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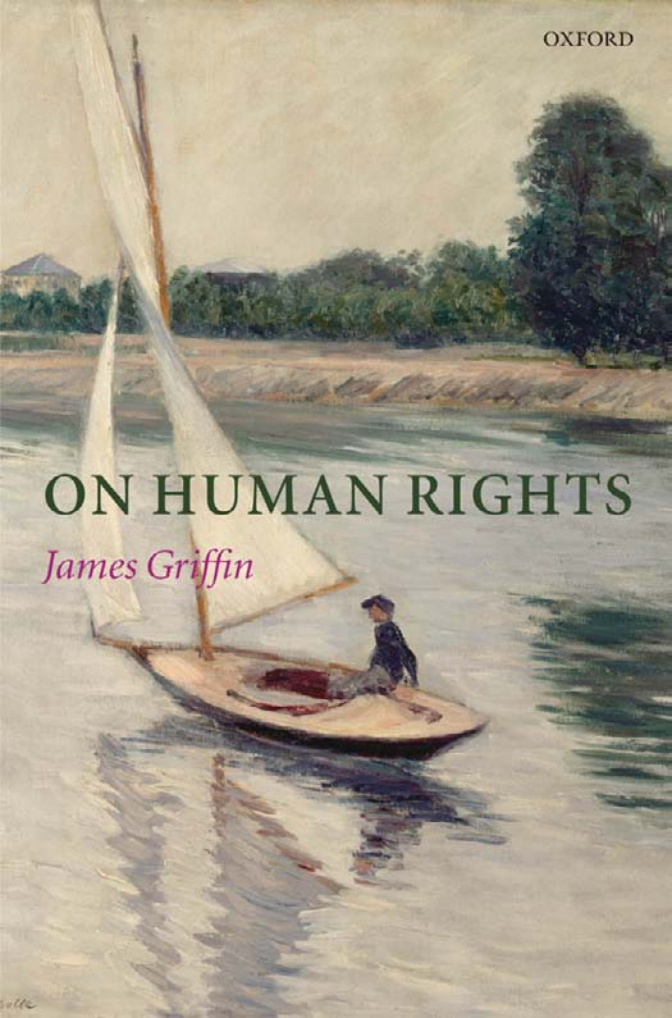
ON HUMAN RIGHTS

James Griffin



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Chapter 4 in D. Archard and C. M. Macleod (eds.), *The Moral and Political Status of Children* (Oxford: Oxford University Press, 2002).

Chapter 5 in T. Campbell and S. Miller (eds.), *Human Rights and the Moral Responsibilities of Corporate and Public Sector Organizations* (Dordrecht: Kluwer, 2004).

Chapter 10 in *Journal of Ethics* 4 (2000).

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Chapter 12 in *Telos* 8 (1998).

Chapter 15 in Lukas Meyer, Stanley Paulson, and Thomas Pogge (eds.), *Rights, Culture, and the Law: Themes from the Legal and Political Philosophy of Joseph Raz* (Oxford: Oxford University Press, 2003).

J.P.G.

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Introduction

This book is prompted by the not uncommon belief that we do not yet have a clear enough idea of what human rights are. But this belief needs more focus. Human rights as used in ethics? In the law? In politics? If in ethics, in an abstract framework such as deontology or teleology? In ethical judgements applied to our societies? If in the law, the law as it is? As it should be? The law where? If in politics, in its history? In empirical explanation? In setting standards?

My focus is ethics. And I prefer to start with ethical judgements as applied to the assessment of our societies—the judgements not just of philosophers but also of political theorists, politicians, international lawyers, and civil servants. The term 'natural right' (*ius naturale*), in its modern sense of an entitlement that a person has, first appeared in the late Middle Ages. God was thought to have placed in us natural dispositions towards the good, dispositions giving rise to action-guiding precepts. These precepts expressed natural laws, from which natural rights could be derived. The theological content of the idea of a natural right was abandoned in stages during the seventeenth and eighteenth centuries, when thinkers increasingly accepted that human rights were available to human reason alone, without belief in God. The idea moved out of the library on to the barricades in the eighteenth century with the American and French revolutions, and the French marked the secularization of the concept by changing its name from 'natural rights' to 'human rights' (*les droits de l'homme*). In its secular form at the end of the Enlightenment it was often still thought to be derived from natural law, but natural law by then widely reduced to no more than a moral principle independent of law and convention. It went into partial eclipse in the nineteenth century, in no small measure in reaction to the bloodiness of the French Revolution. It was brought back into full light by, among others, Franklin Roosevelt at the start of the Second World War and, even more so, by the United Nations at its end. The secularized notion that we were left with at the end of the

Enlightenment is still our notion today, at least in this way. Its intension has not changed since then: *a right that we have simply in virtue of being human*. It is not that there have been no changes at all. An important one is the growth of the international law of human rights in the twentieth century. This has brought about changes in the extension of the term, and changes in extension can constitute changes in meaning—a matter I shall return to shortly.

