satisfaction of the relevant conditions is a matter for natural reason and hence underwrites the objective truth or correctness of positive human rights claims. But the nature of those conditions is notoriously the subject of deep and persistent disagreement. Some philosophers echo contemporary human rights instruments by presenting human dignity as the foundation, others appeal to a schedule of basic human needs or universal interests, yet others to the value of personhood or some combination of these factors. And of course there are still those who insist, against all secular doctrines of the kind just listed, that a compelling grounding of human rights is inescapably theistic in character.

I distinguish the contention that human rights have *foundations*, a version of which I defend in this chapter, from certain *foundationalist* deformations it is liable to undergo. Foundationalism, which elaborates erroneously on the bare orthodox thesis that human rights have objective grounds, comes in both meta-ethical and normative versions. Meta-ethical foundationalists offer defective accounts of what objectivity is, how it is secured, or the nature of its implications. One example is the naturalist thesis that the objective grounding of human rights consists in their being logically derivable exclusively from an array of value-neutral facts about human nature or a metaphysical human essence. Another is the historicist

<sup>1</sup> For a defence of orthodoxy, see J. Tasioulas, 'On the Nature of Human Rights', in *The Philosophy of Human Rights: Contemporary Controversies*, ed. G. Ernst and J-C Heilinger (Berlin: Walter de Gruyter, 2012), 17–59.

<sup>2</sup> I speak interchangeably of the foundations or grounds or basis or justification of human rights throughout this chapter. In each case, I am concerned with what it is that makes it the case that something qualifies as a human right on an orthodox construal. This constitutive issue is distinct from, although also related to, the epistemic one of finding reasons for believing that X is or is not a human right. One may have good reasons for such a belief without being in possession of an account of the foundations of human rights.

thesis that the objectivity of human rights endows them with sufficient psychological and social efficacy to render probable their eventual historical triumph. In his well-known Oxford Amnesty lecture, Richard Rorty foisted both naturalism and historicism on objectivist believers in human rights, doing so as a prelude to insisting that the quest for foundations, so understood, has become a hindrance in sustaining a culture of human rights.<sup>3</sup>

Rorty's mistake was to conflate foundations and foundationalism. Neither the naturalist nor the historicist theses are entailed by the commitment to objectivity. The considerations that ground human rights may themselves belong within the normative domain; for example, they may be inherently reason-giving considerations about the elements of a good human life or the equal moral status of all humans. Moreover, these evaluative considerations may even be thought of as natural facts, provided we have a suitably expansive understanding of the natural realm, one that does not limit natural facts to those that do explanatory work within the natural sciences. This expansive understanding might emerge out of a conception of objectivity according to which objective qualities are those that possess explanatory power; in particular, those qualities that can figure in vindicatory explanations of a certain kind. Thus, justice is on one reckoning an objective property if the best explanation of someone coming to believe the proposition 'Slavery is unjust' can be one that leaves no room for the denial that slavery is unjust. But the claim that objective qualities figure in such vindicatory explanations is categorically distinct from the historicist prediction that they will effect a general convergence of belief on the moral truth.<sup>4</sup>

The normative version of foundationalism consists in the general idea that the values that ground human rights are somehow importantly distinctive in character. This can be made more precise by reference to the role of human interests or the components of a good human life. Paradigmatic human rights seemingly protect an array of human interests. For example, torture attacks our interests in life, health, and freedom from pain, it is corrosive of our capacity for autonomous decision making and our ability to form and sustain intimate relationships. It is a natural inference to conclude that the human right not to be tortured owes its very existence, in crucial part, to the fact that it systematically protects these interests of the right-holder. Moreover, it is equally natural to suppose that human rights share this grounding in human interests with many other standards of inter-personal morality. Normative foundationalism denies the antecedently plausible assumption that human rights are anchored in a profile of universal human interests. In extreme versions, it holds interests to be irrelevant to at least the primary grounding of human rights, whereas in moderate versions, only a narrowly restricted sub-set of human interests plays a grounding role.

Two forms of moderate foundationalism—agency-based and needs-based accounts of human rights—come under scrutiny at the very end of this chapter (section IV). Here I will only make some brief observations about extreme normative foundationalism

<sup>3</sup> R. Rorty, 'Human Rights, Rationality and Sentimentality', in S. Shute and S.L. Hurley (eds.), *On Human Rights: The Oxford Amnesty Lectures, 1993* (New York: Basic Books, 1993), 111–34.

<sup>4</sup> D. Wiggins, *Ethics: Twelve Lectures on the Philosophy of Morality* (London: Penguin Books), chs. 11–12.

prior to outlining a non-foundationalist account of the grounds of human rights (in sections II and III). The least interesting forms of extreme foundationalism, from the perspective of our concern with human rights, are those that present morality in its entirety as having a grounding that is totally independent of interests. On such views, usually referred to as ‘deontological’, there is nothing distinctive about human rights, among moral standards generally, in not being grounded in interests. The more interesting versions allow that interests may ground some moral standards, but maintain that human rights have a sufficient basis in considerations other than human interests. There are at least two, distinct but complementary, routes to this insistence. The first, positive route, finds compelling the idea that human rights are grounded in a value that is not an interest or itself interest-based. The second, negative route, rejects the grounding of human rights in interests as misguided because it fails to capture the distinctive role of human rights within moral thought.<sup>5</sup>

Negative pathways to extreme foundationalism must appeal to some feature of interests that disable them from figuring in the primary grounding of human rights. The most commonly invoked feature is an inability to capture the resistance to being defeated in the context of all-things-considered practical judgments that is supposed to characterize human rights. So, for example, torturing one innocent individual in order to prevent three other innocent individuals from being tortured is ruled out by a proper appreciation of the normative force of the right not to be tortured. Acknowledgement of this resistance to trade-offs is supposed to be compatible with accepting that an obligation associated with a human right may be defeated in order to avert a sufficiently disastrous outcome. Why might human rights, conceived as grounded in human interests, be thought to lack the resistance to trade-offs (against other rights, and against other values) that is supposed to be characteristic of human rights?

One answer begins by interpreting theories that seek to *ground* human rights in interests as *identifying* them with the latter. If this interpretation is sound, then the extreme foundationalist’s objection is cogent. Human interests—even our most urgent interests, such as the avoidance of imminent death—can be impaired or neglected in all sorts of ways without any wrong being committed, let alone one that has the character of a rights violation. Hence, the claims of interests in practical reason are more vulnerable to defeat than those of rights, since the latter inherently involve counterpart duties, and duties are characterized by two features that confer upon them a greater resistance to trade-offs. On the one hand, non-compliance with a duty is a form of moral wrongdoing which, subject to justification or excuse, makes appropriate a range of negative responses, such as blame and guilt; on the other hand, duties are exclusionary in force, putting out of normative play *some* countervailing reasons that would otherwise apply. However, this route to extreme foundationalism proceeds on a false assumption. Grounding human rights in the interests they serve is not the

<sup>5</sup> Both routes are travelled in Thomas Nagel’s ‘Personal Rights and Public Space’: ‘Rights form an essential part of any moral community in which equality of moral status cannot be exhaustively identified with counting everyone’s interests the same as a contribution to an aggregate collective good whose advancement provides the standard of moral justification’, T. Nagel, ‘Personal Rights and Public Space’, in *Concealment and Exposure and Other Essays* (Oxford: Oxford University Press, 2002), 33–4.

same as identifying them with (some class of) the latter. The content of a human right is the content of its associated duties, not of the interests that ground those duties. The key question for an interest-based account of human rights is whether, and the extent to which, an individual's interests generate duties. It follows that not all of the ways in which an interest may be impaired are violations of duties grounded in those interests.

An alternative way of travelling the negative route is by means of the claim that interest-based theories, even if they do not strictly equate human rights with interests, nonetheless explain their normative significance largely in terms of the interests they protect. But, the argument goes, this explanation is incompatible with the resistance to trade-offs characteristic of rights, because the normative significance of interests reduces to the maximization of their fulfilment within some aggregative calculus in which the right-holder's interests are bundled together along with those of others. Hence, an interest-based account of the right against torture would be committed, other things being equal, to endorsing the torture of one innocent person in order to prevent the torture of three others. Again, we should reject the original assumption about the shape inevitably assumed by an interest-based account of human rights. There is no compelling reason to suppose that a logic of maximizing their aggregate fulfilment is the (only) appropriate moral response to interests. We can understand morality, or some segment of it, as teleological—as grounded in advancing, protecting, and respecting human interests—without adopting a consequentialist or maximizing interpretation of the proper moral response to interests. And it is clear that leading proponents of interest-based accounts of rights do not regard those rights as generated by a background principle mandating the aggregate maximization of interests; indeed, some reject the very idea that such a principle forms part of morality, because it is strictly speaking incoherent.<sup>6</sup> Conversely, of course, many who accept a consequentialist/maximizing principle also seek to subsume non-interest-based considerations under it, including rights conceived as grounded independently of interests. If they are correct, the retreat from interests is no defence against the supposed perils of consequentialist maximization.

