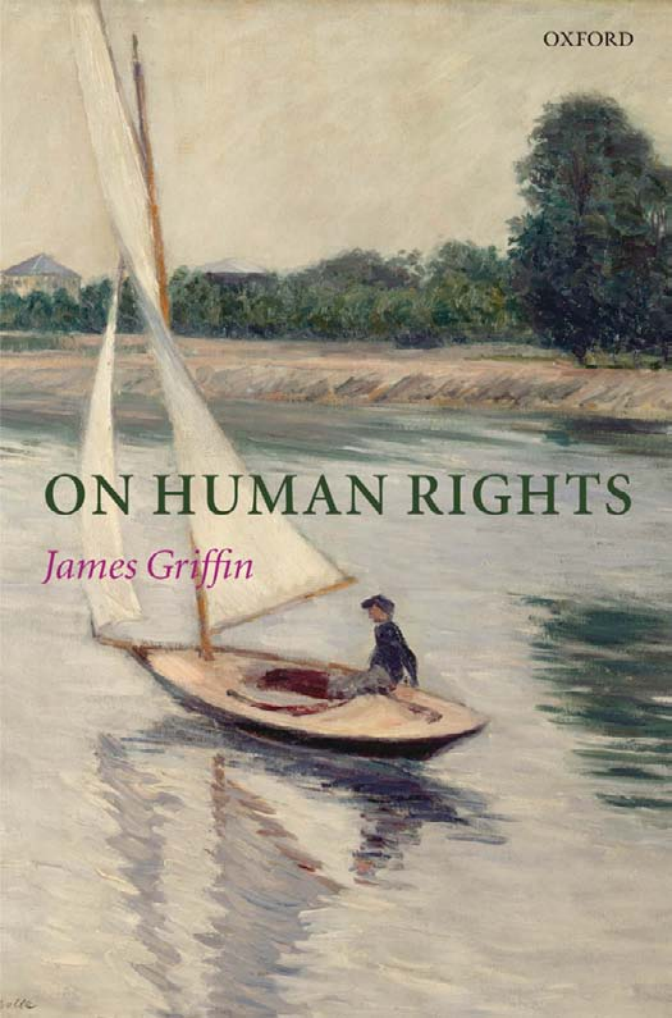
OXFORD

ON HUMAN RIGHTS

James Griffin



However, he paid little attention to how the derivation was supposed to work; he used the language of natural law as a well-established, relatively unproblematic way of speaking.[10] Reason alone, he thought, can establish fundamental moral principles—indeed, can establish them with certainty. At the core of this reasoning, as Pufendorf said before him, will be empirical investigation into the laws needed to enable unsocially social individuals to become members of a properly ordered society. In the course of this reasoning, we need not—indeed, cannot successfully—appeal to any views about the ends of human life; rational persons, he thought, will disagree about them, so a belief about the *summum bonum*, though at the heart of classical and medieval thought, is at best of peripheral interest here, because it is incapable of commanding universal assent and thus of effectively guiding the heterogeneous members of a society.[11] Locke does from time to time refer to God, but it is the God of the Deists: the designer who set the great machine going and then departed from the scene—no intervention, no revelation. Locke's primary interest in the *Two Treatises* was moral constraints on the arbitrary acts of rulers. So it is not surprising that the natural rights that he focused on were the taking of a person's life, liberty, or property without due process, the three most common ways for monarchs to keep their subjects under their thumb.

I referred at the start to 'the Enlightenment project on human rights'. I should now explain what I mean. Why *the* project? Rights were hardly the only concern of Enlightenment writers. What is more, there was no single conception of 'natural law' or 'natural right' that all Enlightenment thinkers shared; indeed, some of them contemptuously repudiated the entire discourse.[12] Yet there was a general movement of thought in the course of the Enlightenment. There was the continued secularization of the doctrines of natural law and natural rights, following the expanding role of human reason. There was the closely related abandonment of much in the way of metaphysical or epistemological background for them. Admittedly, this was not entirely true of Locke, who appealed to God in order to establish the now sometimes overlooked principle of equality at the base of his political thought; but it was true of many of his successors in the eighteenth century. By the end of the Enlightenment, acceptance of natural law seems to have become compatible with just about any metaphysical and epistemological view. In the universe, as conceived by Aquinas, everything has its divinely assigned end. One could therefore see human ends as part of, and readable off, nature. This view, developed in a certain way, can support a strong form

of natural law. It can support, for instance, a form of moral realism—that is, the view that human goods and perhaps even moral principles are not human constructs, but part of a reality that is independent of human thought and attitude. And this sort of moral realism can, in turn, support the epistemic view that judgements about human good and moral principles are capable of truth and falsity in the strong sense that more familiar kinds of reports about nature are. That would be the strongest interpretation of the naturalness of natural law, and there are progressively weaker ones. For instance, we might require of judgements about natural law only that they be objective—that is, that they not be merely expressions of human attitudes. In the course of the seventeenth and eighteenth centuries the claim that there are natural laws became weaker still; it was commonly reduced to no more than the claim that there are moral principles independent of positive law and social convention. It became much like the use in our day of the notion of 'natural justice', which in the mouths of lawyers nowadays commits one to no more than the existence of a standard of justice independent of positive law and convention. And this very weak claim is compatible with virtually all conceptions of ethics—including, for example, Hume's subjectivism—except for ethical relativism, which in any case was a rare view in those days.

So the general movement of thought about rights in the course of the Enlightenment was not just a matter of secularization. Indeed, the secularization was well launched by philosophers who preceded the Enlightenment. In the course of the Enlightenment, though, there were two further developments. Writers aimed at comprehensive lists of *natural* or *human* rights.[13] Lists of rights, of course, were drawn up long before then, but they were lists of positive rights, already or then being granted. The Emperor Constantine, in the Edict of Milan (313), did not claim that Christians already and everywhere had religious freedom; he granted it to them, and others, in the Roman Empire: 'no one whatsoever should be denied the opportunity to give his heart to the observance of the Christian religion, or of that religion which he should think best'. In England, Magna Carta (1215) concerned the rights of certain social classes and institutions: earls, barons, and their widows and heirs; the English Church; the City of London; the clergy; merchants; free men; and so on. It was concerned with establishing a *modus vivendi* for those who had to share power. The rights were not based on human nature; they did not apply to *all* men and only indirectly to women, as wives. Over time, though, the rights and privileges on the lists began to be applied to increasingly broader