There is a continuous, developing notion of human rights running through this history—call it the 'historical notion'. That is the notion with which I want to start. Start, but most likely not finish. I am looking for the notion of human rights that fits into the best ethics that we can establish, and it is unlikely that the notion that history has yielded is already in perfect form for its place in ethics. One of the first things that one notices about the historical notion is that it suffers from no small indeterminateness of sense. When during the seventeenth and eighteenth centuries the theological content of the idea was abandoned, nothing was put in its place. The term was left with so few criteria for determining when it is used correctly, and when incorrectly, that we often have only a tenuous, and sometimes a plainly inadequate, grasp on what is at issue. Its indeterminateness of sense is not something characteristic of ethical terms in general; it is a problem specifically, though perhaps not uniquely, with the term 'human right'. We today need to remedy its indeterminateness; we need to complete the incomplete notion, and thereby most likely change it.

How may we remedy the indeterminateness? Although the theological content of the term was abandoned, the ethical content was not. From time to time in the course of the history one encounters the idea that human rights are protections of our human status and that the human status in question is our rational or, more specifically, normative agency. In my attempt to make the sense of the term 'human rights' more determinate, I suggest that we adopt this part of the tradition, that we see human rights as protections of our normative agency.

I prefer, I say, to start with the historical notion. Where else might someone whose focus is ethics start? In philosophy the most common approach to rights is to derive them from one, or a few, highest-level moral principles. There are well-known examples of this procedure. Kant derives human rights (his 'natural rights') from one of the most abstract principles of his ethics—what he calls 'The Universal Principle of Right', which goes: 'any action is right if it can coexist with everyone's freedom in accordance with a universal law'. From this principle he derives the single innate right: the 'right belonging to

every man by virtue of his humanity', the content of which is the same as that of the Universal Principle of Right. So this one innate right, and the rights derivable from it, cover much of morality—not quite all (not, for example, duties arising from the Doctrine of Virtue), but a large part of it, far more than is covered by the human rights in the Enlightenment and onwards. And John Stuart Mill, in the final chapter of *Utilitarianism*, introduces 'rights' as claims on specifiable others, ultimately derivable from the Principle of Utility, taking into account the disutilities of a society's formulating rules, promulgating them, punishing their disobedience, and so on—a notion of rights that also covers much more of morality than do the human rights of the political life of the last few centuries.

Neither Kant nor Mill was trying to explore the notion of human rights as it appears in that historical tradition. They were just commandeering the term 'human rights' (or 'natural rights' or, in Mill's case, just plain 'rights') to do service in the exposition of their own general moral theory. There is nothing wrong with that so long as we are not misled by it. The extension of their term 'rights' is so substantially different from the extension of the Enlightenment notion that we may well think that Kant and Mill are introducing a different concept, that they are, in effect, changing the subject. And in our day John Rawls has followed in Kant's and Mill's footsteps, in this respect: he too commandeers the term 'human right' for service in his overall account of political justice between peoples, also with a marked difference in extension from the Enlightenment notion, though in his case narrower.

Why do I not do the same as Kant and Mill, only try to do better? If their highest-level moral principles were the wrong ones to start with, why do I not start with the right ones? And if what comes out of my attempt at derivation is, as it was in Kant's and Mill's case, a considerably different extension, so be it. But that, as we saw, could change the subject, which I am reluctant to do. The historical notion is the one that is now so powerful in our political life and that, to my mind, has generally been a force for the good. And it is, at the same time, a key idea in ethics. It is an idea that many of us connect with the notion of 'the dignity of the human person', on some interpretation of that phrase. We see human rights as protections of that dignity, and so as potentially having connections with familiar philosophical concerns about respect for persons, the inviolability of the person, and limits on the pursuit of the common good. Indeed, it confronts us with that key choice in ethics between deontology and teleology. It has a foot in both politics and ethics, and in both theoretical and applied ethics. The bottom-up approach that

I prefer may eventually meet the top-down approach of Kant and Mill. In remedying the indeterminateness of sense, in determining the content of human rights, especially in seeing how to resolve conflict between them, the bottom-up approach will have to rise considerably in theoretical abstraction. Whether it must rise quite to the level of abstraction of the Categorical Imperative or the Principle of Utility we can wait to see. There are merits in starting with the historical notion.