Extreme foundationalism may, instead, be motivated principally by the identification of a value, or set of values, that seems to be a promising candidate for grounding human rights, but which apparently does not have the shape of an interest. For many writers, the value of freedom meets this specification. They argue that freedom is the exclusive positive grounding of human rights, but that it is not an element of the good life, in that the reasons for valuing freedom do not include the intrinsic contribution that it makes to how well a person's life goes for them. Amartya Sen, for example, asserts that many of the freedoms protected by human rights—such as the freedom to play trivial games or participate in political demonstrations—do not serve our interests.<sup>7</sup> But there is a strong case for treating play, even as exemplified by the playing of computer games, as a prudential value.<sup>8</sup> Why should there not also be value in being given the opportunity to *choose* to engage in play? A confusion to guard against in this

<sup>6</sup> Eg, J.M. Finnis, *Natural Law and Natural Rights* (Oxford: Oxford University Press, 1980) and J. Raz, *The Morality of Freedom* (Oxford: Oxford University Press, 1986).

<sup>7</sup> A. Sen, *The Idea of Justice* (Cambridge, MA: Harvard University Press, 2009), 376–9.

<sup>8</sup> J. Tasioulas, 'Games and the Good', *Proceedings of the Aristotelian Society*, sup. vol. 80 (2006), 237–64.

vicinity is that of conflating what *generally* serves our well-being in *some* respect with that which will best serve our *overall* well-being in any *particular* case. This confusion is courted by Sen's case of the 'game maniac'. Even if we agree that his overall well-being is not enhanced by playing a computer game (he would be better off reading a serious newspaper instead), we can still hold fast to the thought that an aspect of his well-being (ie, freedom) is served by having the opportunity to play the game. The case of political protest is rather more troublesome, since here the choice is not to engage in the realization of some other prudential value, but in the promotion of the unmistakably *moral* value of justice. Is the notion of an interest unduly stretched by the claim that someone's interests are served through being able to participate in a demonstration against an unjust war? Now, it certainly is true that he need not be *motivated* by his self-interest in taking part in the demonstration; ideally, he should be motivated by a concern for justice. But, as Joseph Raz has put it, well-being consists in the whole-hearted and successful engagement in worthwhile pursuits,<sup>9</sup> and one of the ways in which a pursuit can be worthwhile is by advancing the cause of justice.

The foregoing hardly amounts to a refutation of non-prudential interpretations of freedom. However, two additional observations are worth making. The first is that such interpretations are sometimes the product of an unduly restrictive understanding of well-being in general. If the intrinsic components of a good human life are given a subjectivist interpretation, as essentially consisting in mental states such as pleasure or in the fulfilment of mental states such as desires or preferences, then the exclusion of freedom from the prudential domain is plausible. We value freedom in ways that do not match this subjectivist construal; for example, we value people's freedom to make life choices even if external interference would promote better outcomes so far as their happiness or preference-satisfaction is concerned. The problem, however, is that the subjectivist interpretation of well-being is not only highly contestable but also deeply flawed. This leaves open the possibility of including freedom—which centrally involves making and pursuing life-shaping choices from a range of worthwhile options—alongside other objective goods such as knowledge, friendship, accomplishment, and play. The second observation is already implicit in the previous sentence. If freedom as a value is constrained by the value of the options to be chosen and pursued—so that preventing someone fulfilling their desire to be tortured, maimed or publicly humiliated is not a genuine restriction of their freedom, as these activities do not embody even minimally worthwhile options—then insisting on the non-prudential character of freedom is a futile way of expelling interests from the foundations of human rights, since the value of those options will itself often turn on prudential judgments.

An even more widely credited candidate for the role of non-prudential foundation of human rights is human dignity, which I take to designate an intrinsically valuable moral status inhering in being human, a status that is shared equally by all human beings, elevating them above non-human animals, but whose normative significance is graspable independently of the interests of the human beings who possess it. For some philosophers, the status of human dignity essentially consists in the possession

<sup>9</sup> Raz, *The Morality of Freedom*, ch. 12.

of a series of universal moral rights, a thesis that expresses what they take to be the fundamental and non-derivative character of those rights. Others reply that the amorphous notion of human dignity is in fact best understood in terms of our capacity to realize one aspect of the human good—freedom itself (see section IV). By contrast, I argue in section II that there is a compelling interpretation of human dignity according to which it *is* a moral status, not a prudential value among others, but that this status does not consist in possession of a schedule of rights. Moreover, although human dignity lies at the foundations of human rights, it does not by itself exhaust those foundations; instead, human dignity characteristically operates in intimate union with a profile of universal human interests in generating human rights. Contrary to extreme foundationalists, my contention is that the foundations of human rights, like those of morality generally, are characterized by a value pluralism that embraces both moral and prudential elements. Human rights are grounded in the universal interests of human beings each and every one of whom possesses an equal moral status arising from their common humanity.

## II. Dignity and Interests

Before addressing the role of human dignity, let me begin with a highly schematic explanation of how human rights are grounded within a broadly interest-based account of moral rights.<sup>10</sup> On such an account, a right exists if an individual's interest in the object of the putative right (for example, freedom from torture, access to health care, opportunities for political participation) has the requisite sort of importance to justify the imposition of duties on others variously to respect, protect or advance that interest by securing to that individual the object of his right. Human rights are rights that all human beings possess simply in virtue of their humanity; on an interest-based account, they are rights grounded in universal interests that generate duties on the part of others. Although it would be pleasingly symmetrical, there is no implication that the duties must also be universal, ie, that all persons bear the duties correlative to the human rights enjoyed by all.

Now, even within an interest-based account there are a variety of potential ways of justifying a human right. One strategy is essentially derivative. It begins by justifying certain other human rights, for example, rights to free speech and an adequate standard of living, and then derives other more specific rights, such as rights to political advocacy or food, from them. But human rights can also be given an independent justification not derived from prior human rights. Let me propose, therefore, the following schema as the basic argument for establishing the existence of a human right:

- (i) For all human beings within a given historical context, and simply in virtue of their humanity, having *X* (the object of the putative right) serves one or more of their basic interests, for example, interests in health, physical security, autonomy, understanding, friendship, achievement, play, etc.

<sup>10</sup> For a classic exposition of the interest-based theory of individual moral rights, to which I am indebted, see Raz, *The Morality of Freedom*, ch.7.

- (ii) The interest in having *X* is, in the case of each human being and simply in virtue of their humanity, pro tanto of sufficient importance to justify the imposition of duties on others, for example, to variously protect, respect or advance their interest in *X*.
- (iii) The duties generated at (ii) are feasible claims on others given the constraints created by general and relatively entrenched facts of human nature and social life in the specified historical context. Therefore:
- (iv) All human beings within the specified historical context have a right to *X*.

Something is an interest of a person if its fulfilment enhances an aspect of their well-being; in other words, it makes that person's life better in some respect, for the person living it, than it would have been but for the fulfilment of that interest. As observed earlier, there is no implication that the fulfilment of the interest makes the person's life better overall than it otherwise would have been. For example, playing cricket may make my life better in one respect than otherwise it would have been, but my overall well-being might be diminished as a result because I forego other, more valuable activities. For an interest-based approach to rights, the operative question is whether any particular interest of ours—any aspect of our well-being—suffices to generate duties on others to respect or protect that interest. The result that we sometimes achieve a lower overall level of well-being than would have been the case had we not exercised our rights (or not exercised them in some particular way) is perfectly compatible with this interest-based view of rights.

The universal interests referred to in (i) are *objective, standardized, pluralistic, open-ended, and holistic* in character. By *objective*, I mean that the interests are interests of human beings whether or not they are believed by them to be interests of theirs and whether or not they actually desire their fulfilment or would do so were they fully informed of certain non-evaluative facts. Describing them as *standardized* indicates that in their specification one may abstract from some variations among individuals by focusing on the standard case of an ordinary human being living in a modern society. Hence, for example, we can regard personal achievement—engaging in difficult activities in such a way as to merit admiration—as a universal human interest, notwithstanding the fact that some individuals may not share this interest, such as those whose idiosyncratic psychological make-up effectively precludes them from engaging in challenging enterprises. There is a *plurality* of interests in play at the level of (i). This means that our basic interests cannot be reduced to some single overarching value, as in the hedonist's attempt to reduce all prudential value to pleasure. Moreover, given this plurality of basic interests, the basic schema does not limit itself to drawing on only one type of basic interest, such as our interest in autonomy. What is envisaged is a flexible, many-faceted approach to the grounding of human rights, whereby more than one interest, or combination of interests, grounds the existence of any given right. The list of interests is *open-ended* rather than definitively established once-and-for-all. In light of their objectivity, we must allow for the possibility that, on further reflection, new interests need to be added. This means that the background account of prudential value that I am drawing on here is one usually referred to as an 'objective list' theory

of the good.<sup>11</sup> Because its emphasis on an open-ended plurality of grounding interests is its most distinctive feature, I will refer to the basic schema as the core of a pluralist account of the grounds of human rights.