groups. The English Bill of Rights (1688) was concerned with 'vindicating and asserting their ancient rights and liberties', 'they' being 'the lords spiritual and temporal, and commons', and though some of the rights—for example, to fair procedure in courts—actually applied to a still larger group, none were derived simply from being human. This was true, too, of virtually all of the charters that poured forth from the sometimes restive British Colonies in North America in the course of the seventeenth and eighteenth centuries; they laid claim only to 'the rights of Englishmen', rights already established in the common law of the mother country. They laid claim, as the Virginia Charter (1606) put it, to 'all liberties, franchises and immunities … to all intents and purposes as if they had been abiding and born within England'.[14] The American colonists no doubt thought that they were on more promising ground claiming rights that had already been granted, but when that strategy got nowhere, their eventual Declaration of Independence (1776) fell back on *natural* rights. The eighteenth century came to an end with comprehensive lists of what were meant to be the most basic or important natural or human rights[15]—namely, the French *Declaration of the Rights of Man and of the Citizen* (1789) and the United States Bill of Rights (1791). And along with these codes of human rights there came a second development. These lists took centre-stage in political life. They justified rebellion—in a detached, retrospective way in the case of Locke's defence of the Glorious Revolution of 1688,[16] but in an altogether more engaged way in the case of the American and French revolutions. Natural or human rights became a popular political force.[17]

The notion of human rights that emerged by the end of the Enlightenment—what can reasonably be called the Enlightenment notion—is the notion we have today. There has been no theoretical development of the idea itself since then. It is not, of course, that there have been no developments of any sort. The League of Nations developed, through treaties, basic mechanisms for the international protection of human rights. The United Nations, through the Universal Declaration and subsequent instruments, created a largely agreed list of human rights, which has had wide ramifications in political life. International law now embodies human rights and has developed complex institutions of adjudication.[18] And so on. But despite the many changes, none has been to the idea itself. The idea is still that of a right we have simply in virtue of being human, with no further explanation of what 'human' means here. Settling the extension of the term, it is true, is one way of determining its sense, and international law is sometimes seen as

having settled the extension of 'human right'. But it has not done anything so decisive. International law has, or should have, ambitions to incorporate human rights determined, at least in part, by ethical considerations independent of law or convention. I shall come back to the aims of international law later.[19]

Natural law began as part of a teleological metaphysics capable of supporting strong interpretations of how morality is rooted in nature, and it ended up at the close of the eighteenth century in something approaching vacuity.[20] It is not that the strong, non-vacuous conceptions of natural law do not have their own considerable problems.[21] Still, many scholastic conceptions of natural law gave us at least *something* to go on in deciding what natural rights there are. Once the metaphysical and epistemological background that they provided is abandoned, as it was in the course of the Enlightenment, what is left? Is enough left?

1.2 THE INDETERMINATENESS OF THE TERM 'HUMAN RIGHT'

In what state is the discourse of human rights today? Take two examples, the first from the United Nations. Thirty world leaders, in a statement issued through the Secretary-General of the United Nations, claimed that 'the opportunity to decide the number and spacing of their children is a basic human right' of parents.[22] Does China's one-child policy then really infringe a human right? Would a five- or a ten-child policy do so too? Next, an example from philosophy, where the scene is not much brighter. In the course of a well-known article about abortion, a distinguished American philosopher builds her case on a presumed right to determine what happens in and to one's body.[23] But do we have such a broad right? If the government were to prohibit us from selling our body parts, as many governments are thinking of doing, would our human rights be infringed? This proposed right is not dissimilar to a widely accepted human right—a right to security of person. But one's person's being secure is considerably different from one's body's being in all respects under one's own determination. How are we to tell whether we have such a strong right?

We do not know. The term 'human right' is nearly criterionless. There are unusually few criteria for determining when the term is used correctly and when incorrectly—and not just among politicians, but among philosophers,

political theorists, and jurisprudents as well. The language of human rights has, in this way, become debased.

Others need not agree with me on the particular lack I see in the term 'human right' for my project to be of use. Nearly everyone accepts that the idea is incomplete in some serious way or other, that it needs more explanation before its use will have the rationality it should have. And my project should go some way towards meeting this widely felt need. Still, I see a specific lack, centring on determinateness of sense.

Determinateness of sense is, admittedly, a matter of degree; one can live with some indeterminateness. It is a rare common noun that has criteria allowing us to determine in all cases whether it is being correctly or incorrectly used; there are usually at least borderline cases. But if, quite apart from the generally recognized borderline cases, there are very many other cases in which nothing is available to us to settle whether a term is being correctly or incorrectly used, then the term is seriously defective. The term 'human right' is far less determinate than most common nouns—even than most ethical terms. We have a range of quite specific ethical terms which clearly do not suffer from unacceptable indeterminateness of sense. We know perfectly well what makes an act 'courageous' or 'considerate'. And the far broader term 'justice' does not suffer from it either. A trouble with the idea of 'justice' is that it is so elastic: it is sometimes used to cover the whole of morality, and sometimes a specific part of it, and it is used of several different specific parts (distributive justice, retributive justice, procedural justice, and so on). It is, in this way, equivocal. But to be equivocal or ambiguous or vague is not to be indeterminate in the way I have in mind. Rather, on each occasion we have to work out in which of its perhaps tolerably determinate senses 'justice' is being used.

It is false, too, that the term 'human rights' is no worse off than very broad and not especially contentful ethical notions such as 'wrong', which we manage to get on with well enough. If you and I were to disagree as to whether a certain action is (morally) wrong, there would be considerable, perhaps complete, agreement between us about what bears on the matter. There might also, of course, be disagreements. You might cite a prohibition about which I had doubts—say, a near absolute prohibition against deliberately taking an innocent person's life without that person's consent. I would not for a moment, though, doubt the relevance of that prohibition to the issue; human life is of great value, which will translate into a stringent moral prohibition. I might disagree with you over the best way to express the

value of human life as a norm of action, or over how many exceptions the norm permits. We may, in the end, be unable to agree whether a certain action is wrong, because we are unable to agree how to express the moral norm—perhaps because you get your norm from religious belief and I am not a believer. Although we are unable to agree, we are, none the less, still able to see what is at issue—perhaps, in the case I have described, whether there is a God or whether we can know what he wants. Contrast this case with the case of our disagreeing about whether there is a broad human right to determine whatever happens in and to our bodies. In this case there is practically no agreement about what is at issue. We agree that human rights are derived from 'human standing' or 'human nature', but have virtually no agreement about the relevant sense of these two supposedly criteria-providing terms.