I propose, as I have said, that we see human rights as protections of our normative agency. That is not a *derivation* of human rights from normative agency; it is a *proposal* based on a hunch that this way of remedying the indeterminateness of the term will best suit its role in ethics. The requirement that it suit ethics holds out prospects—realized, I should say—of supplying standards for determining whether an account of human rights is 'right' or 'wrong'. What I do is distant from what Kant and Mill did. It is also distant from what Alan Gewirth did recently, in seeking to establish human rights by appeal to certain logical necessities. That he too makes human agency central to his project does not make his project close to mine. His first step is to derive rights from agency in the prudential case: every agent, even the purely self-interested, must accept, on pain of contradiction, that 'I have rights to the proximate necessary conditions of my action'. His next step is from the prudential case to the universal: the agent must accept, because of the logical principle of universalizability, and again on pain of contradiction, that 'all other agents equally have these rights', thus establishing them as *human* rights. In contrast, I claim no logical necessity for my proposal that we see human rights as protections of normative agency. Indeed, some of my colleagues not only reject it but also make plausible, contradiction-free counter-proposals that must in some way be seriously assessed.

How would one go about assessing my proposal? Ultimately, by deciding whether it gives us human rights that fit into the best ethics overall. More immediately, by working out its consequences, especially its consequences for supposed human rights that we find contentious or unclear. And by assessing my proposal against counter-proposals: for example, the counter-proposal that the ground of human rights is not solely normative agency but certain other values as well, or that the ground is not normative agency but basic human needs, and so on. And even by answering largely empirical questions such as how determinate we must make the sense of the term 'human right' to avoid creating serious practical problems for ourselves. Such assessments cannot be made quickly; they take a fairly long book.

It may look as though, in *proposing* a sense for the term 'human rights', I am just stipulating its sense. If so, then it is in the way that the writers in the late Middle Ages who first introduced our modern notion of a 'human right' stipulated its sense. They by no means stipulated arbitrarily. They were trying to get at something that, if not morally foundational, was at least morally important.

My remedy for the indeterminateness is by no means the only one on offer. My remedy is to add to the evaluative content of the notion. Not only are there possible evaluative additions other than mine, there are also non-evaluative remedies. Some think that international law has already remedied the indeterminateness in its own quite different way. International law, some think, has by now authoritatively settled the extension of the term 'human right', and in settling its extension has thereby adequately determined its sense.

Has international law settled the extension? No matter who we are, we cannot establish the existence of a human right just by declaring it to be one. We can get it wrong, and we owe attention, therefore, to what are the criteria for right and wrong here. For example, the Universal Declaration contains a right to periodic holidays with pay, to which the overwhelming and cheering reaction has been that, whatever that supposed entitlement is, it is certainly not a human right. The Universal Declaration also includes a right to democratic participation, but it is possible to argue in an intellectually responsible way about whether it really is a human right. Again, we owe attention to how we would settle that argument. And there are widespread doubts about welfare rights—for instance, whether they are human or only civil rights, or whether some of them have not been drawn too lavishly. We quite reasonably want to know how strong the case is for considering them human rights. Again, how would the case be made? And we need far more than a *list* of human rights. We need more than just their *names*. We must also know their content. But how do we decide it? And we need to know how to resolve conflicts between them. A judge on an international bench cannot resolve conflicts by *fiat*. The resolution must be reasoned. But what are to count as good reasons? Even if the list of human rights in current international law were authoritative, which I see no reason to believe, it would not give us all we need. We also need answers to these questions.

To get those answers, I suggest, we should search for a satisfactory interpretation of 'dignity' in the phrase 'the dignity of the human person' when used as the ground of human rights, because obviously not all kinds

of dignity are. A better understanding will increase the intension of the term 'human right'.