In coming to understand the nature of universal human interests, we need to grasp their holistic character, the way they bear important non-instrumental relations to each other, so that an interest's nature and significance is partly determined by its location within a broader web of prudential values. In order to grasp fully the significance of a value such as friendship, for example, we have to understand the special concern that friends have for each other's welfare, and this brings into play elements of the good life other than friendship itself. Equally, to appreciate what genuinely counts as an achievement, we need some fix on the idea of what makes a goal valuable, and often this will involve the way it furthers elements of human well-being other than achievement itself. Indeed, at a further level of complexity, we must also register the way in which prudence and morality inter-penetrate, so that even basic prudential values, such as friendship, are structured by recognizably moral concerns. But even if the full specification of prudential interests characteristically has a moral dimension, we must take care for the purposes of the basic schema not to presuppose the very human right whose existence we are seeking to determine. More generally, we can insist on a specification of the interest such that the significance accorded to its moral dimension is primarily self-regarding (for example, how being able to discharge my responsibilities as a parent enhances *my* life).

It is worth elaborating on this point about holism in relation to the prudential value of freedom—by which I mean the value of exercising one's rational capacities in choosing and pursuing worthwhile goals from a suitably broad range of options.<sup>12</sup> This is because of the uniquely intimate relation that some theorists have posited between freedom and human rights. Let us consider, somewhat artificially, both directions of penetration in turn. As noted earlier, freedom involves being able to choose and pursue what one takes to be worthwhile goals; but there are evaluative constraints on what is plausibly treated as a goal of this sort. Some of this evaluation will be non-prudential in character; it will relate to non-prudential goods such as justice and beauty; some of it will be prudential, referring to other prudential goods such as knowledge, friendship, and so on. Contrast with these goods the freedom to drive the wrong way down a one-way street or to torture people for fun, neither of which are valuable goals. Hence, one way of enhancing people's freedom is by increasing the number of their options that are valuable in these various ways. By contrast, multiplying trivial or morally depraved options does not enhance their freedom.

Second, freedom is often implicated in our engagement with other values, transforming their nature and significance in the process. Pursuit of deep personal relations, or achievement, takes on a different aspect when these activities embody the free choice of individuals. It is difficult to deny, for example, that the value of deep

<sup>11</sup> Versions have been defended by Finnis, *Natural Law and Natural Rights*, J. Griffin, *Value Judgement: Improving our Ethical Beliefs* (Oxford: Oxford University Press, 1996), and M. Nussbaum, *Women and Human Development: The Capabilities Approach* (Cambridge: Cambridge University Press, 2000).

<sup>12</sup> By 'freedom' I mean to refer compendiously to the two values that James Griffin separates out as 'autonomy' and 'liberty', although I speak more broadly of 'worthwhile goals' than 'conceptions of the good life'.



personal relations can be realized even within a relationship which has not been freely embarked upon, and which cannot be freely exited, such as an arranged marriage. Yet the romantic ideal of marriage as a voluntary union transforms and enhances the value of the ensuing relationship. Even something as rudimentary as the conditions for preserving one's animal being—such as our interest in adequate nutrition—acquires a different character through the exercise of our capacity to choose what and how to eat and with whom.<sup>13</sup> Some have even advanced the sweeping conjecture that autonomous engagement with other values is in general a necessary condition of their contributing intrinsically to our well-being.<sup>14</sup> This seems plausible in some cases: it is questionable, for example, that forcing a person to engage in religious observances makes any intrinsic contribution to their welfare. But it is less plausible in others: even a forced marriage, one that neither party can exit without incurring severe social censure, may realize the good of friendship, and similarly an unwilling pupil's life may be enhanced by the knowledge he is forced to acquire. So, we can register the special, pervasive significance of freedom without endorsing this additional claim.

This pervasive significance of freedom also emerges in the way that many human rights protect our ability to make choices from a range of valuable options, including the choice not to take up any of these options. The right to marry and have a family does not simply entitle one to get married and have a family but to choose whom one marries or whether one gets married or has a family at all; likewise, the right to freedom of religion protects not only one's choice of religious affiliation, from a very broad range, but also the choice to reject any such affiliation. The nature and extent of the contribution made by freedom to the existence and content of human rights will naturally differ from one right to another. For example, although the right to work may include a right to some degree of choice from a range of occupational options, it may not include, as in the case of the right to marry or to freedom of religion, a right to abstain from any work at all. The content of the right not to be tortured, by contrast, may be totally inattentive to the choices of the right-holder.

It might be thought that the pluralist's basic justificatory schema offers an account of the grounds of human rights that dispenses with any reliance on the controversial notion of human dignity. Although this might be perceived as a merit of the approach, interpreting it in this way is a mistake. The interests on which the pluralist account draws are always the interests of individual human beings, and understanding their normative significance requires that we grasp the intrinsically valuable status equally possessed by all human beings, one grounded in the fact that they are humans. What emerges is a form of the interest-based theory which regards the interests in question as generative of human rights in crucial part because they are the interests of human beings who possess equal moral status: human dignity and universal human interests

<sup>13</sup> The Aristotelian idea that even humans' 'animal' functions and needs are transformed by the distinctively human capacity to pursue them through the use of reason and in community with others, which is also a prominent theme in the writings of Marx, has been helpfully emphasized by Martha Nussbaum in *Women and Human Development*, 71ff.

<sup>14</sup> Thus, it has been argued that 'nothing counts as an accomplishment... unless it is one's own choosing... Understanding, in the relevant sense, can only be autonomous', J. Griffin, *On Human Rights* (Oxford: Oxford University Press, 2009), 151.

are equally fundamental grounds of human rights, characteristically bound together in their operation.<sup>15</sup>

What it is to be a human being, the ontological basis of human dignity, is an inexhaustible topic. But in broad outline it consists in the fact that humans belong to a species which is in turn characterized by a variety of capacities and features: a characteristic form of embodiment; a finite life-span of a certain rough duration; capacities for physical growth and reproduction; psychological capacities, such as perception, self-consciousness, and memory; and, specifically rational capacities, such as the capacities for language-use, for registering a diverse range of normative considerations (including evaluative considerations, prudential, moral, aesthetic, and others besides), and for aligning one's judgments, emotions, and actions with those considerations. Call this the human nature conception of human dignity, insofar as it grounds the value of human dignity in the characteristic elements that constitute human nature. It is worth observing that, complex and elusive as they are, the heterogeneous facts listed here can be gleaned by a phenomenology of human life that does not obviously implicate scientific or metaphysical conjectures about an underlying, historically invariant human nature or essence.

Two significant implications of this conception of human dignity are worth highlighting. First, it consists in an equality of basic *moral* status among human beings, affirming a fundamental level of moral regard at which they enjoy an equal importance as human beings. It does not, in itself, consist in any claim about the social, political or legal status that should be conferred upon them.<sup>16</sup> Indeed, historically, defenders of human dignity, or the basic moral equality of human beings, such as the Stoics, Aquinas, Locke, and Kant, have espoused some strikingly inegalitarian doctrines regarding social, political, and legal status, ranging from the exclusion of women from political participation to the acceptance of some form of slavery. But even if these practices are inconsistent with human dignity, this can only be shown by

<sup>15</sup> George Kateb has also defended a structurally similar grounding of human rights in which two elements—the 'existential' element of equal individual status (one of the aspects of human dignity, along with the stature of the human species) and the 'moral' element of minimizing pain and suffering—operate together, each 'doing indispensable work', G. Kateb, *Human Dignity* (Cambridge, MA: Harvard University Press, 2011), 39. I differ from him in my characterization of the two grounding elements. For me, the recognition of the equal dignity of each individual is itself a moral notion. Kateb, however, construes morality as essentially concerned with pain and suffering, which has the unfortunate consequence that other universal interests, beyond the avoidance of pain and suffering, are not given their due in the foundations of human rights. Rather closer to my view is the account of human dignity, and its relationship to human rights, advanced by 'new natural law' theorists, eg. J. Finnis, *Aquinas: Moral, Political, and Legal Theory* (New York: Oxford University Press, 1998), 176–80 and 'Equality and Differences', *Solidarity: The Journal of Catholic Social Thought and Secular Ethics*, 2 (2012), 1–22, and P. Lee and R.P. George, 'The Nature and Basis of Human Dignity', *Ratio Juris*, 21 (2008), 173–93. But there are also some important differences, among them: I separate much more sharply the attribution of the status of human dignity from the attribution of human rights and I do not treat possession of a rational nature as a necessary condition for the capacity to have moral rights, hence allowing for the possibility that non-human animals may have rights.