Do I exaggerate the trouble with the term 'human rights'? It is not that it is entirely unusable. There are at least *some* criteria for determining when the term is used correctly and when incorrectly. I have said that there is an Enlightenment notion of human rights, that it has an element of intension—namely, that a human right is a right that we have simply in virtue of being human—and an extension—roughly, the rights found in the United States Bill of Rights, in the French Declaration of the Rights of Man, and in certain key United Nations instruments. Thin though its intension is, and challengeable though its extension is, the Enlightenment notion is not completely empty. So we often can, and do, make negative judgements. The Universal Declaration of 1948, the most restrained of United Nations' lists of human rights, blunders at one point in asserting a right to periodic holidays with pay, which, as I mentioned in the introduction, is widely rejected. What is more, we all agree on several paradigms: freedom of expression, freedom of worship, and so on. We must be able to settle some harder cases by extrapolation from these paradigm cases. But the resources here are still too meagre. The few criteria attaching to the term 'human rights' would still leave very many cases of its use, far more than borderline cases, undetermined. And the paradigms on which we agree are all civil and political rights, which would leave us with too many unanswered questions. Do we have a human right to determine how many children we have? Do we have a human right to determine whatever happens in and to our bodies?

But do I not exaggerate at least the rarity of the lack I find in the term 'human rights'? Is not the progress that I desiderate in the case of 'human rights' simply the progress sought for in very many other moral ideas: namely,

the progress from 'concept' to 'conception', as that distinction is drawn by John Rawls in *A Theory of Justice*? [24] We have a common concept of, say, justice, and what more is needed is to fill it out into a particular conception, such as Rawls's justice as fairness. What I am maintaining is that in the case of the term 'human rights' there is a serious lack on the *concept* side, which has no parallel in the case of, say, justice.

The cases of 'justice' and 'human rights', I have admitted, differ only in degree. In the case of 'human rights' there are so few criteria to determine when the term is used correctly or incorrectly that we are largely in the dark even as to what considerations are to be taken as relevant. In contrast, we largely agree about what is relevant to correct and incorrect use of the word 'justice'. The words 'just' and 'fair', as we have them in ordinary speech, are such that, so long as the context or the speaker makes clear what sort of justice is under discussion—distributive, retributive, procedural, or so on—we largely agree on what is at issue. Agreement of that degree is not available to us in the case of the term 'human right'. Do we have a human right to determine how many children we have? Can we even tell what is relevant to the question? Well, the fragment of intension we have—namely, a claim that we have on others simply in virtue of our being human—holds of moral claims in general, and not all moral claims are rights-generated. For example, the claim that one has on others that they not gratuitously cause one pain is not. Either a claim arising from a human right is a special sort of claim, not merely a moral claim, or the human status from which the claim arises is something more specific than that human beings are the subject of moral obligations. Until we have agreement on some such matters as these, the concept of a 'human right' will remain, among moral terms, unusually thin.

This indeterminateness of sense mattered less in the seventeenth and eighteenth centuries, when there was wide agreement on examples. As the problem commanding urgent attention at the time was autocratic rulers, the solution naturally focused on a range of civil and political rights.[25] By the twentieth century, however, the general agreement on examples had vanished. Constitutions and international instruments began including hotly resisted welfare rights,[26] as well as such suspect items as rights to peace,[27] to inherit,[28] and to freedom of residence within the borders of one's own country.[29] These too, it was asserted, are human rights. But are they? The runaway growth of the extension of the term in our time makes having some grasp of its intension the more urgent, and its intension is what is so especially thin.

It is not that we must now come up with a definition of the term 'human right'—some form of words more or less synonymous with the term, or a list of essential features.[30] It is not clear, even, that the component term 'right' is definable in that sense, although several contemporary philosophers offer a definition or something close to it.[31] Many terms have satisfactorily determinate senses, not because they can be defined, but simply in virtue of having a fairly well settled use. But the term 'human rights' has a largely unsettled use. It is a theoretical term, introduced as the successor to another highly theoretical term, 'natural rights'—introduced, though, without much in the way of necessary background. We may not need definition, but we certainly need more in the way of explanation.

The job of philosophers and jurisprudents and political theorists in our time is to remedy the indeterminateness—to do what the Enlightenment failed to do.

1.3 REMEDIES FOR THE INDETERMINATENESS

One drastic remedy is simply to abandon human rights discourse. If it is so unsatisfactory, why not jettison it?

But, despite what Bentham says, it is not that the term is nonsense. And there is no shortage of ways to remedy its indeterminateness. If human rights were basic in the whole moral structure, then we could not do without the term. But human rights are not, I think, basic; they appear on a low-to-middle level in the whole structure, though my reasons for saying so will have to wait.[32]

There is, though, a question that we can answer now. If, as I think, our ethical vocabulary is ample enough for us to drop the term 'human right' and carry on instead with a more circuitous way of saying the same thing, would anything important be lost? One may think that mankind has already been in that position. There has been a fair amount of discussion recently as to whether the ancient Greeks and Romans had the concept of a human right—not a term with roughly the same meaning but the concept.[33] This raises the general question of what it is to have a concept, and whether a high degree of circuitousness is not itself prima facie ground to doubt its possession. And we cannot tell whether the ancients had our modern concept of human rights, unless we know what that is, about which more later. To my

mind, the circuitous formulae that the ancients assembled always fell short of our modern concept.

But would something be lost simply by not having a single word or simple term for human rights? Having a simple term serves several practical purposes. It highlights a certain consideration, attracts our attention to it, marks its importance in our culture, makes its discussion easier, increases the chances of its having certain social effects such as ease of transmission and potency in political action. It can facilitate deep moral shifts, such as the emergence of individualism at the end of the Middle Ages. It lends itself to political slogans and provides the centrepiece of popular movements. It allows lists of 'human rights', and so checklists for the sort of monitoring done by Amnesty International and Human Rights Watch.[34] It can empower individuals. I was told recently[35] of a woman in Senegal whose husband had left her and taken the children, which he was legally entitled to do, and the land they lived on, which she had brought into marriage. The term 'human rights' had entered their language only a few years before, but the woman was spurred by its possession to complain forcefully and publicly: she had a right, she said, to some of the land and to see her children. She had no hope that the elders would help her, but they were eventually moved by the confidence and persistence of her complaints to allow that, despite their customs, she had a case.