As for a sufficiently determinate sense for the term, we do not have it yet. The law contributes to greater determinateness. It is especially good at moving from particular cases to more general understanding of what is at issue. Not all increases in determinateness are increases in determinateness of *sense*. The latter has to do specifically with determinateness in the criteria for correct and incorrect use of the term. But to the extent that the law makes clearer what is at issue it also contributes to determinateness of sense. My argument is that ethics must make a contribution too, not that it alone will do the job. We will not reach sufficient determinateness of sense without contribution from ethics. That I do not say much about international law is simply because I do not know much about it.

Those, summarily rehearsed, are the thoughts that give my book its direction and will, I hope, make its direction clear to readers. I shall return to all of these matters in a more dialectical spirit and with some scholarly apparatus in what follows.

PART I

AN ACCOUNT OF HUMAN RIGHTS

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1

Human Rights: The Incomplete Idea

1.1 THE ENLIGHTENMENT PROJECT ON HUMAN RIGHTS

Use of the term 'human rights' began at the end of the eighteenth century (for example, in the French Declaration of the Rights of Man and of the Citizen (1789)—'les droits de l'homme'), but it gained wide currency only in the middle of the twentieth century. Before the end of the eighteenth century, the talk was instead of 'natural rights'. The two terms come from the same continuous tradition; they have largely the same extension,[1] though different intensions. 'Natural rights' were generally seen as derived from 'natural laws'. As we shall see, it is altogether harder to say from what 'human rights' are supposed to be derived.

Although the doctrine of natural law has ramified roots deep in Greek and Roman antiquity, it was given its most influential statement by Thomas Aquinas. God has placed in all things various innate natural dispositions, but only in human beings has he further placed a disposition to reason: that is, a disposition issuing in various precepts to guide action—for example, that we are to preserve ourselves in being; to propagate our kind; to seek knowledge of, and to worship, God; and to live peacefully in society.[2] These and other precepts constitute the natural law, and the natural law serves as the measure of the natural right. But Aquinas's reference here to 'right' is by no means our modern sense of 'a right', which is an entitlement that a person *has*. Rather, the 'right' that Aquinas here wrote of is a property of a state of affairs: namely, that the state of affairs is right or just or fair. Aquinas had much to say about natural law and the natural right, but it is a matter of dispute whether he had our modern concept of a natural right.[3]

Indeed, the term 'natural right', in our modern sense, though it first appeared in the late Middle Ages, did not itself gain wide use until the seventeenth and eighteenth centuries. Let me retrace some of the steps on

the route from Aquinas to the Enlightenment. Clearly one major natural disposition leading human beings to the good is rationality, which issues in the precept: follow practical rationality. That precept largely lacks moral content; it is more a directive for arriving at that content, indeed so comprehensive a directive that it threatens to displace all other precepts. And if human reason is sufficient to identify natural law, can God be necessary to it? Francisco Suarez, the most influential writer in the Thomist tradition in the seventeenth century,[4] had an answer. Although their reason gives human beings a certain independence of God, that independence has its limits. Human beings can, unaided, understand the content of natural laws, but what they understand has the status of law—that is, of a command with force—only because of God's will.

The Protestant Hugo Grotius earned his reputation as the founder of the modern secular theory of natural law by taking the further step of arguing that God is not needed even to explain the obligatoriness of natural law. He wrote that 'what we have been saying [namely, that there are natural laws and that they obligate] would have a certain degree of validity even if we should concede that which cannot be conceded without the utmost wickedness, that there is no God, or that the affairs of men are of no concern to him'.[5] Grotius, a pious Christian, never himself made the 'wicked concession'. None the less, he thought that we can establish natural laws through the kind of understanding open to all of us, whatever we believe about religion: namely, that we must act in accord with our rational nature, and that we must do the various things necessary to maintain a society both consonant with reason and composed of inconsistently motivated members such as us—by nature desirous of society yet by nature so self-interested as to undermine society.

Like Grotius, Samuel Pufendorf thought that although divine revelation may help us to know natural law, 'it can still be investigated and definitely proved, even without such aid, by the power of reason'.[6] What particularly needs empirical investigation, he thought, is which precepts are needed to produce a rationally stable society out of the unsocially social creatures that human beings are.[7]

With these steps we arrive at the Enlightenment, which I shall take as running from the last fifteen years or so of the seventeenth century to the end of the eighteenth.[8] In the *Two Treatises of Civil Government* John Locke still gave central place in his argument to both natural law and natural rights; the latter he too thought derivable from the former.[9]