<sup>16</sup> This distinction is marked by Rawls, who insists on the difference between 'equality as it is invoked in connection with the distribution of certain goods, some of which will almost certainly give higher status or prestige to those who are more favoured, and equality as it applies to the respect which is owed to persons irrespective of social position', J. Rawls, *A Theory of Justice* (Oxford: Oxford University Press, 1999), 447.

means of a substantive argument that draws out the social and other implications of that underlying moral status. The claim of human dignity is not in and of itself a claim about any such social status, just as human rights may have political implications, but are not themselves inherently political claims.<sup>17</sup> Second, the possession of this status is contingent on the possession of a human nature. The value of human dignity is therefore equally shared by human beings despite other ethically salient differences among them, such as those that bear on matters of personal desert or virtue. Someone with profoundly underdeveloped or impaired rational capacities (for example, a newborn baby or a sufferer of advanced senile dementia) has this status no less than someone with exceptional intellectual capacities (a scientific genius), since both equally share a human nature, and the same applies to someone who has neglected the development of their capacities or committed wrongs against others. What matters, so far as human dignity is concerned, is that they all equally belong to a species that has certain characteristic features and capacities.

Of course, considerably more needs to be said about the content, and ontological basis, of human dignity. Here I indicate only two key respects in which it operates within the basic schema. It is a presupposition of that schema that human beings have the capacity to possess moral rights. As Joseph Raz has argued, a necessary condition for any individual's capacity to have rights, leaving aside artificial agents such as corporations, is that their existence and well-being have intrinsic and non-derivative value.<sup>18</sup> Beings with the capacity to possess rights are in this way sources of ultimate moral concern. Now, the value of human dignity is one way, albeit not the only way, of satisfying this general condition for rights-bearing capacity. Beings who belong to the human species are one type of being with the capacity to possess rights. Their existence and welfare has intrinsic or non-instrumental value, rather than merely having value in virtue of their causal consequences; and this intrinsic value is not exhausted by the constitutive role they play in sustaining the existence or advancing the interests of some other being. Human beings matter in themselves, and so satisfy a necessary condition for possessing rights, whereas entities such as the collection of water molecules or the man-made receptacle in which they are contained do not. Second, if we understand the interests on which human rights are grounded as belonging to individuals who share equally in the status of human dignity, we can start to make sense of the characteristic resistance to trade-offs displayed by human rights. If human beings matter in themselves, as sources of ultimate moral concern, each potentially with their own life to lead, then it is a travesty simply to 'detach' their interests from them with a view to maximizing the overall fulfilment of interests across persons. The individuals with these interests count in themselves and not because the satisfaction or frustration of their interests is ultimately assimilated to some overarching aggregative concern.

Like universal human interests, basic human dignity is a ground for human rights but is not itself to be identified with human rights. Instead, the value of human dignity

<sup>17</sup> cf. Jeremy Waldron's recent conjecture that human dignity is principally a juridical notion that attributes to all human beings a 'high-ranking legal, political, and social status', J. Waldron, *Dignity, Rank, and Rights* (Oxford: Oxford University Press, 2012), 47.

<sup>18</sup> Raz, *The Morality of Freedom*, 176–80.

forms part of the indispensable moral background to the vindication of such rights. That the idea of equal human dignity is distinct from the human rights it grounds emerges by reflecting on the case of the liberal racist. This could be someone whose attitudes and behaviour unmistakably express the fact that they do not regard blacks as of equal moral worth to whites, perhaps because of a racist upbringing, but who disowns these racist attitudes and does nothing that we should be inclined to describe as a human rights violation. Instead, his lack of respect for blacks is revealed by distress at the prospect of one of his children marrying a black person or frostiness towards his black neighbours. In neither case, however, would it make obvious sense to regard this individual as breaching anyone's rights in virtue of his racist attitudes and behaviour.

That human dignity is a ground of human rights, as of interpersonal morality in general, does not prevent it from playing a more prominent role in the shaping of some moral standards, including some human rights, as compared with others. This is because some moral standards are more directly protective of equal human status than others. One type of case consists of moral prohibitions against the discriminatory treatment of various classes of people—women, gays, ethnic and religious minorities, the poor—insofar as it reflects the odious idea that, simply in virtue of belonging to these classes, such people do not 'count' morally as much as others. Another type of case is those norms that prohibit certain forms of degrading or humiliating treatment of the sort that is sometimes aptly described as reducing humans to the level of non-human animals. However, in neither of these cases need we suppose that human dignity is the only operative value in grounding the relevant moral standard. If some standards are exclusively grounded in the value of human dignity, they are most likely to be those prohibiting certain kinds of purely symbolic wrong—attitudes and conduct that give expression to the idea that certain people lack equal human dignity without threatening their interests. Plausibly, such a wrong is committed when neo-Nazi thugs desecrate a Jewish cemetery, giving vent to their belief in the sub-human status of the people buried there. But it is hardly a coincidence that arguably no human rights violation is perpetrated in this case and the reason for this is the difficulty of regarding the dead as having interests capable of being harmed.<sup>19</sup> There is no compulsion to resolve the question either way, however. The key point is that human dignity has an indispensable role in justifying human rights, but that it characteristically plays this role in intimate alliance with universal human interests. We should reject as false the choice between a status-based or dignitarian account of human rights and an interest-based account.

### III. The Threshold

A vital feature of an interest-based account of human rights, along the lines of the pluralist theory sketched in the previous section is that it does not equate human

<sup>19</sup> For a related discussion of human dignity and the treatment of human corpses, see M. Rosen, *Dignity: Its History and Meaning* (Cambridge, MA: Harvard University Press, 2012), ch. 3. However, I think that Rosen concludes too quickly that human dignity is not foundational for human rights, partly because he considers it as an exclusive basis for such rights and does not entertain the possibility that it characteristically performs its grounding role in tandem with universal human interests.

rights either with the universal interests of human beings or with the principle that they possess an equal share in human dignity. Most fundamentally, this is because the pluralist approach offers a claim about the *grounding* of human rights, not a *semantic* claim about the concept of human rights. Still, it might be thought that the link it asserts between interests and rights is so immediate that the right in effect consists in the interest, with the result that infringing the former straightforwardly amounts to impairing the latter.<sup>20</sup> But this is a gross caricature of the interest-based approach. Instead, as premises (ii) and (iii) of the basic schema make clear, any universal interests of human beings must first pass a crucial threshold before a human right is generated. The threshold requires an affirmative answer to the question: do the specified universal interests of human beings, all of them bearers of equal moral worth, generate in the case of each and every one of them duties to secure the object of the putative right? And duties are here to be understood as moral reasons of a special kind: categorical, exclusionary, and subject to an array of moral responses—such as blame, guilt, etc—in light of their violation. If the answer is affirmative, then there is a human right to that object. Although the precise allocation and specification of the duties may be subject to legitimate variation from case to case, it is the fact that the self-same object—for example, a certain level of access to health care or a certain degree of freedom to express one's political and religious beliefs—is to be secured as a matter of duty for all that justifies the assertion of a unitary human right. It is their having crossed this threshold that distinguishes human rights from a mere shopping list of valuable 'goals'.

It is doubtful, however, that there is a great deal that can be helpfully said, at the abstract level at which philosophers customarily operate, about the threshold at which universal interests give rise to duties to deliver the objects of putative rights. As we should expect, philosophy is best confined to articulating the variety of considerations that bear on the question of the threshold and the relations among them, rather than striving to offer a litmus test that would enable us to dispense with any resort to contestable judgments. Moreover, we should acknowledge that at the level of pure moral reasoning, there may be an ineliminable indeterminacy in the deontic content of any given right, even one we are confident exists, so that the formulation of a practically workable standard will require us to supplement such reasoning with positive legal norms or social conventions. This indeterminacy characterizes moral norms quite generally and is hardly unique to human rights.

With these caveats in mind, we can shed some light on the nature of the threshold by distinguishing two parts (premises (ii) and (iii)), the first of which relates to the existence of a pro tanto case for a duty, the second of which affirms or rejects that case in light of the supposed duty's feasibility. The two stages are meant to register two

<sup>20</sup> cf G.A. Cohen's comment on Raz's interest-based theory of rights: '[T]he justification of the right by the interest is so immediate on this different and nonaggregative view that it would seem bizarre to say that honouring the right is a matter of justice but satisfying the interest is not', G.A. Cohen, *Rescuing Justice and Equality* (Cambridge, MA: Harvard University Press, 2008), 290. As argued later, the self-same interest, eg, in health, may be set back in ways that involve a rights violation (eg, by not providing a person with an adequate standard of health care) and in ways which do not (eg, by not providing that person with the highest attainable standard of health care).

broad categories of obstacles to the derivation of a duty from the relevant set of interests, which might be called internal and external respectively. At stage (ii), a pro tanto case for the existence of a duty depends on the absence of certain internal impediments to such a duty. They are internal obstacles just in the sense that they do not take into consideration any interests beyond those of the putative right-holders (and only their interests *qua* right-holders, prescinding from the question of how the recognition of the right may affect them as a potential duty-bearers). One such obstacle is that the object of the supposed right cannot be secured to the right-holder, because it is impossible to do so. The impossibility may be logical, metaphysical or empirical (in the specified socio-historical context). Thus, there is no right to be both alive and dead at the same time, no right to give birth irrespective of one's sex, and no right to inter-galactic space travel.