Ethics should be concerned not just with identifying right and wrong, but also with realizing the right and preventing the wrong. Having the simple term 'human right' is important to the latter. Strictly speaking, though, that is a case for having a simple term, not necessarily for the term's being 'human rights'. It could instead be 'constitutional rights' or 'basic rights' or 'entrenched rights', to which we could attach a satisfactorily determinate sense, say of a positive nature: a 'constitutional right', we could say, is one chosen by a certain sort of convention of citizens and given a certain sort of foundational place in the legal system. Of course, what would be lost by taking this route would be the idea that certain rights have their foundational status in society not because of conventions or place in the legal system but because of their moral status. And that is something that we need not, and should not, lose.

In any case, we philosophers, jurisprudents, and political theorists could not undermine 'human rights' discourse, with its large ambitions to regulate the world, even if we tried. It is much too well established for that. Our only realistic option, quite optimistic enough, is to influence it, to develop it, to complete it.[36]

1.4 DIFFERENT APPROACHES TO EXPLAINING RIGHTS: SUBSTANTIVE AND STRUCTURAL ACCOUNTS

We need an account of 'human rights' with at least enough content to tell us, for any such proposed right, difficult borderline cases aside, whether it really is one and to what it is a right.

There are several accounts of rights that, however much they give us, do not give us what we need here. Several modern philosophers try to characterize rights largely by their structural features. For instance, Joel Feinberg's account of rights is largely structural. A right, he says, is a claim with two features: it is a claim, first, *against* specifiable individuals and, second, *to* their action or omission on one's behalf. Or, more strictly, it is such a claim when it is sufficiently backed by laws or moral principles and therefore valid.[37] But this is intended as an account of rights in general, not of human rights in particular. An obvious way to get an account of human rights out of Feinberg's framework is to add a contentful specification of one or more of the moral principles that Feinberg has in mind—a principle that, perhaps, expresses the value of our human standing. But that, of course, is to add some substantial evaluation, as Feinberg would doubtless agree.

Ronald Dworkin's view that rights are 'trumps' is another highly structural one.[38] But the point of rights, even the basic legal rights that Dworkin has primarily in mind, cannot be, as he claims, to act as trumps over appeals to the general welfare. The consequence of that claim would be that rights have no point in restraining most of the agents whom in the course of history they have been used to restrain: overreaching popes, absolute monarchs, dictatorships of the proletariat, murderous thugs who seize political power, not all of whom (to put it no higher) had the general welfare as their goal. Nor is the claim much more plausible if we reinterpret Dworkin more sympathetically to be referring only to ideal political conditions, when the state is committed to pursuing the impartial maximization of welfare, or whatever the best conception of promoting a people's good turns out to be.[39] The point of rights in those ideal conditions, we can understand Dworkin to be saying, is as trumps over the best policy of promoting the good of all. But that cannot be right either. It does nothing to lessen the implausibility

of denying human rights the role they have played throughout their history. Besides, justice and fairness are likely also sometimes to trump the promotion of the good of all, and, as we shall see later,[40] the domain of justice and the domain of human rights are only overlapping, not congruent. If more than rights are trumps, one cannot use trumping to characterize rights. In any case, rights are not, strictly speaking, trumps. There is some, perhaps especially high, level of the general good at which it would override a right, as Dworkin himself accepts.[41] At what level? To answer that, we need to know how to attach moral weight both to rights and to different levels of the general good. If the weight we attach to rights is not to be arbitrary, we must have a sufficiently rich understanding of the value that rights represent—for *human* rights that would most likely require a sufficiently rich understanding of the dignity, or worth, of the human person, whatever the proper understanding of that now widely used phrase is.[42] A satisfactory account of *human* rights, therefore, must contain some adumbration of that exceedingly vague term 'human dignity', again not in all of its varied uses but in its role as a ground for human rights. So the account must have more substantive evaluative elements than Dworkin supplies.[43]

Robert Nozick's account of rights as 'side-constraints' has a little more ethical content than Dworkin's, but is still largely structural: rights set limits on the permissible pursuit of personal or the common good; these side-constraints, though, may be overridden in the extremely rare case of a 'catastrophe'.[44] But Nozick's proposal is not helpful without a gloss on the word 'catastrophe'. It is something on the order of a nuclear holocaust, he has explained. But all that this example does is to set the level of resistance to trade-offs extraordinarily high, without saying exactly how high, and without supplying any reason why that is where to set it. For example, would the threat of a repetition of the terrorist attack on Manhattan of 11 September 2001, though this time with a primitive nuclear bomb capable of destroying the southern half of the island, constitute a 'catastrophe' in the relevant sense? Destruction of the southern half of Manhattan, for all its terribleness, is well short of nuclear holocaust. Still, would this lesser threat justify, for example, the detention without trial introduced subsequently by the United States government with just this sort of possibility in mind? We do not know; the word 'catastrophe' gives far too little help. In any case, Nozick does not regard being overrideable only by a catastrophe as a characterization of what a human right *is*, or of the very point of such rights. If it were such a characterization, then anyone adopting a less demanding standard for the

overriding conditions, even if the standard still required much more than a simple surplus of the general good over the right, would be making a mistake about what a human right is, which is clearly not so. On the contrary, Nozick introduces an element of ethical substance: rights represent the moral significance of the separateness of persons. But it is also highly unclear what that significance is, and Nozick says nothing in its further explanation. What we need in order to make progress with these matters is, among other things, further explanation of the idea of the separateness of persons. Despite the ethical substance that Nozick has given us, we need more.

In general, what we need is a more ethically substantive account of human rights than Feinberg's or Dworkin's or Nozick's. I say '*more* substantive' because no plausible account of human rights will be purely structural or substantive; it will be a mixture of the two. The more ethically substantive account that we need will itself have structural implications. I have no general argument that, in order to explain human rights, structural accounts must become more substantive. Besides the fact that the class of structural accounts is not well defined, I have found no one failing in the three particular cases I have looked at. My remarks are, at best, suggestive—suggestive that an account of human rights should have more substantive evaluation than that offered by any of the well-known, predominantly structural accounts we now have.

1.5 A DIFFERENT KIND OF SUBSTANTIVE ACCOUNT

Still, I do not now mean to imply that the only way to make an account of human rights more ethically substantive is to ground the rights directly in substantive *values*, a belief that John Rawls has recently challenged.[45] He is right that one can also make the account more substantive by spelling out the role that human rights play in a larger theory—in Rawls's case, in a theory of political justice between peoples. What we need in order to establish a law of peoples, he thinks, is a set of notions and principles usable in a practical political context in which what he calls 'well-ordered' peoples with, it may be, considerably different religious, philosophical, and moral beliefs will come to agree, without coercion, on rules to govern their behaviour to one another. The class of well-ordered peoples includes, besides liberal democracies, what Rawls labels 'hierarchical' peoples who are not aggressive, respect human rights, have a legal system that their members take to impose

bona fide moral duties on them, follow a common-good idea of justice, and have a basic political structure that, while not democratic, contains at least a certain minimal 'consultation hierarchy'.[46] None the less, Rawls's case for his version of the law of peoples is, by design, deeply rooted in the perspective of a politically liberal society; it works outward from that in two stages. He argues, first, that a group of liberal democratic peoples, wishing to arrive at just rules for behaviour among themselves, will settle on his version of the law of peoples. He then argues that a group of liberal democratic peoples, similarly wishing to establish just rules for their dealings with decent hierarchical societies, would reach agreement with them on the same version of the law of peoples. This version, he concludes, is thereby established as the law of peoples for all well-ordered peoples.

Now, persons exercising reason under free institutions, Rawls plausibly believes, will typically arrive at differing comprehensive religious, philosophical, and moral views; in short, freedom fosters this sort of pluralism.[47] To reach agreement between well-ordered peoples at either stage of the argument, one must appeal, Rawls says, to public reasons: reasons that do not derive from any particular comprehensive view and will be accepted as authoritative by all parties to the agreement. This is all the more to the point when the agreement at stake is between liberal peoples and decent hierarchical peoples. Then we have to avoid ethnocentricity. As Rawls puts it, we should avoid saying 'that human beings are moral persons and have equal worth in the eyes of God; or that they have certain moral and intellectual powers that entitle them to the rights'; we do not want to ground rights directly in such evaluative notions, he thinks, because decent hierarchical peoples might reject the notions 'as liberal or democratic, or as in some way distinctive of Western political tradition and prejudicial to other cultures'.[48] Instead, the principles behind the law of peoples, Rawls says, 'are expressed solely in terms of a political conception and its political values'.[49] These restrictions lead to a markedly shorter list of human rights than the lists common in liberal democracies.[50] Rawls's own shorter list omits such typical human rights as freedom of expression, freedom of association (except what is needed for freedom of conscience and of religious observance), the right to democratic political participation, and any economic rights that go beyond our right to mere subsistence.[51] And the role of human rights, on Rawls's conception of them, is quite restricted: it is to provide the justifying reasons for war and its conduct, and to set conditions for when one state may coercively intervene in another.[52]

So much for Rawls's proposal. In the course of history, there have been many different lists of rights: Rawls's shortened list for the law of peoples is an example, as is the longer list adopted by certain constitutional liberal democracies, and the still longer list that emerges from a compilation of United Nations documents, and the lists derived from comprehensive moral views such as a Thomist or Kantian or Utilitarian view, and so on. If we step back for a moment and ask which of the items on these lists almost universally attracts the label 'human rights', it is clearly those on the second (certain liberal democracies) or third (the United Nations). Rawls's shorter list is, he says, a proper subset of the second or third sort of list.[53] Why, then, does Rawls adopt the label 'human rights' for his shorter list? For no sufficient reason. Even if Rawls is correct that the law of peoples needs a shortened list, which I doubt for reasons I shall come to later,[54] that is no reason why he should consider it a list of 'human' rights. He gives no reason to think that this is what human rights really are, or are now best thought of as being. He makes no effort to show that it is only the rights on his list that human beings have simply as human beings, or however else he wants to interpret 'human'. He says that his list contains 'a special class of urgent rights',[55] without telling us how they are urgent while the excluded rights on the liberal democratic lists are not. To establish that Rawls's shorter list is what human rights are best thought of as being would take a much stronger argument—say, an argument to the effect that all versions of the liberal democratic list are incorrigibly flawed. There are such arguments,[56] but none that I know of establishes anything approaching such a strong conclusion. And Rawls's characterization of the *role* of human rights—briefly, that their role is to establish rules of war between nations and conditions for one nation's being allowed to intervene in another—is similarly under-motivated. The point of human rights, on the almost universally accepted conception of them, is far wider than that. For example, they quite obviously have point intra-nationally: to justify rebellion, to establish a case for peaceful reform, to curb an autocratic ruler, to criticize a majority's treatment of racial or ethnic minorities. And they are used by the United Nations and by non-governmental agencies to issue periodic reports on the human rights record of individual countries, seen from an internal point of view. They are also used to criticize institutions within a single society. Many hospitals are still condemned for denying patients really informed consent. And some parents can reasonably be criticized for violating their mature children's autonomy and liberty.

Of course, when seeking agreement between well-ordered nations on a law of peoples, we should, when possible, use language that will cross cultures. Rawls says, more strongly, that we should use a 'public reason'; it is, he claims, our best hope for reaching agreement. But that is an empirical claim, which he never tries to justify. He treats it as obvious; but it is, on the contrary, quite doubtful. To my mind, Rawls's views about ethnocentricity are fast going out of date.[57]

Shirin Ebadi, the winner of the Nobel Peace Prize for 2003, said in an interview following the announcement of her prize that the human-rights-based reform movement in Iran 'cannot be stopped. In every society there comes a time when people want to be free. That time has come in Iran.'[58] This view is widespread among educated Iranians, as has been manifested by large student demonstrations. Much the same is true of China and South-East Asia. And unforced agreement between nations does not require every member to adopt the language of human rights; it is enough if the more politically alert and active do so. Admittedly, some of the tribal societies of the Middle East are not yet ripe for freedom. Still, if one wants a *practical* route to a law of peoples, if one wants the ideal society of peoples also to be *realistic*, as Rawls does, then one would promote, perhaps with minor amendments, the United Nations list of human rights—or so I shall shortly argue.