In determining what is *possible* for these purposes, we ask what is generally compossible by way of duty-fulfilment in the case of all supposed right-holders. Here we depart from Jeremy Waldron's suggestion that, in justifying rights claims, one need consider only whether the fulfilment of any given individual's right, taken in isolation, is possible. Addressing familiar objections to 'welfare rights' that invoke insufficient resources and capabilities to satisfy the positive duties such rights would impose, Waldron observes:

The problems posed by scarcity and underdevelopment only arise when we take all the claims of right together. It is not the duties in each individual case which demand the impossible (as it would be for example, if we talked about a right to happiness); rather it is the combination of all the duties taken together that cannot be fulfilled. But one of the important features of rights discourse is that rights are attributed to individuals one by one, not collectively or in the aggregate.<sup>21</sup>

Waldron is correct that the positive case for a human right stems from the normative significance of each person's interests considered individually, rather than some aggregative function of many persons' interests. This is the vital non-aggregative dimension of the interest-based approach that is often ignored by its deontological critics. But given that the rights in question are supposedly *human rights*—rights possessed by all human beings simply in virtue of their humanity—their being possessed by any one human being must be compatible with their being simultaneously possessed by all others within the specified socio-historical context. Hence, the fulfilment of all their rights, through compliance with the counterpart duties, must be generally compossible (although this general constraint leaves open the possibility of practical conflicts involving unfulfillable rights in specific circumstances). Therefore, on the grounds of impossibility, we can rule out a right to live in luxury, construed as imposing a positive duty to provide the right-holder with all the trappings for a luxurious lifestyle, since given limited material resources, this is not possible for all. But it is highly likely, on this basis, that we can affirm a right to an *adequate* standard of living and many other standard welfare rights. Moreover, this conclusion leaves it open that, *qua* members of

<sup>21</sup> J. Waldron, 'Rights in Conflict', in his *Liberal Rights: Collected Papers 1981–1991* (Cambridge: Cambridge University Press, 1993), 208.

particular polities, rather than simply in virtue of their humanity, some people may have a right to a more-than-adequate standard of living.

Another internal limit to the existence of human rights relates to cases of what might be called *evaluative* impossibilities. Here, the very idea of having a *duty* to deliver the relevant object of the putative right seems inappropriate in terms of the the right-holder's own interests. The starkest case is one in which imposing a duty would destroy the value of the object of the right to the right-holder. Consider, for example, the way in which our interests are served by being the object of another's romantic love. Can this interest generate a positive duty on the part of others to love us romantically? Any such duty is incompatible with the way in which romantic love enhances our lives. Romantic love is one of the valuable aspects of human life regarding which the notion of a duty to bestow it, and the kind of moral assessment such a duty entails, is inherently out of place. It is not merely that feelings of romantic love are not manifestly subject to control by their subjects. After all, a modern-day equivalent of Puck's potion in *A Midsummer Night's Dream* might be invented, a drug that could bring about romantic feelings towards pre-determined persons. Rather, the idea is that the way romantic love serves our interests is inconsistent with its being motivated by, or properly subject to, critical evaluation in terms of a moral duty to experience it towards specified persons. Romantic love is valuable as a freely bestowed gift, a spontaneous expression of the lover's own deepest desires, rather than something one is obligated to deliver. Another way of putting it would be to say that the recognition of such a duty would be self-defeating, seeking to deliver the object of the putative right by eliminating a feature inextricably bound up with the distinctive value possessed by that object. In making romantic love an object of duty, and moreover one that can be demanded by right, we do violence to its nature: the supposed right-holder stands to receive only the pitiful simulacra of such love rather than the genuine article.

Other cases in which the right-holder's interests themselves bar the recognition of a *duty* to deliver the object of a putative right do not rely on the idea that the duty is constitutively self-defeating in undermining the value to the right-holder of the object of his supposed right. Consider, for example, the claim that there is a human right to the highest attainable standard of mental and physical health, one that includes a positive duty to ensure that the right-holder enjoys this formidably robust level of health. Now, such a right might be ruled out on the simple grounds of impossibility: if the highest attainable standard is construed as an absolute standard, then it may be empirically impossible to bring all people, irrespective of their genetic make-up, up to this very high level of health. One might respond by relativizing the standard of health, so that it is taken as the highest attainable standard of health for each and every person in light of their particular genetic constitution. But even such a right might be precluded, because a duty to deliver its object would be incompatible with the interests in autonomy of the right-holder. This is because it would validate repeated interventions in the latter's life—overriding his will on health-affecting choices such as diet, occupation, leisure activities, and so on—that constitute an unacceptable curtailment of his autonomy. At best, it would seem, we could affirm a right of access to the highest attainable standard of mental and physical *health care*, rather than health itself, leaving it in

significant part to the discretion of the right-holder (within certain limits) whether or not to avail themselves of such care.

But even if a putative duty does not fall at the hurdles of impossibility or internal principled objections of the sort we have just canvassed, the case for it may still be defeated at the second level, at which we register the implications of the supposed right on the interests of duty-bearers and on other values. Let us subsume these implications under the heading of ‘burdensomeness’. What is in question is the joint feasibility of the supposed duties generated severally by each and every supposed right-holder. Consider again the supposed human right to the highest attainable standard of physical and mental health care. A duty to provide this seems neither obviously impossible to deliver nor unsupported by the interests of the putative right-holder *qua* right-holder, whether his interests in health care itself or more generally. So, a *pro tanto* case for the existence of a duty to deliver this object, arising from the interests of each and every human being, may well survive the first stage of the threshold. But now at the second stage we ask whether this duty is excessively burdensome. Is the case for recognizing it defeated because the supposed duty imposes excessive burdens on potential duty-bearers, in terms of other values, including excessive sacrifices in our ability to fulfil other human rights? It seems unlikely that a human right to the highest attainable standard of health care can be sustained on the grounds of feasibility. Any duty of health care that arises from our interests in it, therefore, will be considerably less demanding than the readings of ‘highest attainable’ canvassed so far. Something similar may be said of a positive duty of romantic love, even if I was mistaken in claiming that a *pro tanto* case could not be made for its existence.

At this point it is worth underlining the significance of the fact that the interests in question are not free-floating, but are rather the interests of beings with an equal share in human dignity. Two features ultimately trace back to this crucial fact. The first is that we cannot determine whether or not a putative right exists by means of a cost-benefit analysis that simply aggregates across persons. We cannot, for example, argue that there is a human right to be able compulsorily to acquire essential human organs if one is in need of a transplant, on the grounds that such a right maximizes interest-fulfilment overall. This would be to treat human beings as merely the ‘locations’ at which various interests are fulfilled or unfulfilled, ignoring the fact that, as humans, they merit a kind of respect that is far more exacting than the subsumption of their interests within an overarching aggregative function. Second, in assessing the costs associated with a putative right for the purpose of determining its existence, we should accord no weight to those costs that are in some significant sense attributable to mistaken moral beliefs on the part of would-be duty bearers. Among the most egregious cases are those in which the mistaken beliefs involve a denial of the equal dignity of the putative right-holders.

So, for example, there is a sense in which the rights not to be discriminated against on the grounds of race or sexual orientation may be ‘costly’ to people with racist or homophobic outlooks. Such people may be outraged at the prospect of black children attending the same school as their own children, or of gays being employed to teach their children. But these attitudes and beliefs are typically premised on a deep moral error—the inherent inferiority of blacks and gays—and should therefore be



disregarded in determining whether a human right to non-discrimination exists. The alternative would be to put the existence of human rights at the mercy of warped beliefs that are inconsistent with the ethical considerations those rights are supposed to reflect. Accepting this second point is entirely consistent with factoring the excluded costs into an all-things-considered decision regarding whether, and to what extent, to demand compliance with those rights or embody them in law. So, if the homophobes are so hostile to the prospect of openly homosexual teachers that they are prepared to bring down the entire education system, rather than have their prejudices thwarted, the all-things-considered best course is not to insist on the strict implementation of the right to non-discrimination. This is a case in which the relevant human right is justifiably infringed with consequent obligations of apology and reparation. In this way, we preserve the important distinction between considerations that bear on the existence of human rights, and those that do not but which, given unfortunate circumstances, may lead to the demands of those rights being compromised or defeated in all-things-considered practical deliberation.

This general way of conceiving the threshold between interests (of beings of equal moral dignity) and human rights has two consequential advantages. First, it helps to account for the way in which human rights evolve over time. In making judgments of empirical possibility and burdensomeness, at respectively the first and second stages of the threshold test, reference is made to the socio-historical conditions that have been specified as the background to any attempt to deploy the pluralist approach. This means that our assessments as to empirical possibility and burden may quite properly shift over time, especially with the growth in our knowledge and the development of new technologies, modes of social and economic organization, and so on. Hence, there may now be a human right to positive assistance in reproduction, including access to IVF treatment, which did not exist prior to the development of IVF technology (or prior to the point at which its development became feasible). This gives us one benign interpretation of at least some of the ‘proliferation’ of human rights claims over the years. Equally, it enables us to see how, in light of the potential effects of population growth or climate change on our ability to serve people’s interests, some existing human rights may eventually cease to apply to future generations.

Second, it helps us make sense of the idea that rights have a special *directed* quality, in that violations of them constitute the *wronging* of a specific individual, ie, the right-holder. Although we may all be legitimately aggrieved at wrongdoings committed against anyone, we recognize that the person whose right has been violated is legitimately aggrieved in a special way. This special standing manifests itself in the fact that some emotional responses, such as resentment, are paradigmatically if not exclusively responses available to victims of rights violations, and also in the fact that the victim of a rights violation has certain moral powers over the wrongdoer, such as the granting of forgiveness or, in some cases, the power to waive performance of the duty associated with the right. What the directedness of the right ultimately comes down to, on the interest-based view, is the fact that its counterpart duty has its source exclusively in the interests of the right-holder. This means that only the interests of the right-holder, and not anyone else’s interests, need to be invoked as part of the positive

case for the right's existence. It is a wronging of *him* insofar as the duty violated owes its existence exclusively to his interests as a being of equal moral status.

Consider, by contrast, 'imperfect' duties, such as those of charity, which lack a right-holder. Judges may have a duty to be merciful in sentencing, but we should not normally say that a properly convicted criminal has a *right* to merciful treatment, ie, to be punished less severely than he deserves given the gravity of the offence he has committed. The reason for this is that his interest in such leniency is not sufficient to generate a duty to show him mercy given the pre-existing duty of retributive justice to inflict a deserved punishment.<sup>22</sup> Still, there may yet be a sound case for a duty of mercy, one that affords a compelling basis for tempering the demands of justice in particular cases, but it will have to draw on considerations that go beyond the benefit to the wrongdoer, such as the way in which various aspects of the common good are advanced by showing mercy to certain categories of criminals, for example, those who have already repented of their wrongdoing. Compare the right not to be subjected to a sentence in excess of that which is deserved in light of the gravity of one's wrongdoing. This is a strong candidate for recognition as a human right precisely because the interests of the offender in avoiding such punishment arguably generate duties that pre-empt or exclude, at least in the standard cases that bear on the content of the duty, many of the social benefits of inflicting it, such as those of incapacitation or general deterrence.

We can now appreciate the deceptive simplicity of some of the slogans in terms of which the interest-based approach to (human) rights has been presented, both by critics and defenders. Thus, it is a mistake to suppose that the pluralist's basic schema depends upon the idea that a right will be generated by an interest provided only that the interest in question is in some independent sense 'important'.<sup>23</sup> Few things, after all, can claim to be more 'important' to our flourishing than romantic love. But the notion of 'importance' here is not only rather amorphous, it also bears no suitable rights-generative interpretation. Instead, the interest must have a very specific *kind* of moral importance, namely, it must be capable of generating a duty, as partially explained by premises (ii) and (iii)—and, since we are speaking here of human rights, it must be a duty in the case of each and every human being simply in virtue of their humanity.

We should also handle with care the seductive idea that interest-based accounts regard human rights as securing the 'conditions of a minimally good life' rather than a good life itself.<sup>24</sup> This slogan contains a grain of truth. Whether or not we achieve a

<sup>22</sup> See J. Tasioulas, 'Punishment and Repentance', *Philosophy*, 81 (2006), 279–322. The situation here is potentially rather complex; as Raz indicates, sometimes the systematic presence of conflicting reasons may not undermine the existence of the right but, instead, qualify its content: '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', *The Morality of Freedom*, 184.

<sup>23</sup> cf K. Eddy, 'On Revaluing the Currency of Human Rights', *Politics, Philosophy, and Economics*, 6 (2007): 307–28, 314.

<sup>24</sup> See J. Nickel, *Making Sense of Human Rights* (Oxford: Blackwell, 2007), 138: 'Human rights are not ideals of the good life for humans; they are rather concerned with ensuring the conditions, negative and positive, of a minimally good life'.

good life is to a significant degree down to our own attitudes, choices, and conduct, but whether our human rights are respected is fundamentally a matter of whether others comply with the duties corresponding to those rights. But the slogan is misleading insofar as it suggests that we need an independent grip on the ‘conditions of a minimally good life’ in order to identify which putative human rights meet the threshold requirements set out in premises (ii) and (iii). On the contrary, the explanation goes in the opposite direction: human rights are such ‘minimum conditions’ precisely in virtue of satisfying, *inter alia*, the demands of (ii) and (iii). They are those conditions of a good life that can, in the case of everybody, be demanded as of right simply in virtue of our humanity. The alternative reading would leave an interest-based account vulnerable to the accusation that it is incapable of validating prominent elements of the contemporary human rights culture, such as anti-discrimination rights. This is because we can intelligibly interpret the phrase ‘conditions of a minimally good life’ in ways that fall short of encompassing many of these rights. For example, one can enjoy a recognizably ‘good life’ despite being legally excluded, on the grounds of sex or religious creed, from occupying major public offices or openly expressing one’s political beliefs.<sup>25</sup> But this complaint gets matters back-to-front. The only sense of ‘minimum conditions’ properly operative here is that given by the threshold from interests to duties; it therefore remains an open question to what extent anti-discrimination rights satisfy the criteria it imposes.

#### IV. Beyond Freedom and Necessity

The idea that human rights reflect certain minimal conditions or aspects of a good life, specifiable in advance of the operation of the threshold, is not so easily laid to rest. It informs two interest-based approaches to the grounding of human rights that are major rivals to the pluralist theory—the agency and needs theories. The agency theory restricts the human rights-generative interests to those in freedom or normative agency, while the needs theory confines them to basic human needs. Hence an extra test is introduced at the level of the input in premise (i) on the grounds that a plurality of objective and universal human interests—although in some sense undeniably important—does not adequately reflect the distinctive significance characteristic of human rights.<sup>26</sup> One consequence of this failure, according to agency and needs theories, is that the pluralist approach countenances more human rights norms than is desirable either in terms of the desiderata of fidelity to the wider human rights culture or ensuring the non-parochial character of our approved schedule of human rights.

James Griffin’s *On Human Rights* is the most significant contemporary statement of the agency theory. It grounds the existence of human rights exclusively in the value

<sup>25</sup> See the critique of Nickel’s theory along these lines in A. Buchanan, ‘The Egalitarianism of Human Rights’, *Ethics*, 120 (2010), 679–710.

<sup>26</sup> This is a widely shared intuition; e.g., Nickel insists that human rights norms enjoy ‘importance’ or ‘high priority’ because they protect ‘things that are central to a decent life as a person’, *Making Sense of Human Rights*, 70. Griffin, too, writes: ‘There is a minimalist character to human rights, which different writers will explain in different ways. I explain it as coming from human rights’ being protections not of a fully flourishing life but only of the more austere life of a normative agent’, *On Human Rights*, 53.

of possessing, and being able reasonably effectively to exercise, the capacity for personhood or normative agency. Normative agency is in turn decomposed into the values of autonomy, liberty, and the minimum material provision that they require.<sup>27</sup> As for the needs theory, we may take David Miller's lucid formulation as our focus. It grounds human rights in *basic* human needs: conditions that human beings everywhere require in order to avoid harm, ie, to be able live a 'minimally decent life' in whichever society they happen to belong.<sup>28</sup>

A problem that arises for both theories, however, is that it is hardly obvious that we have a determinate grasp of the kind of 'minimalism' they claim to secure. For example, prescinding from the sorts of considerations set out in (ii) and (iii), how do we begin to identify the culturally universal conditions of a 'decent life'? What makes it the case, for example, that freedom of movement counts as such a condition but democratic political participation does not? And even if we agree with Miller that education is a condition of a decent life, how do we decide whether this means only basic primary education or extends to secondary and even tertiary education? Similarly, in the case of Griffin's agency theory, some critics have discerned a supposedly fatal ambiguity in his characterization of personhood. Sometimes this seems to consist in the bare capacity for intentional action together with some measure of its successful exercise, in which case even a slave's life could realize it. At other times, a richer conception of 'normative agency' is at work, one that requires the presence of a diverse array of genuinely valuable options from which to choose in shaping the contours of one's life, and enough liberty and material wherewithal to makes one's choices effective.<sup>29</sup> Whatever the merits of these objections, we should not simply take for granted that the 'minimalism' of either theory is well-defined. But even on the assumption that it is, serious difficulties remain.

<sup>27</sup> 'Human rights can then be seen as protections of our human standing or, as I shall put it, our personhood. And one can break down the notion of personhood into clearer components by breaking down the notion of agency. To be an agent, in the fullest sense of which we are capable, one must (first) choose one's own path through life—that is, not be dominated or controlled by someone or something else (call it "autonomy"). And (second) one's choice must be real; one must have at least a certain minimum education and information. And having chosen, one must then be able to act: that is, one must have at least the minimum provision of resources and capabilities that it takes (call all of this "minimum provision"). And none of this is any good if someone then blocks one; so (third) other must also not forcibly stop one from pursuing what one sees as a worthwhile life (call this "liberty")', Griffin, *On Human Rights*, 32–3. Although Griffin describes his theory as 'trinitist', appealing to the three values of personhood: autonomy, liberty, and minimum provision (at 51), it is probably best to regard it as dualist, since minimum provision is invoked only as a condition for realizing the other two values.