In any case, international discourse needs a largely agreed list of human rights; whether it needs an agreed justification of the list is another matter. We have had a fairly largely agreed list for the last fifty years. When in 1947 the United Nations set up a committee to draft a declaration of human rights, the newly created UNESCO set up a parallel commission of philosophers to advise the drafting commission. Philosophers were assembled from all major cultures; even more were polled. They had no trouble agreeing on a list of human rights, much like the list that eventually appeared in the Universal Declaration of 1948. Jacques Maritain, the French Thomist, a member of the UNESCO committee, reported that when a visitor to their proceedings expressed amazement that such a culturally diverse group was able to agree on a list of human rights, he was told, 'we agree about the rights but on condition no one asks us why'.[59] This sensible silence on the part of the philosophers is like the silence of the law on the justification of many of its norms. For instance, in the criminal law members of a society have no trouble agreeing on a list of major crimes, while often substantially disagreeing about what makes them crimes.[60]

None the less, having agreement only on a list of human rights, and not on any reasons behind it, has major drawbacks. A greater measure of convergence on the justification of the list might produce more wholehearted promotion of human rights, fewer disagreements over their content, fewer disputes about priorities between them, and more rational and more uniform resolution of their conflicts—all much to be desired.

But what are the most likely ways for this to come about? This is the empirical question Rawls raises. There are, I should say, two most likely ways. The first is the continued spread of the largely Western-inspired discourse of human rights that we have witnessed over the last sixty years. At its core is the idea that human beings are unique, that we are made in God's image (Genesis 1: 27), that we too are creators—creators of ourselves, and by our actions, of part of the world around us, on which we shall be judged. Genesis is common to 'the people of the book': Jews, Christians, and Muslims. But the egalitarian and individualist implications of the idea that we are made in God's image lay dormant in Christianity until the late Middle Ages. Then the authoritarian strand in the Church gave some ground to the view that we cannot earn reward or punishment unless we are responsible for our acts, that we cannot be responsible unless we are autonomous, and that we cannot be autonomous unless we can exercise our individual consciences. There is no dignity in mere submission to authority. And human rights are to be seen as protections of this elevated status of human beings, although there are many different accounts of how, in detail, this justification of rights works. The transition of thought from merit to individual conscience is not particularly Western; it is essential to one's seeing oneself as a moral agent among other moral agents. Admittedly, the final step—the step from moral agency to the adoption of the discourse of human rights—need not be taken; but the idea that one's moral agency is to be protected is integral to the idea of one's moral agency's being of particularly high value. The latter idea is such a deep component of the moral point of view that there is reasonable expectation that its appeal extends well beyond the bounds of the Western world. There is the view among some Western writers that it would be 'intolerant' of us to tie the idea of human rights to our peculiar Western conception of them;[61] but it is hardly intolerant of us to be reluctant to give up the moral point of view, as we understand it, in which our idea of human rights, though separable, is deeply rooted.

The second of the most likely ways in which we might reach greater convergence on justification is by finding justifying ideas present, even if only

latently, in non-Western cultures. Several writers have lately been searching non-Western cultures for such ideas.[62] And the ones that they have found have often shown striking overlap with those used in the West: individual responsibility, autonomy, freedom, and human dignity.[63]

This second way may look less ethnocentric, and so more promising, than the first. I shall argue later[64] that, despite appearances, it is, rather, the first approach that is the more promising.

Neither of these two ways, however, is the contractualist way. Neither appeals to the sort of public reason that Rawls thinks necessary. Instead, they involve an agreement directly on values—not on a comprehensive moral view, it is true, but on a particularly deep conception of agency that figures, or can without daunting difficulty come to figure, in all of them. Human rights can, therefore, be directly grounded in values without becoming culturally limited. What Rawls says about the law of peoples should not leave us any less interested than before in pursuing the liberal understanding of human rights or in developing an ethically substantive account by grounding them directly in values.[65]

1.6 HOW SHOULD WE GO ABOUT COMPLETING THE IDEA?

Why have recent writers (for example, Feinberg, Dworkin, Nozick) so favoured structural or (Rawls, Beitz) legal-functional accounts of rights? Most writers long ago abandoned all but the weakest natural law accounts. Today most would also like to avoid accounts with any sort of broad ethical commitment: that way, they think, lies mere sentiment and endless disagreement. No substantive account but the very vaguest has achieved currency: for example, the United Nations' claim that human rights derive from 'the dignity of the human person'. If an account becomes much less vague, it is thought, we get entangled in our own incompatible comprehensive ethical beliefs. That was Locke's point about not appealing to a *summum bonum*; it was Hume's point, so dominant in the twentieth century, about ethical judgements' being expressions of sentiment. Still, we feel that the idea of rights, especially the idea of human rights, needs something more in the way of explanation. Lacking a substantive account that is well worked out and congenial to the modern mind, we naturally look elsewhere.

But, as we have seen, the largely structural or legal-functional accounts that many looked to are short on explanatory power. A couple of centuries ago philosophers showed no reluctance to produce richer substantive accounts—for example, by incorporating rights into their comprehensive ethical views. Kant did that for 'natural rights' in his late work *The Metaphysics of Morals*, and Mill did it for 'rights' in the last chapter of *Utilitarianism*. Neither of these stipulations, though, has done anything to solve the problem of the indeterminateness of the idea of 'human rights'. There is no good reason, I just said, to accept Rawls's stipulation. The case with Kant and Mill is different; their stipulations have been around long enough for us to be able to conclude that not enough speakers or writers have accepted them—in contrast to some philosophers accepting their larger theories—for them to have become a broadly accepted part of the criteria for the correct and incorrect use of the term 'right' or 'human right'.

Kant's, Mill's, and Rawls's stipulations all yield extensions for the term substantially different from that in the Enlightenment tradition: in Rawls's case, as we have seen, markedly smaller, and in Kant's and Mill's very much larger.[66] And if a stipulation for the term 'human right' yields a very different extension from that in the Enlightenment, why think that it is the *best* stipulation? Why think even that it explains the term we set out to explain in the first place? Does it not just change the subject?

Still, we cannot decide instead just to adumbrate the Enlightenment idea of a 'human right'. That is the seriously incomplete idea. To gain a satisfactory notion of human rights, we need not adumbration of this idea but its completion.

Meanwhile, my immediate question stands: what content should we add to the notion of a human right?