<sup>28</sup> '[W]e prove that something is a human right by showing that right fulfils the [basic] needs of the right-holder... Basic needs... are to be understood by reference to this idea of a decent human life. They are the conditions that must be met for a person to have a decent life given the environmental conditions he faces. The list of such needs will include (but not be exhausted by): food and water, clothing and shelter, physical security, health care, education, work and leisure, freedoms of movement, conscience, and expression', D. Miller, *National Responsibility and Global Justice* (Oxford: Oxford University Press, 2008), 184.

<sup>29</sup> Such an equivocation is identified by Joseph Raz, 'Human Rights without Foundations', in S. Besson and J. Tasioulas (eds.), *The Philosophy of International Law* (Oxford: Oxford University Press, 2010) and Buchanan, 'The Egalitarianism of Human Rights'. My own view is that there is a charitable interpretation of Griffin's theory, according to which the austere interpretation of personhood is the condition for possessing human rights, while human rights protect both that capacity and its reasonably effective exercise.

To appreciate these difficulties, we can begin by noting that the agency and needs theories can both be interpreted in either of two broad ways. First, they are amenable to an essentially reductive interpretation, one that identifies human rights with the values of normative agency or basic needs. But this interpretation faces all the grave problems that arise for reductive views whose account of the nature of human rights does not treat them as a sub-class of moral rights in general.<sup>30</sup> In disregarding or downplaying the fact that human rights are rights, both theories on this interpretation would fail to capture the distinctive moral character of human rights discourse. One manifestation of this is that the reductive interpretation of both would lead to their countenancing a massive proliferation of ‘human rights’. For example, provided some medical operation or cure was needed to save someone’s life, and so was a basic need of theirs or indispensable to preserving their status as a normative agent, there would be a ‘human right’ to it, in spite of its potentially exorbitant cost.

So, we should adopt the second interpretation of the two theories, according to which human rights come into being only once the significance of the underlying needs or agency values crosses a threshold akin to (ii) and (iii) of the basic schema. This is broadly consonant with Griffin’s claim that human rights characteristically—but not always<sup>31</sup>—have a *dual* foundation: in normative agency or personhood and ‘practicalities’. These practicalities are a heterogeneous group of considerations that shape the content of a human right so it can be ‘an effective, socially manageable claim on others’.<sup>32</sup> Griffin’s account of practicalities is disappointingly terse, but it is endorsed, and helpfully elaborated upon, by Miller in such a way as to bring it rather close to premises (ii) and (iii) of the basic schema.<sup>33</sup> Let us proceed, then, on the basis that the restricted input of the agency and needs theories must be conjoined with a threshold—the broad equivalent of premises (ii) and (iii)—in generating human rights.

Does the fact that the pluralist approach allows universal interests, not just basic needs or interests in normative agency, to play a human rights-grounding role render it inferior to either the agency or needs theories? Prima facie, it would seem odd to suppose that it does. After all, assuming that universal interests beyond the category of basic needs or agency values are capable of satisfying the threshold requirements of (ii) and (iii), so that in the case of each human being they generated duties to serve those interests in various ways, what would justify withholding the description ‘human right’ from the resultant universal rights? In particular, what sense would there be in maintaining a bifurcated account of universal moral rights, one that turned on the prudential basis of the respective universal rights?<sup>34</sup> But rather than rest content with shifting the burden of proof onto agency and needs theorists, let me instead outline some of the ways in which the parsimoniousness of these theories makes them less attractive than the unrestricted pluralist approach.

<sup>30</sup> See Tasioulas, ‘On the Nature of Human Rights’.

<sup>31</sup> Griffin, *On Human Rights*, 37. This qualification has to be dropped on the second interpretation.

<sup>32</sup> Griffin, *On Human Rights*, 38.

<sup>33</sup> Miller, *National Responsibility and Global Justice*, 186–94.

<sup>34</sup> In recent work, however, David Miller takes for granted as a ‘fundamental intuition’ the proposition that only needs can ground moral rights generally, see D. Miller, ‘Grounding Human Rights’, *Critical Review of International Social and Political Philosophy*, 15 (2012), 207–27, 422.

The first problem with the agency and needs theories is one of fidelity, and concerns their inability to vindicate certain key human rights. For example, Miller's theory is unable to encompass human rights that reflect vital interests, but which arguably do not plausibly protect basic human needs. Consider, for example, his treatment of religious freedom. Here, the operative basic need is freedom of conscience—'not being forced to live according to values that you cannot endorse, and that you may find repugnant'.<sup>35</sup> Leave aside the problematically subjective formulation of this supposed need—after all, what if I find laws enforcing moral prohibitions against murder and theft 'repugnant'? The key point is that according to Miller himself it generates a rather limited protection of religious freedom: it prevents one being forced to adopt religious practices or espouse religious beliefs that one does not endorse, but does not extend to the right to proselytize or establish a church.<sup>36</sup> The resultant freedom is modest compared to the extensive religious freedom many believe to be protected by the human right of freedom of conscience (or religion). Similar considerations apply to human rights prohibiting discrimination on the grounds of sex, religion, and political creed. For example, a society that excluded women or members of religious or political minorities from holding public office might not thereby imperil the satisfaction of their basic needs, even if in doing so it acts detrimentally to their interests.<sup>37</sup> By contrast, a pluralist is free to exploit the rights-generative power of all universal human interests within the discourse of human rights. In the case of Griffin, the problem with fidelity arises not so much in the grounding of standard rights, but in securing their scope of application. As interpreted by Griffin, the agency theory attributes human rights to human beings only to the extent that they have the actual rather than merely the potential capacity for normative agency. As a result, newborn babies and those suffering from profound mental disabilities are excluded from the scope of human rights protection. Griffin regards these exclusions as welcome confirmations of the determinateness of sense secured by his theory: we can mobilize other vocabulary, that of cruelty, murder, etc, to characterize the moral wrong in these cases.<sup>38</sup> But, on the one hand, this seems to confuse determinateness with parsimoniousness; and, on the other hand, it appears to exact a serious cost in fidelity to ordinary modes of thought that have a strong grip on us, such as the idea that torturing babies violates their human rights. The pluralist, by contrast, is better placed to extend the protection of at least some human rights, such as the right not to be tortured, to human beings who are not agents, because it can appeal directly to their non-agency interests, such as the avoidance of pain.

But perhaps the deepest difficulty for both theories concerns not their inability to ground standard human rights, in terms of content and scope, but the counter-intuitively circuitous and precarious justifications they offer for many such rights. There is no human right more paradigmatic than the right not to be tortured. In conformity

<sup>35</sup> Miller, *National Responsibility and Global Justice*, 196.

<sup>36</sup> Miller, *National Responsibility and Global Justice*, 196.

<sup>37</sup> Miller, 'Grounding Human Rights', 421, where he claims that the need for recognition does not ground a 'strong, universal, right of non-discrimination', since it can be met by securing recognition for people as members of 'status groups'.

<sup>38</sup> Griffin, *On Human Rights*, ch. 4.

with common sense, this right can be defended within the pluralist account as resting directly, but not exclusively, on the victim's interest in avoiding severe pain. By contrast, for the agency theorist, the pain of torture can only bear indirectly on the justification of that right, ie, insofar as it impacts adversely on our personhood by 'render[ing] us unable to decide for ourselves or to stick to our decision'.<sup>39</sup> The point extends to not quite so paradigmatic human rights, such as those to education, work, and leisure (resting, in key part, on our interests in knowledge, accomplishment, and play, respectively). To this a pluralist may add the *ad hominem* observation that Griffin's rich understanding of personhood values—the way in which he conceives of autonomy as the capacity to choose among *intelligible* conceptions of a worthwhile life, and of liberty as the unimpeded pursuit of such choices—already implicates judgments about human interests beyond strictly those of normative agency. Consider, by way of illustration, Griffin's heavy reliance on the values of deep personal relations and accomplishment when vindicating a human right to same-sex marriage.<sup>40</sup> The pluralist account therefore elaborates a tendency already latent in Griffin's agency, but one which is disguised by his official commitment to an agency theory of human rights.

The needs theory also gives counter-intuitively roundabout and precariously contingent justifications of standard human rights norms. Many classic civil and political rights cannot be plausibly grounded directly in basic intrinsic needs; instead, they will have to be given a derivative justification in terms of securing *other* human rights, such as the right to bodily security, which do enjoy a direct grounding in such needs.<sup>41</sup> Such derivative groundings of key human rights not only rely on often controversial empirical premises, for example, that rights to political participation or a fair trial are as a contingent matter 'necessary' to guarantee rights of bodily security or subsistence, etc. They are also strikingly counter-intuitive insofar as they deny that rights of the former sort can be made to stand on their own feet, justifying them instead exclusively as means for securing other rights that do possess a direct grounding in basic needs. Surely political rights 'matter' independently of how they serve rights to bodily security, subsistence, etc, and their so mattering should at least in principle count in favour of their status as human rights. The pluralist's basic schema for grounding human rights, by contrast, allows greater scope for the possibility of a non-derivative grounding of classic civil and political rights by lifting the embargo on invoking interests that are not basic needs. We can therefore appeal to our interests in autonomy and communal identification, for example, in order to ground civil and political rights.