2

First Steps in an Account of Human Rights

2.1 TOP-DOWN AND BOTTOM-UP ACCOUNTS

At the end of the last chapter we met two general ways for philosophy to supply a more substantive account of human rights. There is a top-down approach: one starts with an overarching principle, or principles, or an authoritative decision procedure—say, the principle of utility or the Categorical Imperative or the model of parties to a contract reaching agreement—from which human rights can then be derived. Most accounts of rights in philosophy these days are top-down. Then there is a bottom-up approach: one starts with human rights as used in our actual social life by politicians, lawyers, social campaigners, as well as theorists of various sorts, and then sees what higher principles one must resort to in order to explain their moral weight, when one thinks they have it, and to resolve conflicts between them.

We should welcome both approaches, and see what help each can give us. I prefer the bottom-up approach. We may not have to rise all the way to the highly abstract moral principles used in the top-down approach in order to explain what needs explaining. And we shall not then have to assume, at least initially, the correctness of any of these contentious abstract moral principles, or indeed even the possibility of large-scale system in ethics. In any case, the top-down approach cannot do without some explanation of how the notion of human rights is used in our social life. We need it to test whether what is derivable from these highly abstract moral principles *are* human rights and *all* human rights. We need not treat the use of the term in present social life as beyond revision, but we need some understanding of what human rights are independent of the principle or principles from which they are said to be derivable, and their social use is the most likely source.

What content, then, should we attach to the notion of a human right? If we adopt the bottom-up approach, there are two parts to the job. Clearly the content will be determined to some degree by the criteria for use, insufficient

as they are, that the notion of 'human rights' already has attaching to it. So the first part of our job is to consult the long tradition from which the notion comes and to discover the content already there. Although the notion is incomplete, it is not completely empty.

Still, the seventeenth- and eighteenth-century accounts, which remain for us the last major development of the idea itself, left much for us to add. Because that is our job, we today are, to a surprising extent, in at the creation both of a substantive account and therefore, to some extent, of human rights themselves. The account that we need will, as we shall see, turn out to have a measure of stipulation. That gives us freedom, though freedom under constraints. There is the constraint of the tradition and the constraints of meeting practical needs and of fitting well with the rest of our ethical thought.

2.2 THE HUMAN RIGHTS TRADITION

Let me now give, in summary form, what seems to me the most plausible history of the idea of a right.[1]

As I mentioned in the Introduction, a term with our modern sense of a 'right' emerged in the late Middle Ages, probably first in Bologna, in the work of the canonists, who glossed, commented on, and to some extent brought harmony to the many, not always consistent, norms of canon law and, on the civil side, Roman law. In the course of the twelfth and thirteenth centuries the use of the Latin word *ius* expanded from meaning what is fair to include also our modern sense of a 'right'—that is, an entitlement that a person possesses to control or claim something. Modern writers have come to refer to these two senses of natural right (*ius naturale*) as the 'objective' and the 'subjective'. Aquinas, for instance, wrote often of 'the natural right,' but never used a term translatable as 'a natural right', though some believe he had the concept.[2] In the 1280s, Geoffrey of Fontaines used the modern subjective idea of a right in mounting a case against papal power.[3] But a more sustained use came in the course of the curious poverty debates. After the death of Francis of Assisi, the Franciscans themselves began disputing what exactly their vow of poverty implied. And soon the popes, understandably unnerved by the teaching that the ideal Christian life required the renunciation of property and power, joined in. One argument to command attention—a preposterous one—went like this: when someone gives a Franciscan meat and bread for his supper, it is clearly not a loan; a loan requires care and eventual return

of the goods; the goods given to the Franciscan, however, are meant to be consumed; so, once in receipt of them, the Franciscan must own them and has not therefore truly renounced property.[4] Another argument, in this case Ockham's, went like this: Franciscans have not renounced property. Each of us has an inalienable natural right to goods when in extreme need. To alienate it is not allowed, because it would be, in effect, to commit suicide.[5] Behind the various arguments in the poverty debates was a certain view of property. God gave the riches of the world to us all in common. But unless particular persons have responsibility for particular goods, they will not be preserved or usefully exploited. So, not God, but human beings introduce schemes of property. But ownership of property is only stewardship; the goods may be taken back into a common stock as needed. In these debates one finds the transition from the form of words that it is a natural law (*ius*) that all things are held in common, and so a person in mortal need who takes from a person in surplus does not steal, to the newly emergent form of words that a person in need has a right (*ius*) to take from a person in surplus and so does not steal. And twelfth- and thirteenth-century commentators began using the word *ius* of a faculty or power, reinforcing the subjective sense: a faculty or power, such as rational agency, is something an individual has.[6] Two world-changing events of the twelfth century were the recovery of the entire corpus of Roman Law and the appearance of a critically ordered edition of some of the mass of canon law texts, in the *Decretum* of Gratian (*c*.1140). And it is plausible that the subjective sense of 'natural right' appeared not too much later,[7] in the struggle of commentators to bring a greater measure of order and understanding to these two sets of laws.

William of Ockham (*c*.1285–1349), following a tradition going back to the early canonists, saw reason as giving us freedom, and freedom as giving us dignity. Pico della Mirandola, an early Renaissance philosopher who studied canon law in Bologna in 1477, gave an influential account of the link between our freedom and the dignity of our status. God fixed the nature of all other things, but left man alone free to determine his own nature. In this he is God-like. Man too is a creator—a creator of himself. It is given to man 'to have that which he chooses and be that which he wills'.[8] This freedom constitutes, as it is put in the title of Pico's best-known work, 'the dignity of man'.

This same link between freedom and dignity was at the centre of the early sixteenth-century Indian debates about the Spanish enslavement of the natives of the New World. Many canonists argued emphatically that the American natives were undeniably agents and, therefore, should not be

deprived of their autonomy and liberty, which the Spanish commanders were everywhere doing. The same notion of dignity was also central to political thought in the seventeenth and eighteenth centuries, when it received its most powerful development at the hands of Rousseau and Kant. But I shall stop here; these last remarks take us well into the modern period, with which my historical comments in Chapter 1 began.

What I have sketched is the dominant conception of natural rights in the late Middle Ages and Renaissance. Of course, there were also deviant conceptions. At one time, for example, a theory was developed that cut the link between natural rights and agency, allowing rights-bearers also to include animals and inanimate objects.[9] But this deviant interpretation did not endure. Shortly thereafter, Francisco de Vitoria (1492–1546) was again asserting the link between our bearing rights and our being made in God's image.