We may conclude by reflecting on two possible rejoinders on behalf of the agency and needs theories. An agency theorist might challenge the claimed superiority of

<sup>39</sup> Griffin, *On Human Rights*, 52.

<sup>40</sup> Griffin, *On Human Rights*, 163–4.

<sup>41</sup> 'It is clear that (intrinsic) needs can only play an indirect role in justifying most civil and political rights. If we start from the conditions that human beings everywhere require to avoid harm, then although we can move directly to rights such as bodily security and freedom of movement, other rights will prove to be important only as secondary protections for these more basic conditions. Political rights, for example, will matter if it can be shown that the possession and exercise of these rights is necessary in order to guarantee rights to bodily security, subsistence, and so forth'. Miller, *National Responsibility and Global Justice*, 195. See also Miller, 'Grounding Human Rights', 421–2.

pluralism on the grounds of both fidelity and distinctive importance. Thus, Griffin contends that something like an unrestricted, interest-based approach would be excessively permissive, conniving at human rights ‘proliferation’ by promoting a bloated conception of human rights that threatens to ‘fill most of the domain of well-being’.<sup>42</sup> If well-grounded, this would be a powerful objection; but Griffin does little to substantiate his claim. After all, the pluralist’s basic schema offers a framework aimed precisely at drawing a genuine distinction between human interests, on the one hand, and what they entitle all of us to as a matter of right, on the other. To say, as Griffin does, that pluralism ‘undermines our belief that we have a human right to material and cultural resources only up to a minimum acceptable level beyond which they are *not* a matter of right’ is simply to reject, without argument, the efficacy of premises such as (ii) and (iii) in establishing this distinction. But, as we have already noted, such a denial would be devastating for Griffin’s own theory, since it too presupposes something like the threshold embodied by those two premises.<sup>43</sup>

Perhaps Griffin’s real objection is a simpler one of infidelity. He may believe that pluralism countenances as ‘human rights’ a whole host of entitlements that have never appeared in the canonical human rights documents and, in Griffin’s case, form no part of the ‘Enlightenment’ human rights tradition. This is one way of reading his case of the callous spouse: ‘One partner in an unsuccessful marriage, for example, might treat the other coldly and callously, and the suffering caused the second partner over the years might mount up into something much worse than a short period of physical torture. The first partner, however, simply by being cruel, does not thereby violate the second’s human rights’.<sup>44</sup> Now, it would certainly be odd to claim that we can give a *full* explanation of the wrongness of such behaviour solely by appealing to the violation of human rights. But the pluralist is committed to no such claim. On the contrary, there will be values, and even rights, violated by cruelty and cold indifference within marriage which are not recognizably *human* rights. This is because their existence arises from the fact that the spouses are parties to a special relationship, rather than being rights possessed simply in virtue of our humanity.

A pluralist might stop there, and simply deny that the callous spouse case, as described by Griffin, involves any human rights violation. More plausibly, he might venture a somewhat more complex explanation. There may indeed be a human right against being subject to cruel treatment, and some forms of cruelty within marriage may constitute a violation of it. But it does not follow that all the rights that the spouses have against each other not to be subject to cruel treatment are themselves human rights, even if their violation is a way of violating the broader right, which is a human right. This is because they do not have the former rights simply in virtue of

<sup>42</sup> Griffin, *On Human Rights*, 55.

<sup>43</sup> That the agency theory requires such a threshold is something Griffin occasionally acknowledges, eg, ‘The place where we fix the limits of these demands [of duties corresponding to human rights] is not easy either to decide or defend. But, again, this is not a problem special to human rights’, *On Human Rights*, 106. But precisely the same point is available to the pluralist, as Griffin elsewhere implicitly acknowledges, *On Human Rights*, 47.

<sup>44</sup> Griffin, *On Human Rights*, 52. For a helpful discussion of this and other cases invoked by Griffin against a more pluralist interest-based grounding of human rights, see S. Matthew, ‘Agency and Human Rights’, *Journal of Applied Philosophy*, 27 (2010), 15–25.



their humanity, but in part because of the special relationship of marriage. The situation is comparable to the way in which the denial of a vote to a citizen of a democratic society may be a violation of their human right to political participation, even though there is no *human right* to vote as such.<sup>45</sup> Moreover, there are other considerations at stake in a case of marital cruelty—considerations such as mutual trust, personal love, and the significance of a commitment to a shared life—that go beyond anything contemplated by the discourses either of human rights or rights more generally, but which are germane to the wrongfulness of the callous spouse's conduct.

Compare Griffin's analysis. He claims a human rights violation will only emerge at the point at which the culpable spouse's behaviour 'starts to undermine the other's ability to function as an agent'.<sup>46</sup> This is because, according to Griffin, the break in the spectrum between something impacting on one's well-being, on the one hand, and generating a (human rights-based) duty, on the other, is marked by the point at which the values of normative agency are implicated. But as we have already seen in rejecting the reductive interpretation of the agency theory, this claim is mistaken. The mere fact that agency values are in play—and are even seriously threatened—in any given situation does not entail the existence of a right of any kind. Such a right will arise only if the significance of the values in that sort of case satisfies a threshold akin to premises (ii) and (iii). But a threshold of this sort is common ground between the pluralist and the agency theories. We should not, as Griffin is prone to do, conflate 'minimalism' at the level of prudential input (premise (i)) and insistence on a threshold at which any prudential values general rights (premises (ii) and (iii)). With that conflation skirted, the agency theory's relatively parsimonious account of the prudential basis of human rights stands revealed as not only under-motivated but also as distortive of the moral significance of human rights.

The objection from the needs theorist travels in the opposite direction: it accuses pluralism of *excessive* fidelity to existing human rights practice, at least in the large number of norms it seems prepared to countenance as genuine human rights. But—the response goes—many of these norms cannot be given a non-parochial justification. The needs theory, by contrast, is able to pick out from the general class of universal moral rights those that can be justified to all people, irrespective of cultural variations, because they are grounded in needs that all people have independently of which particular society they inhabit.

The problem with this line of argument centres on Miller's interpretation of the non-parochialism desideratum. If the kind of justification it calls for is one that purports to issue in an objectively true conclusion, then it seems that pluralism satisfies it, provided that the interests it appeals to in generating human rights are genuinely interests of all human beings irrespective of the particular society to which they belong. Now, there is room here to debate such questions as whether, in fact, all human beings simply in virtue of their humanity, and living in broadly modern circumstances, have interests that would directly justify a right of democratic political participation or extensive religious freedom. The important point is that nothing in the non-parochialism desideratum, interpreted as requiring an objective vindication

<sup>45</sup> Tasioulas, 'On the Nature of Human Rights', 39.

<sup>46</sup> Griffin, *On Human Rights*, 56.

of human rights norms, necessitates the restriction of the grounds of human rights to basic needs.

However, Miller clearly regards the non-parochialism desideratum as involving more than a bare insistence on objectivity. Human rights must be capable of being justified *to* members of all diverse cultures, which means that the justification is one that ‘connects to beliefs that they already hold’.<sup>47</sup> Now, it is far from obvious what sort of connection is contemplated here; however, it suffices to note two major problems for Miller’s own version of this proposal. First, there is a serious risk that it may backfire. After all, it is arguable that many of the supposed basic needs he lists are not regarded as such by members of some cultures—or at least not in a way that extends equally to all human beings, whether male or female, believers or non-believers, and so on. Why suppose, for example, that a prohibition on female genital mutilation protects a basic need, given widespread cultural adherence to the practice?<sup>48</sup> Second, even if something like Miller’s subjectivist constraint on justification can be stated in a cogent, non-self-undermining way, the question remains, why it should bear on the ultimate grounds of human rights. A natural alternative is to treat it as operating downstream from the question of grounds, playing an important role in guiding our judgments about the extent to which objectively grounded human rights should be established in international law or whether, and in what way, it is appropriate to enforce or more generally seek to implement those rights.

## V. Conclusion

Human rights—understood as moral rights possessed by all human beings simply in virtue of their humanity—are grounded in the universal interests of their holders, all of whom possess the equal moral status of human dignity. This is a two-level pluralist account of the grounding of human rights, since it appeals to both moral (equal human dignity) and prudential (universal human interests) considerations, and allows a plurality of human interests to play a grounding role. One consequence of this view is that the distinctive character of human rights is given by their nature as universal moral rights and not by the underlying values that ground them. The idea that the special character of human rights involves a highly distinctive grounding, as developed in different ways by extreme and moderate foundationalists, should be discarded as an obstructive fantasy that has been projected by philosophers onto human rights morality.

<sup>47</sup> Miller, *National Responsibility and Global Justice*, 165.

<sup>48</sup> Miller, ‘Grounding Human Rights’, 424.