2.3 A PROPOSAL OF A SUBSTANTIVE ACCOUNT

The human rights tradition does not lead us inescapably to any particular substantive account. There can be reasons to take a tradition in a new direction or to break with it altogether. Still, the best substantive account is, to my mind, in the spirit of the tradition and goes like this. Human life is different from the life of other animals. We human beings have a conception of ourselves and of our past and future. We reflect and assess. We form pictures of what a good life would be—often, it is true, only on a small scale, but occasionally also on a large scale. And we try to realize these pictures. This is what we mean by a distinctively *human* existence—distinctive so far as we know. Perhaps Great Apes share more of our nature than we used to think, though we have no evidence that any species but *Homo sapiens* can form and pursue conceptions of a worthwhile life. But there might be intelligent creatures elsewhere in the universe also capable of such deliberation and action. If so, we should have to consider how *human* rights would have to be adapted to fit them. So long as we do not ignore this possibility, there is no harm in continuing to speak of a distinctively 'human' existence. And we value our status as human beings especially highly, often more highly than even our happiness. This status centres on our being agents—deliberating, assessing, choosing, and acting to make what we see as a good life for ourselves.

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) others must also not forcibly stop one from pursuing what one sees as a worthwhile life (call this 'liberty'). Because we attach such high value to our individual personhood, we see its domain of exercise as privileged and protected.

That is the central intuitive idea. In this chapter I want to sketch, in quick broad strokes, my proposed substantive account of human rights, and then return in later chapters to elaboration and fuller argument.

2.4 ONE GROUND FOR HUMAN RIGHTS: PERSONHOOD

In what should we say that human rights are grounded? Well, primarily in personhood. Out of the notion of personhood we can generate most of the conventional list of human rights. We have a right to life (without it, personhood is impossible), to security of person (for the same reason), to a voice in political decision (a key exercise of autonomy), to free expression, to assembly, and to a free press (without them, exercise of autonomy would be hollow), to worship (a key exercise of what one takes to be the point of life). It also generates, I should say (though this is hotly disputed), a positive freedom: namely, a right to basic education and minimum provision needed for existence as a person—something more, that is, than mere physical survival. It also generates a right not to be tortured, because, among its several evils, torture destroys one's capacity to decide and to stick to the decision. And so on. It should already be clear that the generative capacities of the notion of personhood are quite great.

My making personhood central helps explain further the way in which my account is substantive. Some of the structural accounts that I mentioned

earlier also aim to provide existence conditions. But substantive accounts go further; my account, for instance, grounds human rights not in formal features or a role in a larger moral structure, but directly in a central range of substantive values, the values of personhood.

Grounding human rights in personhood imposes an obvious constraint on their content: they are rights not to anything that promotes human *good* or *flourishing*, but merely to what is needed for human *status*. They are protections of that somewhat austere state, a characteristically human life, not of a good or happy or perfected or flourishing human life. For one thing, it seems that the more austere notion is what the tradition of human rights supports. For another, it seems to be the proper stipulation to make. If we had rights to all that is needed for a good or happy life, then the language of rights would become redundant. We already have a perfectly adequate way of speaking about individual well-being and any obligations there might be to promote it. At most, we have a right to the *pursuit* of happiness, to the base on which one might oneself construct a happy life, not to happiness itself.

What does this tell us about how we should understand the key word 'human' in 'human rights'? 'Human' cannot there mean simply being a member of the species *Homo sapiens*. Infants, the severely mentally retarded, people in an irreversible coma, are all members of the species, but are not agents. It is tempting, then, to identify 'human beings' with 'agents' and to abstract from biological species entirely. More than just *Homo sapiens* can be agents: aliens emerging from a spaceship would be. But this line of thought is dangerous. It turns the holder of rights into a highly spare, abstract entity, characterized solely by rationality and intentionality. To my mind, this goes too far. One of the features of the spare, abstract agent would be autonomy; that would have to be a feature if the concept of agency were to yield any rights at all. Kant thought that one would be autonomous only if one's actions came from a purely rational, intentional centre, undetermined by anything outside it—undetermined, for instance, by one's biology or one's society. Kant contrasted this noumenal self, of course, with the familiar phenomenal self, which is part of the causal network, shaped by nature and nurture. But rationality requires thought; thought—at least thought about how to live one's life—requires language; and language is a cultural artefact, deeply influenced by the form of life lived by animals like us. If one peels away everything about us that is shaped by nature or nurture, not enough is left.

Autonomy should be explained, therefore, as we find it in the phenomenal world, and we find it there deeply embedded in the causal network. So

the kind of autonomy we are interested in will reflect the peculiarly human way of experiencing and conceptualizing the world; it will be shaped by characteristic human concerns and sense of importance. We do not know what it is like to be Martian or Venusian. Our aim must be the more modest one of understanding not the autonomy of a spare, abstract self, but the autonomy of *Homo sapiens*. So by the word 'human' in the phrase 'human rights' we should mean, roughly, a functioning human agent. And human rights cannot therefore be entirely ahistorical.

But just how deeply embedded in a particular history must human rights therefore be? Statements about human nature could most easily lay claim to cross-cultural standards of correctness if they could be seen, as some classical natural law theorists saw them, as observations of the constitution and workings of part of the natural world.[10] But, on the face of it, this looks like trying to derive values (human rights) from facts (human nature), which generations of philosophers have been taught cannot be done. But it cannot be done only on a certain conception of nature: namely, the conception that sees nature as what the natural sciences, especially the physical sciences, describe. As such, nature excludes values. On this narrow conception of the natural, the conception of the 'human' that I am proposing is not natural. I single out functioning human agents via notions such as their autonomy and liberty, and I choose those features precisely because they are especially important human interests. It is only because they are especially important interests that rights can be derived from them; rights are strong protections, and so require something especially valuable to attract protection. So my notions of 'human nature' and 'human agent' are already well within the normative circle, and there is no obvious fallacy involved in deriving rights from notions as evaluatively rich as they are.

Still, that defence of the derivation, by drawing the notions of 'human nature' and 'human agency' inside the normative circle, seems to sacrifice a central feature of the human rights tradition: namely, that human rights are derived from something objective and factual, and so demand universal acknowledgement. It is, though, much too quick to think that what is evaluative cannot also be objective. It is too quick to think that it cannot also be natural. David Hume's dichotomy of fact and value depended upon his narrow conception of fact. But, to my mind, there is a weighty case for thinking that basic human interests are features of the world, and that these interests' being met or not met are goings-on in the world. One of our basic interests is in avoiding pain. In fact, our concept of pain is made up both